

NOW THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

I. FINDINGS

1. Defendants received notice of the Permanent Injunction.
2. Defendants resumed their sale of magazine subscriptions and magazine subscription packages on or about October 21, 1996, after the entry of the Permanent Injunction. Each individual defendant, during the applicable time period, controls or has authority to control one or more of the corporate defendants.
3. The evidence clearly and convincingly indicates that defendants' acts and practices in connection with the sale of magazine subscriptions and magazine subscription packages violate the following injunctive provisions of the Permanent Injunction: Paragraph I, Paragraph II, Paragraph VII, Paragraph IX, and Paragraph XIII.¹ These violations have occurred between October 21, 1996, and the date of this Order and include many instances of:
 - a) misrepresentation of the cost of defendants' subscription packages;
 - b) misrepresentation of the cost of the subscription packages by describing the cost as merely a shipping charge;
 - c) misrepresentation of the cost of the subscription packages by describing some of the magazine subscriptions therein as "free";

¹Defendants assert they have made every reasonable effort to comply with the Permanent Injunction and have substantially complied with it. Upon review of the evidence, the Court finds defendants cannot avail themselves of the substantial compliance defense. "Substantial compliance" is a defense to civil contempt such that "[i]f a violating party has taken 'all reasonable steps' to comply with the court order, technical or inadvertent violations of the order will not support a finding of civil contempt." *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986). The Tenth Circuit has not specifically recognized this defense, and even if the Tenth Circuit would recognize this defense, the Court finds defendants have not substantially complied with the Permanent Injunction. The violations of the Permanent Injunction the Court has found are neither technical nor inadvertent.

- d) misrepresentation of consumers' ability to cancel defendants' subscription packages;
- e) misrepresentation that consumers can cancel at any time;
- f) misrepresentation of the enforceability of defendants' subscription package agreements; and
- g) violating the Telemarketing Sales Rule.

4. The evidence further indicates that the consumer injury caused by defendants' contumacious conduct amounts to at least \$39,000,000.

5. The Court finds defendants H.G. Kuykendall, Jr., Diversified Marketing Service Corp., H.G. Kuykendall, Sr., C.H. Kuykendall, National Marketing Service, Inc., NPC Corporation of the Midwest, Inc., and Magazine Club Billing Service, Inc., and each of them, in civil contempt of the Permanent Injunction. The Court finds that it is necessary to issue this Order to coerce compliance with the Permanent Injunction and finds that defendants are jointly and severally liable for consumer redress for injuries resulting from defendants' contumacious conduct.

6. This action and the relief awarded herein are in addition to, and not in lieu of, other remedies as may be provided by law, including both civil and criminal remedies.

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

II. COMPENSATION FOR INJURIES RESULTING FROM DEFENDANTS' CONTUMACIOUS CONDUCT

IT IS FURTHER ORDERED that, within 30 days of the date of this Order, in order to compensate the injuries resulting from defendants' contumacious conduct, as indicated in Section I.5, above, defendants shall supply to the FTC a certified check in the amount of \$39 million to be used

for payment of consumer redress and for related purposes, as described below in Section V of this Order.

III. CONTINUED MONITORING

IT IS FURTHER ORDERED that Paragraph XVII of the Permanent Injunction shall be modified to extend the time from five (5) years to ten (10) years in which defendants shall permit Commission access as set forth in parts A and B of that Paragraph. Further, Paragraph XVII of the Permanent Injunction shall also be modified to require the FTC to submit to this Court every two years a report setting forth the FTC's findings from its continued monitoring.

IV. H.G. KUYKENDALL, SR. AND C.H. KUYKENDALL

IT IS FURTHER ORDERED that the Permanent Injunction shall be modified to relieve defendants H.G. Kuykendall, Sr. and C.H. Kuykendall from compliance with the Permanent Injunction from the date of this Order forward.²

V. CLAIMS PROCEDURE

IT IS FURTHER ORDERED that:

A. All funds paid pursuant to this Paragraph 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 redress and any attendant expenses for the administration of any redress fund. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after redress is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer

²At the hearing in this matter, the evidence revealed both H.G. Kuykendall, Sr. and C.H. Kuykendall now have no involvement in the defendant corporations. The Court finds, in the interest of justice, these individual defendants should be relieved of their obligation to ensure compliance with the Permanent Injunction.

information remedies) as it determines to be reasonably related to defendants' practices alleged in the complaint and the contempt motion. Any funds not used for such equitable relief shall be deposited to the Treasury as disgorgement. Defendants shall have no right to challenge the Commission's choice of remedies under this Paragraph.

B. The Commission shall submit a plan for the disbursement of consumer redress to the Court for review and approval. In establishing this plan the Commission shall have full and sole discretion to:


1. Determine the criteria and parameters for participation by injured parties in a redress program, and
2. Delegate any and all tasks connected with such redress program to any individuals, partnerships, or corporations, and pay the fees, salaries, and expenses incurred thereby in carrying out said tasks.

C. Defendants forever disclaim all right, title, and interest to all funds paid or transferred to the Commission pursuant to this Order.

VI. ORDER ENTRY

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

IT IS SO ORDERED this 4th day of March, 2002.


VICKI MILES-LGRANGE
UNITED STATES DISTRICT JUDGE