

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

YOUR MAGAZINE PROVIDER,
INC., a corporation, also D.B.A.
PERIODICALS, and
U.S. MAGAZINE SERVICES; and
JASON W. ELSWORTH,

Defendants

Case No. CV-08-64-M-DWM

STIPULATED FINAL JUDGMENT
AND ORDER FOR PERMANENT
INJUNCTION

Plaintiff, the Federal Trade Commission (“Commission” or “FTC”), has filed its Complaint for permanent injunction and other equitable relief pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C.

§§ 53(b) and 57b, and the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”), 15 U.S.C. §§ 6101 et seq., charging Defendants Your Magazine Provider, Inc., also doing business as Periodicals and as U.S. Magazine Services and Jason W. Ellsworth with violating Section 5 of the FTC Act, 15 U.S.C. § 45 and the FTC’s Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310.

Plaintiff FTC and Defendants Your Magazine Provider, Inc., and Jason W. Ellsworth have agreed to entry of this Stipulated Final Judgment and Order for Permanent Injunction (“Order”) by this Court to resolve all matters of dispute between them in this action.

NOW, THEREFORE, the Commission and Defendants Your Magazine Provider, Inc., and Jason W. Ellsworth, having requested the Court to enter this Order, it is ORDERED, ADJUD

Section 4 of the FTC Act, 15 U.S.C. § 44

4. The Complaint states a claim upon which relief may be granted against Defendants under Sections 5(a), 13(b), and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 53(b), and 57b; and under the TSR, 16 C.F.R. Part 310.

5. Defendants waive any and all rights that may arise under the Equal Access to Justice Act, 28 U.S.C. § 2412, amended by Pub. L. 104-121, 110 Stat. 847, 863-64 (1996).

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

7. Defendants waive all rights to seek appellate review or otherwise challenge or contest the validity of this Order. Defendants further waive and release any claim that they may have against the Commission, its employees, agents, and representatives.

8. Defendants enter into this Order freely and acknowledge that they have read and understand the provisions of this Order and agree to abide by them.

9. This Order is for settlement purposes only, and does not constitute and shall not be interpreted to constitute an admission by Defendants or a finding that the law has been violated as alleged in the Complaint, or that the facts alleged in the Complaint, other than the jurisdictional facts, are true.

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

11. Each party shall bear its own costs and attorneys' fees.

DEFINITIONS

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

1. "Assets" means any legal or equitable interest in, right to, or claim to, any real or personal property including, but not limited to, chattel, goods, instruments, equipment, fixtures, general intangibles, effects, leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits, receivables (as those terms are defined in the Uniform Commercial Code), and all cash, wherever located.

2. "Assisting others" means knowingly providing any of the following goods or services to another person or entity:

a. performing customer service functions including, but not limited to, receiving or responding to consumer complaints;

b. formulating or providing, or arranging for the formulation or provision of, any telephone sales script or any other marketing material;

c. providing names of, or assisting in the generation of, potential customers;

d. hiring, recruiting, or training personnel;

e. advising or acting as a consultant to others on the

electronic medium such as software, the Internet, or online services, a disclosure must be unavoidable and presented prior to the consumer incurring any financial obligation. Any audio message shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual message shall be of a size and shade, with a degree of contrast to the background against which it appears, and shall appear on the screen a duration and in a location sufficiently noticeable for an ordinary consumer to read and comprehend it; and

d. regardless of the medium used to disseminate it, the message shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the message shall be used in any communication.

4. "Consumer" means an actual or potential purchaser, customer, licensee, or lessee, regardless of whether that person is a corporation, limited liability corporation, partnership, association, other business or governmental entity, or natural person, and regardless of whether the purchase is made for business purposes or for personal or household purposes.

5. "Corporate Defendant" means Your Magazine Provider, Inc., db.a. Periodicals and db.a. U.S. Magazine Services, and its successors and assigns.

6. "Defendants" means the Individual Defendant and the Corporate Defendant, individually, collectively, or in any combination.

7. "Document" is synonymous in meaning and equal in scope to the usage of the term in Federal Rule of Civil Procedure 34(a), and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from which information can be obtained and translated, if necessary, through detection devices into reasonably usable form. A draft or non-identical copy is a separate document within the meaning of the term.

8. "Individual Defendant" means Jason W. Ellsworth.

9. "Material" means likely to affect a person's choice of conduct regarding, goods or services

10. "Person" means any individual, group, unincorporated association, limited or general partnership, corporation, or other business or governmental entity.

11. "Prize promotion" means:

a. a sweepstakes or other game of chance; or

b. an oral or written express or implied representation that a person is eligible to

12. “Telemarketing Sales Rule” or “Rule” or “TSR” means the FTC Rule entitled “Telemarketing Sales Rule,” 16 C.F.R. Part 310, or as it may be hereafter amended.

13. The terms “and” and “or” sha

policy, all material terms and conditions of any such policy; and

- 3. Any other fact material to a consumer's decision to purchase such product or service;

B. Misrepresenting, directly or by implication, any fact material to a consumer's decision to purchase such product or service;

C. Charging or debiting, or causing to be charged or debited, credit card or bank account of any consumer for renewal of a magazine or other subscription without the express informed consent of the consumer, and

D. Violating, or assisting others in violating, any provision of the Telemarketing Sales Rule, 16 C.F.R. Part 310, including, but not limited to:

- 1. Section 310.3(a)(ii) of the TSR, 16 C.F.R. § 310.3(a)(1)(i), by failing to disclose truthfully, in a clear and conspicuous manner, before a consumer pays for the goods or services offered, all material restrictions, limitations, or conditions to purchase from Defendants, including the amount, frequency, and duration of any payments;

- 2. Section 310.3(a)(iii) of the TSR, 16 C.F.R. § 310.3(a)(1)(i), by failing, if they have

their policy; or by failing, if they make a representation about a refund, cancellation, exchange or repurchase policy, to disclose all material terms and conditions of such policy;

3. Section 310.3(a)(iv) of the TSR, 16 C.F.R. § 310.3(a)(1)(v), by failing to disclose truthfully, in a clear and conspicuous manner, before a consumer pays for the goods or services offered, in any prize promotion, the odds of being able to receive the prize, and, if the odds are not calculable in advance, the factors used in calculating the odds and that no purchase or payment is required to win a prize or participate in a prize promotion and that any purchase or payment will not increase the consumer's chances of winning a prize in a prize promotion;
4. Section 310.3(a)

promotion;

6. Section 3104(a)(6) of the TSR, 16 C.F.R. § 310.4(a)(6), by causing any billing information to be submitted for payment without the express informed consent of the consumer, or
7. Section 310.4(d)(1)(3) of the TSR, 16 C.F.R. § 310.4(d)(1)-(3), by failing, in an outbound telephone call or internal or external upsell to induce the purchase of goods or services, to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:
 - a. The identity of the seller;
 - b. That the purpose of the call is to sell goods or services and
 - c. The nature of the goods or services

II. MONETARY RELIEF

IT IS FURTHER ORDERED that:

- A. Judgment in the amount of \$600,000 (six hundred thousand dollars) (“Judgment Amount”) is hereby entered against Defendants, jointly and severally, as equitable monetary relief in favor of the Commission;
- B. Defendants shall pay the Judgment Amount in three installments. The

first installment of \$50,000 (fifty thousand dollars) shall be paid no later than five (5) days after the date of entry of this Order. The second installment of \$250,000 (two hundred fifty thousand dollars) shall be paid no later than six (6) months after the date of entry of this Order

Commission shall refrain from recording the Security Documents until after the Court's entry of this Order. In the event that the Court does not enter this Order, within five (5) days after receipt of the Court's denial of this Order the FTC shall return the Security Documents to Defendants. Defendants shall be responsible for paying all costs and fees (including attorneys' fees and filing fees) required in connection with the liens and security interests granted herein, including all fees and costs related to the preparation, execution, delivery, filing, continuation, and termination of such liens and security interests and to carry out the purposes of this Order;

E. Upon Defendants' timely and complete satisfaction of the payments required by Subsection II. B of this Order, the Commission agrees to release the liens and security interests granted herein and Defendants shall be responsible for preparing and filing (at their expense) any termination or other statements reasonably required in connection therewith. The Commission shall also promptly release such liens and security interests to the extent necessary to permit the sale or encumbrance of part or all of the Collateral if the proceeds of such sale or financing are remitted directly to the Commission immediately upon closing of such sale or financing in partial or complete satisfaction of this Order and Defendants shall pay all fees and costs related to such release, including filing fees;

F. All funds paid pursuant to this Section II shall be deposited into a fund administered by the Commission or its agent to be used for equitable relief including, but not limited to, consumer restitution and any attendant expenses for the administration of any restitution fund. Defendants shall cooperate in identifying and locating consumers entitled to restitution under this Order. In the event that direct restitution to consumers is wholly or partially impracticable or funds remain after restitution is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to the practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited in the United States Treasury as disgorgement. Defendants shall have no right to challenge the Commission's choice of remedies under this Section. No portion of any payments or assets assigned under the judgment herein shall be deemed a payment of any fine, penalty, or punitive assessment;

G. In the event of default on the payments required to be made by this Section, the entire unpaid amount, together with interest computed under 28 U.S.C. § 1961, accrued from the date of default until the date of payment, shall be immediately due and payable;

H. Defendants relinquish all dominion, control, and title to the funds paid

to the fullest extent permitted by law. Defendants shall make no claim to or demand return of the funds directly or indirectly, through counsel or otherwise, and

I. Defendants agree that the facts as alleged in the Complaint filed in this action shall be taken as true without further proof in any bankruptcy case or subsequent civil litigation pursued by the Commission to enforce its rights to any payment or money judgment pursuant to this Order, including, but not limited to, a nondischargeability complaint in any bankruptcy case. Defendants further stipulate and agree that the facts alleged in the Complaint establish all elements necessary to sustain an action pursuant to, and that this Order shall have collateral estoppel effect for purposes of, Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A).

III. CUSTOMER INFORMATION

IT IS FURTHER ORDERED that Defendants, and their officers, agents, servants, employees, and attorneys, and all other persons who are in active concert or participation with any of them, shall not disclose to any third party, in any manner, any information that is confidential or otherwise protected under applicable law, including but not limited to, the information contained in the Complaint, the Order, or any other documents filed in this case.

(including a credit card, bank account, or other financial account), of any person which any Defendant obtained prior to entry of this Order in connection with the telemarketing of magazine subscriptions, other than collecting on open subscription accounts; and

B. Failing to dispose of such customer information in all forms in their possession, custody or control within thirty (30) days after entry of this Order except that information relating to open subscription accounts shall be disposed of within thirty (30) days of the end of the subscription period. Disposal shall be by means that protect against unauthorized access to the customer information, such as by burning, pulverizing, or shredding any papers, and by erasing or destroying any electronic media, to ensure that the customer information cannot practically be read or reconstructed.

Provided, however, that customer information need not be disposed of, and may be disclosed, to the extent requested by a government agency or required by a law, regulation, or court order.

IV. COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring and investigating compliance with any provision of this Order:

A. Within ten (10) days of receipt of written notice from a representative

of the Commission, Defendants each shall submit additional written reports that are true and accurate and sworn to under penalty of perjury; produce documents or recordings for inspection and copying; appear for deposition, and provide entry during normal business hours to any business location in such Defendant's possession or direct or indirect control to inspect the business operation;

B. In addition, the Commission is authorized to use all other lawful means, including, but not limited to:

1. Obtaining discovery from any person, without further leave of court, using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, 45, and 69; and
2. Having its representatives pose as consumers and suppliers to Defendants, their employees, or any other entity managed or controlled in whole or in part by any Defendant, without the necessity of identification or prior notice; and

C. Defendants each shall permit representatives of the Commission to interview any employer, consultant, independent contractor, representative, agent, or employee who has agreed to such an interview, relating in any way to any conduct subject to this Order. The person interviewed may have counsel present.

Provided, however, that 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, 57b-1, to obtain any documentary material, tangible things, testimony, or information relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of Section 5(a)(1) of the Act).

(30) days prior to the date such action is taken, such Defendant shall notify the Commission as soon as is practicable after obtaining such knowledge;

B. One hundred eighty (180) days after the date of entry of this Order and annually thereafter for a period of five (5) years, Defendants each shall provide a written report to the FTC that is true and accurate and sworn to under penalty of perjury, setting forth in detail the manner and form in which they have complied and are complying with this Order. This report shall include, but not be limited to:

1. For the Individual Defendant:
 - a. such Defendant's then-current residence address, mailing addresses, and telephone numbers;
 - b. such Defendant's then-current employment status (including self-employment), including the name, addresses, and telephone numbers of each business that such Defendant is affiliated with, employed by, or performs services for; a detailed description of the nature of the business; and a detailed description of such Defendant's duties and responsibilities in connection with the business or employment; and

c. Any other changes required to be reported under Subsection A of this Section;

2. For both Defendants

a. A copy of each acknowledgment of receipt of this Order, obtained pursuant to the Section titled "Distribution of Order"; and

b. Any other changes required to be reported under Subsection A of this Section;

C. Each Defendant shall notify the Commission of the filing of a bankruptcy petition by such Defendant within fifteen (15) days of filing;

D. For the purposes of this Order, Defendants shall, unless otherwise directed by the Commission's authorized representatives, send by overnight courier all reports and notifications required by this Order to the Commission, to the following address:

Associate Director for Enforcement
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Room NJ-2122
Washington, D.C. 20580
Re: FTC v. Your Magazine Provider, Inc., et al.
CV 08-64-DWM

Provided that, in lieu of overnight courier, Defendants may send such reports or notifications by first-class mail, but only if Defendants contemporaneously send

an electronic version of such report or notification to the Commission at:

DEBrief@ftc.gov, and

E. For purposes of the compliance reporting and monitoring required by this Order, the Commission is authorized to communicate directly with each Defendant.

VI. RECORD KEEPING PROVISIONS

IT IS FURTHER ORDERED that, for a period of eight (8) years from the date of entry of this Order, the Defendants, while engaged in conduct related to the subject matter of this Order, and their agents, employees, officers, corporations, 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 retain the following records:

A. Accounting records that reflect the cost of goods or services sold, revenues generated, and the disbursement of such revenues;

B. Personnel records accurately reflecting: the name, address, and telephone number of each person employed in any capacity by such business, 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;

C. Customer files containing the names, addresses, phone numbers, dollar amounts paid, quantity of items or services purchased, and description of items or services purchased, to the extent such information is obtained in the ordinary course of business;

D. Complaints and refund requests (whether received directly, indirectly or through any third party) and any responses to those complaints or requests

E. Copies of all sales scripts, training materials, advertisements, or other marketing materials; and

F. All records and documents necessary to demonstrate full compliance with each provision of this Order, including but not limited to, copies of acknowledgments of receipt of this Order, required by the Sections titled "Distribution of Order" and "Acknowledgment of Receipt of Order," and all reports submitted to the FTC pursuant to the Section titled "Compliance Reporting."

VII . DISTRIBUTION OF ORDER

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Order, Defendants shall deliver copies of the Order directed below:

A. Corporate Defendant: The Corporate Defendant must deliver a copy of this Order to (1) all of its principals, officers, directors, and managers; (2) all of its

employees, agents, and representatives who engage in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure set forth in Subsection 2A of the Section titled Compliance Reporting.” For current personnel, delivery shall be within five (5) days of service of this Order upon such Defendant. For new personnel, delivery shall occur prior to them assuming their responsibilities. For any business entity resulting from any change in structure set forth in Subsection A.2 of the Section titled ‘Compliance Reporting,’ delivery shall be at least ten (10) days prior to the change in structure;

B. Individual Defendant as Control Person: For any business that the Individual Defendant controls, directly or indirectly, or in which he has a majority ownership interest, the Individual Defendant must deliver a copy of this Order to (1) all principals, officers, directors, and managers of that business; (2) all employees, agents, and representatives of that business who engage in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure set forth in Subsection 2A of the Section titled Compliance Reporting.” For current personnel, delivery shall be within five (5) days of service of this Order upon such Defendant. For new personnel, delivery shall occur prior to them assuming their responsibilities. For any business entity resulting from any change in structure set forth in Subsection A.2 of the Section titled ‘Compliance

ATTACHMENT A

DESCRIPTION OF COLLATERAL

Property 1 - 737 HWY 93N, Hamilton, MT 59840

A parcel of land situated in the SE1/4 of Section 1, Township 6 North, Range 21 West, P.M.M., Ravalli County Montana, and more particularly described as Tract B, Certificate of Survey

No. 321.

Property 2 - 739 HWY 93N, Hamilton, MT 59840

A parcel of land situated in the SE1/4 of Section 1, Township 6 North, Range 21 West, P.M.M., Ravalli County Montana, and more particularly described as Tract A, Certificate of Survey

No. 321.

Property 3 - Land in Victor, MT, on Mitter Rd

A parcel of land situated in Section 8, Township 8 North, Range 20 West, P.M.M., Ravalli County, Montana, and more particularly described as Lot 9, Certificate of Survey No. 2721.