

1 JONATHAN E. NUECHTERLEIN
2 GENERAL COUNSEL

3 JAMES DAVIS
4 jdavis@ftc.gov
5 Federal Trade Commission
6 55 West Monroe Street, Suite 1825
7 Chicago, Illinois 60603
8 Telephone: (312) 960-5634
9 Facsimile: (312) 960-5600

10 Local Counsel
11 RAYMOND MCKOWN
12 rmckown@ftc.gov
13 CA Bar No. 150975
14 FEDERAL TRADE COMMISSION
15 10877 Wilshire Blvd., Suite 700
16 Los Angeles, CA 90024
17 Telephone: (310) 824-4325
18 Facsimile: (310) 824-4380

19 Attorneys for Plaintiff
20 FEDERAL TRADE COMMISSION

21 UNITED STATES DISTRICT COURT
22 CENTRAL DISTRICT OF CALIFORNIA

23 FEDERAL TRADE COMMISSION,

24 Plaintiff,

25 v.

26 27

1 Street, Santa Ana, California, for Defendant

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Federal Trade Commission (“FTC”) returns to Court to enforce an August 2011 Stipulated Permanent Injunction and Order (“2011 Final Order”) that defendant Phillip Flora began violating immediately after signing it. The core provision of this order permanently enjoins Flora from sending unsolicited commercial text messages to consumers. The Court prohibited this conduct based on evidence showing that Flora had sent millions of text messages to consumers promoting a deceptive mortgage modification service.

In flagrant violation of the 2011 Final Order, Flora continued inundating consumers with unsolicited commercial text messages. The new messages falsely informed recipients that they had been specially selected to receive a free \$1,000 gift card. Flora employed a variety of ruses in an attempt to conceal his responsibility for this conduct, hiding behind aliases, family members, and acquaintances. Notwithstanding this subterfuge, the FTC obtained evidence clearly showing Flora’s responsibility for a text spam operation that bombarded consumers with over 29 million messages in 2012 alone. Flora ultimately admitted to an FBI agent that he was solely responsible for this conduct.

After bringing a second law enforcement action against Flora addressing this conduct,¹ the FTC obtained a final judgment finding that Flora violated the Federal Trade Commission Act “in the course of sending, or assisting others in sending, millions of Unauthorized or Unsolicited Commercial Electronic Text Messages to

¹ See *FTC v. Flora et al., d/b/a Seaside Building Marketing and SB Marketing*, No. SACV 13-00381 AG (C.D. Ca. March 3, 2013) (“*Seaside*”). Because this contempt proceeding and the *Seaside* case arise from the same events and call for the determination of substantially similar issues of fact and law, the Commission filed the new case as a related action under Local Rule 83-1.3.

1 mobile telephones....” Because these practices violate clear and definite terms of
2 the Court’s 2011 Final Order, the FTC asks that Flora be held in civil contempt.

3 **II. PROCEDURAL AND FACTUAL BACKGROUND**

4 **A. *FTC v. Flora I (2011)***

5 In February 2011, the Commission filed its complaint in this case to enjoin
6 unfair and deceptive practices engaged in by Flora in violation of Section 5 of the
7 Federal Trade Commission Act (“FTC Act”). Specifically, the FTC alleged that
8 Flora blasted millions of email and text messages promoting purported mortgage
9 modification services offered through the website, “LOANMOD-GOV.NET.”²

10 Some of Flora’s text spam messages read:

11
12 Homeowners, we can lower your mortgage payment by
13 doing a Loan Modification. Late on payments OK. No
14 equity OK. May we please give you a call?
loanmod-gov.net.³

15 The website located at LOANMOD-GOV.NET claimed to provide “Official Home
16 Loan Modification and Audit Assistance Information” beneath a graphic of the
17 U.S. flag.⁴ In its complaint, the FTC charged Flora with violating Section 5 of the
18 FTC Act by: 1) engaging in the unfair transmission of text message spam; and
19 2) by deceptively representing that the mortgage modification business promoted
20 in his text message spam was operated by or affiliated with a governmental entity.⁵
21
22
23

24 _____
25 ² PX 1, Complaint 5.1X 1, Com
26
27
28

1 identified as a friend. They claim to have had no knowledge of the conduct alleged
2 in the Commission’s complaint. As noted below, Flora eventually confirmed these
3 statements in an FBI interview.

4 In an order dated November 25, 2013, the Court granted the FTC’s motion
5 for entry of a default judgment. Citing *Geddes v. United Fin. Group*, 559 F.2d
6 557, 560 (9th Cir. 1997), for the general rule of law that the factual allegations of a
7 complaint, except those relating to damages, are taken as true in the event of a
8 default, the Court found:

9 Flora had “transmitted at least 29 million unsolicited text messages to
10 United States consumers since March 2012”; and
11 Messages transmitted by Flora “purport that the recipient has won free
12 merchandise . . . [but] fail to disclose that the consumers must incur costs
13 and other obligations to obtain the purportedly free merchandise.”¹⁰

14 Based on these facts and other allegations from the FTC’s complaint taken
15 as true, the Court entered an order finding that Flora had sent, “or assist[ed] others
16 in sending, millions of Unauthorized or Unsolicited Commercial Electronic Text
17 Messages to mobile telephones.”¹¹ This conduct, the Court concluded, constituted
18 deceptive and unfair practices in violation of Section 5 of the FTC Act.¹² The
19 Court imposed a monetary judgment of \$148,309, the total revenue generated by
20 Flora’s 2012 text spam campaigns.¹³

25 ¹⁰ PX 4, *Seaside* Order Regarding Default Judgment at 1.

26 ¹¹ PX 5, *Seaside* Final Order for Permanent Injunction as to Defendant Philip
27 Flora at 7.

28 ¹² *Id.* at 8.

¹³ *Id.* at 7.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19

1
2
3
4
5
6
7
8
9
10
11
2
3

1 Section I of the Order could hardly be more specific. It permanently bars
2 Flora from any participation in a distinct business activity -- commercial text
3 messaging. In particular, the Order provides:

4 [Flora,], whether acting directly or through a trust, corporation, subsidiary,
5 division, or other device, is hereby permanently enjoined from sending, or
6 assisting others in the sending of Unauthorized or Unsolicited Commercial
7 Electronic Text Messages to mobile telephones or other wireless devices.

8 The term “Unauthorized or Unsolicited Commercial Electronic Text Messages” is
9 separately defined to mean “an unauthorized or unsolicited text message the
10 primary purpose of which is a commercial advertisement or promotion of a
11 commercial product or service (including the content of an Internet website
12 operated for commercial purposes).”

13 Clear and convincing evidence establishes that Flora willfully engaged in the
14 precise conduct explicitly prohibited under Section I of the 2011 Final Order.
15 Specifically, Flora sent over 29 million unsolicited commercial text messages to
16 consumers’ mobile phones in under a year. A single domain name purchased by
17 Flora appeared in over 850,000 text messages promoting a commercial website.
18 Flora’s attempt to hide behind others is belied by clear evidence of his
19 involvement, including his own admission. This evidence unquestionably shows
20 that Flora violated the 2011 Final Order by “sending, or assisting others in the
21 sending” of prohibited text messages. Flora should therefore be held in civil
22 contempt.

23 The FTC does not recommend imposition of compensatory sanctions for
24 Flora’s contempt because the final order entered by the Court in connection with
25 the FTC’s 2013 action includes a monetary judgment that reflects Flora’s total
26 revenue from his contemptuous conduct.²¹ However, a civil contempt finding is

27 _____
28 ²¹ The Commission has submitted a Proposed Order for Civil Contempt with
this motion.

1

2

3

4

5

6

7

8

9

10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

I, James Davis, hereby certify as follows:

I am an attorney employed by and representing the Plaintiff, Federal Trade Commission. I am not a party to this action. On February 21, 2014, I electronically filed a copy of the foregoing “Notice of Motion and Motion for Order to Show Cause Why Defendant Philip Flora Should Not Be Held in Contempt” as well as supporting exhibits with the Court using the CM/ECF system. I served copies of these documents via Federal Express overnight delivery to:

Bobby Samini, Esq.
Samini Scheinberg PC
949 South Coast Drive, Suite 420
Costa Mesa, CA 92626
Attorney for Defendant Philip Flora

/s/ James Davis
James Davis