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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

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| FEDERAL TRADE COMMISSION,<br><br>Plaintiff,<br>vs.<br><br>YOUR MAGAZINE PROVIDER, INC., a corporation, also D.B.A. PERIODICALS and U.S. MAGAZINE SERVICES; and JASON W. ELLSWORTH,<br><br>Defendants. | Case No. CV 08-64-M-DWM<br><br>COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF |

Plaintiff, the Federal Trade Commission ("FTC"), for its complaint alleges:

1. The FTC brings this action under 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 - 6108, to

obtain temporary, preliminary, and permanent injunctive relief, rescission or reformation of contracts, restitution, disgorgement of ill-gotten monies, and other equitable relief for defendants' acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and in violation of the FTC's Telemarketing Sales Rule ("TSR"),16 C.F.R. Part 310.

## JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c), and 6105(b).

3. Venue is proper in this District under 28 U.S.C. § 1391(b) and (c), and 15 U.S.C. § 53(b).

## PLAINTIFF

4. Plaintiff FTC is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41 - 58. The FTC is charged, *inter alia*, with enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair and deceptive acts or practices in or affecting commerce. The FTC is also charged with enforcement of the Telemarketing Act, 15 U.S.C. §§ 6101 - 6108. Pursuant to the Telemarketing Act, the FTC promulgated and enforces the TSR, 16 C.F.R. Part 310, which prohibits deceptive and abusive telemarketing acts or practices. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act and the TSR, and to secure such equitable relief as may be appropriate in each case, including restitution and disgorgement. 15 U.S.C. §§ 53(b), 57b, 6102(c), and 6105(b).

## DEFENDANTS

5. Defendant Your Magazine Provider, Inc., also doing business as Periodicals and as U.S. Magazine Services ("US Magazine"), is a Montana corporation with its mailing address

and principal place of business at 11300 U.S. Highway 93 N., Lolo Shopping Center, Suite K, Lolo, Montana 59847. US Magazine transacts or has transacted business in this District.

6. Defendant Jason W. Ellsworth ("Ellsworth") is the president and a director of US Magazine. In connection with the matters alleged herein, Ellsworth resides or has transacted business in this District. At all times material to this complaint, acting alone or in concert with others, he has formulated, directed, controlled, or participated in the acts and practices of US Magazine, including the acts and practices set forth in this complaint.

## DEFENDANTS' BUSINESS PRACTICES

7. Defendants US Magazine and Ellsworth are sellers of magazine subscriptions to consumers. Defendants are also telemarketers that initiate outbound telephone calls to consumers in the United States to induce the purchase of Defendants' goods or services.

8. Defendants have engaged in telemarketing by a plan, program, or campaign conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call.

9. At all times relevant to this complaint, Defendants have maintained a substantial course of trade or business in the offering for sale and sale of goods or services via the telephone, in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

10. In initial calls to consumers, Defendants tell consumers that, because they are preferred customers with the magazine publishers and with the consumer's credit or debit card company, their names have been entered into a sweepstakes and they are in the running for a grand prize of $1,000,000. They do not tell consumers that no purchase is necessary to win or participate in the sweepstakes and that any purchase from Defendants will not increase the

consumers' chances of winning a prize in the sweepstakes.

11. Defendants tell consumers that by participating in Defendants' promotion, consumers will receive a free diamond quartz watch and two free magazine subscriptions.

12. Defendants then tell consumers that in order to participate in Defendants' promotion, they must purchase two additional magazine subscriptions. They tell consumers that the price of the two paid subscriptions is a 40% discount off the newsstand price. Defendants quote a rate of $3.83 per week, which they say is guaranteed for 48 months.

13. Later during this call, or in a subsequent call a short time later, the Defendants obtain the consumer's credit card or debit card account number, using one of two methods. In some instances, they tell consumers that their credit or debit card accounts will be charged for the two paid subscriptions. After the consumer provides an account number, the Defendants disclose, for the first time, that the consumer must pay three months of charges at a time, resulting in a monthly charge of $49.81 for a period of 16 months.

14. In other instances, Defendants tell consumers that Defendants need the account number simply to verify the consumer's credit or debit card account for purposes of the sweepstakes. In these instances, consumers are not told that their accounts will be charged for the two magazine subscriptions, and in some instances consumers are led to believe that they need not make a purchase decision until they review written materials that they will receive from Defendants in the mail. However, whether or not these consumers receive materials in the mail or respond to them, their accounts are charged $49.81 per month without their authorization.

15. In numerous instances, once consumers learn of the increased monthly charge, whether from the Defendants on the phone or by notice from their account issuer, they try to cancel the order, advising Defendants that the $49.81 monthly charge is more than the cost

disclosed in the initial sales pitch, or that they did not authorize the charge. The Defendants then inform consumers for the first time that no cancellations are allowed once consumers provide their account numbers. Defendants typically refuse to cancel the orders and bill consumers' credit or debit card accounts $49.81 per month for 16 months. In some instances, Defendants agree to reduce the monthly fee by amounts ranging from $10 to $20 or cancel orders of those consumers whose complaints were forwarded to them by the Better Business Bureau or a state law enforcement agency.

## VIOLATIONS OF SECTION 5 OF THE FTC ACT

16. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits "unfair or deceptive acts or practices in or affecting commerce."

### COUNT I
(Failure to Disclose)

17. In numerous instances, in the course of telemarketing magazine subscriptions, Defendants represent, expressly or by implication, that the cost of the subscriptions is less than $4 per week for 48 months.

18. In numerous instances, Defendants have failed to disclose, or disclose adequately to consumers, before consumers provide their account numbers to Defendants, that:

a. Defendants will accelerate the payments and bill consumers monthly at the rate of $49.81 for 16 months; and

b. Defendants do not allow cancellations after the consumer provides his or her account information.

19. Defendants' failure to disclose or to disclose adequately the material information described in Paragraph 18, above, in light of the representation described in Paragraph 17, above,

constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

## VIOLATIONS OF THE TELEMARKETING SALES RULE

20. Congress directed the FTC to prescribe rules prohibiting abusive and deceptive telemarketing acts or practices pursuant to the Telemarketing Act, 15 U.S.C. §§ 6101 - 6108, in 1994. On August 16, 1995, the FTC adopted the Telemarketing Sales Rule (the "Original TSR"), 16 C.F.R. Part 310, which became effective on December 31, 1995. On January 29, 2003, the FTC amended the Original TSR by issuing a Statement of Basis and Purpose and the final amended Telemarketing Sales Rule (the "TSR"). 68 Fed. Reg. 4580, 4669.

21. Defendants are "sellers" or "telemarketers" engaged in "telemarketing," as those terms are defined by the TSR, 16 C.F.R. § 310.2(z), (bb), and (cc).

22. The TSR prohibits sellers and telemarketers from failing to disclose truthfully in a clear and conspicuous manner, before a customer pays for goods and services, among other things:

a. All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer. 16 C.F.R. § 310.3(a)(1)(ii);

b. If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement informing the customer that this is the seller's policy; or if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy. 16 C.F.R. § 310.3(a)(1)(iii); and

c. 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; that no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person's chances of winning; and the no-purchase/no-payment method of participating in the prize promotion with either instructions on how to participate or an address or local toll-free telephone number to which customers may write or call for information on how to participate. 16 C.F.R. § 310.3(a)(1)(iv).

23. It is an abusive telemarketing act or practice and a violation of the TSR for any seller or telemarketer to cause billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. 16 C.F.R. § 310.4(a)(6).

24. Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the TSR constitutes an unfair or deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

**COUNT II**

(Failure to Disclose Material Restrictions, Limitations, or Conditions)

25. In numerous instances, in the course of telemarketing magazine subscriptions, Defendants have failed 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 magazine subscriptions from Defendants, including that Defendants will accelerate the payments and charge consumers' accounts monthly at the rate of $49.81 for 16 months.

26. Defendants' practice as alleged in Paragraph 25 is a deceptive telemarketing practice that violates Section 310.3(a)(1)(ii) of the TSR, 16 C.F.R. § 310.3(a)(1)(ii).

**COUNT III**

(Failure to Disclose Restrictions on Cancellations)

27. In numerous instances, in the course of telemarketing magazine subscriptions, Defendants have failed to disclose truthfully, in a clear and conspicuous manner, before a consumer pays for the goods or services offered, a statement that Defendants do not allow cancellations once account information is provided.

28. Defendants' practice as alleged in Paragraph 27 is a deceptive telemarketing practice that violates Section 310.3(a)(1)(iii) of the TSR, 16 C.F.R. § 310.3(a)(1)(iii).

**COUNT IV**

(Failure to Disclose Prize Promotion Information)

29. In numerous instances, in the course of telemarketing magazine subscriptions, Defendants have failed to disclose truthfully, in a clear and conspicuous manner, before a consumer pays for the goods or services offered, that no purchase or payment is required to win a prize or participate in the million dollar sweepstakes and that any purchase or payment will not increase the consumer's chances of winning a prize in the million dollar sweepstakes.

30. Defendants' practice as alleged in Paragraph 29 is a deceptive telemarketing practice that violates Section 310.3(a)(1)(iv) of the TSR, 16 C.F.R. § 310.3(a)(1)(iv).

**COUNT V**
(Failure to Obtain Express Informed Consent)

31. In numerous instances, in connection with telemarketing magazine subscriptions, Defendants have caused billing information to be submitted for payment without the express

informed consent of the consumer.

32. Defendants' practice as alleged in Paragraph 31 is an abusive telemarketing practice that violates Section 310.4(a)(6) of the TSR, 16 C.F.R. § 310.4(a)(6).

## CONSUMER INJURY

33. Consumers in the United States have suffered and will continue to suffer injury as a result of Defendants' violations of the FTC Act and the TSR. In addition, Defendants have been unjustly enriched as a result of their unlawful practices. Absent injunctive relief by this Court, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

## THIS COURT'S POWER TO GRANT RELIEF

34. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and such other relief as the Court may deem appropriate to halt and redress violations of the FTC Act. The Court, in the exercise of its equitable jurisdiction, may award ancillary relief, including rescission of contracts and restitution, and the disgorgement of ill-gotten monies, to prevent and remedy any violation of any provision of law enforced by the FTC.

35. Section 19 of the FTC Act, 15 U.S.C. § 57b, and Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), authorize this Court to grant such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the TSR, including the rescission and reformation of contracts, and the refund of money.

## PRAYER FOR RELIEF

Wherefore, Plaintiff Federal Trade Commission, pursuant to Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, and Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), and the Court's own equitable powers, requests that the Court:

A. Award Plaintiff such preliminary injunctive and ancillary relief as may be necessary to avert the likelihood of consumer injury during the pendency of this action and to preserve the possibility of effective final relief including, but not limited to, temporary and preliminary injunctions, and an order freezing assets;

B. Enter a permanent injunction to prevent future violations of the FTC Act and the TSR by Defendants;

C. Award such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the FTC Act and the TSR, including, but not limited to, rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies; and

D. Award Plaintiff the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

Dated May 13, , 2008

/s/ Mary T. Benfield
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