

Statement of Commissioner Jon Leibowitz Concurring in Part, Dissenting in Part  
In re Member Source Media, LLC and Chris Sommer

I concur in the settlement insofar as it provides strong injunctive relief, but dissent in part because the monetary relief may be, once again, too weak to deter others from pursuing the same flawed business model.

The nature of the “free” gift program offered by Member Source Media, LLC (“MSM”) was substantially the same – and just as disturbing – as that challenged in the Commission’s action against *Adteractive, Inc.* According to the Commission’s complaint, MSM sent spam emails with subject lines like “Second Attempt: Target Gift Card Inside” or “Congratulations! You Have Been Chosen to Receive a FREE GATEWAY LAPTOP.” Once on MSM’s website, consumers were presented with a series of optional offers – five or six computer screens’ worth. After wading through all of those offers, the consumer found out what he or she must do to get the “free” gift: sign up for, or pay for, multiple additional offers in each of three more rounds. While offers in the first two rounds required only a modest financial outlay or commitment – like signing up for a monthly DVD or CD subscription service – a consumer reaching the *final* round learned for the first time that he or she would have to incur very significant obligations to complete the third round, for instance, by signing up for several credit card accounts or a new car loan. Clearly, the process was designed to get consumers to slog through offer after offer and make purchases or subscribe to numerous products and services in the earlier rounds – including many offers that they would have never signed up for absent the free laptop at the end of the process – while setting up practically insurmountable obstacles to claiming the promised free gift.

I dissented in *Adteractive* on the ground that the civil penalty the company had to pay represented a downward departure from our other CAN-SPAM Act cases and was not adequate to deter violations in the future. I respectfully dissent in part in this case because I believe that the civil penalty here, which was being negotiated at roughly the same time as that in *Adteractive*, is also inadequate. But I am concurring in part because I do not want a continuing difference on the amount of the civil penalty to suggest that I disagree with the Commission’s efforts in this area. The Commission’s program to hold lead generators responsible for deceiving consumers deserves strong support. And these cases will, hopefully, make the companies sponsoring the offers – legitimate DVD and CD subscription services, credit card marketers, ISPs, newspapers, and others – start doing a better job of policing their affiliate marketers down the chain of distribution.

Simply put, companies that are acquiring new customers on the cheap should realize that they are tarnishing their brands by outsourcing their sales, apparently without supervision, to companies whose business models are based on deceit.