

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. ELLSWORTH,

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

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

commencement or management of a telemarketing or prize promotion business; or

f. performing marketing services of any kind.

3. **“In a clear and conspicuous manner”** means:

a. in print communications, the message shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. If the information is contained in a multi-page document, the disclosure shall appear on the first page;

b. in communications disseminated orally, the message shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it;

c. in communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services, and software), the message shall be presented simultaneously in both the audio, if any, and visual portions of the communication. In any communication presented solely through visual or audio means, the message may be made through the same means in which the communication is presented. In any communication disseminated by means of an interactive

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.

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”**

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”** shall be construed conjunctively or disjunctively as necessary to make the applicable phrase or sentence inclusive rather than exclusive.

ORDER

I. PROHIBITED PRACTICES

IT IS THEREFORE ORDERED that, in connection with the marketing, offering for sale, or sale of any product or service, Defendants and their officers, agents, servants, and employees, and all other persons who are in active concert or participation with any of them who receive actual notice of this Order by personal service or otherwise, are permanently restrained and enjoined from:

A. Failing to disclose truthfully, in a clear and conspicuous manner, before consumers provide their credit or debit card account numbers or any other billing information:

1. The amount, frequency, and duration of any payments;
2. Any policy of not making refunds or cancellations or, if Defendants make a representation about a refund or cancellation

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, a 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

their policy; or by failing, if they make a representation about a

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promotion;

6. Section 310.4(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. The third and final installment of \$300,000 (three hundred thousand dollars) shall be paid no later than twelve (12) months after the date of entry of this Order. All payments to the Commission shall be made by certified check or other guaranteed funds payable to and delivered to the Commission, or by wire transfer in accordance with directions provided by the Commission, on or before the due dates given above;

C. To secure the payments required by Subsection II. B of this Order, Defendants hereby grant to the Commission a lien on and security interest in certain real property as described in Attachment A to this Order, together with all dwelling houses, other structures, improvements, appurtenances, hereditaments and other rights appertaining or belonging thereto (collectively referred to as the "Collateral"). Defendants represent and acknowledge that the Commission is relying on the material representations that one or more of the Defendants are the sole owners in fee simple of the Collateral, that title to the Collateral is marketable, and that the Collateral currently is not encumbered by any other lien, mortgage, deed of trust, assignment, pledge, security interest or other interest except as disclosed to the

Commission in the financial statements dated May 21-24, 2008, and updated asset list sent to FTC counsel via email on July 9, 2009. Defendants represent that none of the encumbrances on the Collateral are in default. Defendants further agree that, as of the date on which they sign this Order, they shall refrain from transferring, converting, encumbering, selling, assigning, or otherwise disposing of the Collateral, except with the express prior written permission of counsel for the Commission. The individual Defendant hereby releasesn disesnsnsnanie

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 who receive actual notice of this Order by personal service or otherwise, are permanently restrained and enjoined from:

A. Disclosing, using, or benefitting from customer information, including the name, address, telephone number, email address, social security number, other identifying information, or any data that enables access to a customer's account

(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 practicably 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 15 U.S.C. § 45(a)(1)).

V. COMPLIANCE REPORTING

IT IS FURTHER ORDERED that, in order that compliance with the provisions of this Order may be monitored:

- A. For a period of five (5) years from the date of entry of this Order,
 1. The Individual Defendant shall notify the Commission of the following:
 - a. Any changes in such Defendant's residence, mailing addresses, and telephone numbers, within ten (10) days of the date of such change;
 - b. Any changes in such Defendant's employment status (including self-employment), and any change in such Defendant's ownership in any business entity, within ten (10) days of the date of such change. Such notice shall include the name and address of each business that such Defendant is affiliated with, employed by, creates or

forms, 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 changes in such Defendant's name or use of any aliases or fictitious names within (10) days of such

(30) days prior to the date such action is to take place, 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

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

DEBrief@ftc.gov

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 as 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

Reporting,” delivery shall be at least ten (10) days prior to the change in structure;

C. Individual Defendant as employee or non-control person: For any business where the Individual Defendant is not a controlling person of a business but otherwise engages in conduct related to the subject matter of this Order, he must deliver a copy of this Order to all principals and managers of such business before engaging in such conduct; and

D. Defendants must secure a signed and dated statement acknowledging receipt of the Order, within thirty (30) days of delivery, from all persons receiving a copy of the Order pursuant to this Section.

VIII. ACKNOWLEDGMENT OF RECEIPT OF ORDER

IT IS FURTHER ORDERED that each Defendant, within five (5) business days of receipt of this Order as entered by the Court, must submit to the Commission a truthful sworn statement acknowledging receipt of this Order.

IX. SEVERABILITY

IT IS FURTHER ORDERED that the provisions of this Order are separate and severable from one another. If any provision is stayed or determined to be invalid, all of the remaining provisions shall remain in full force and effect.

X. RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction over the injunction entered in this case.

The Clerk is directed to close the case.

DATED this 7th day of October, 2009. 15:10 p.m.

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 Mittower 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.