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U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

1 JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

2 EUGENE M. THIROLF
3 Director,
4 KENNETH L. JOST
Deputy Director,
Office of Consumer Litigation

5 JOHN W. BURKE (VA. BAR NO. 72780)
6 Trial Attorney, Office of Consumer Litigation
Civil Division
7 United States Department of Justice
P.O. Box 386
8 Washington, D.C. 20044
Telephone: 202-353-2001
9 Facsimile: 202-514-8742
Email: josh.burke@usdoj.gov

MEJ

10 Attorneys for Plaintiff United States of America

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

CV 08

0642

13 UNITED STATES OF AMERICA,
14 Plaintiff,
15 v.
16 Member Source Media LLC, doing
17 business as ConsumerGain.com,
18 PremiumPerks.com,
19 FreeRetailRewards.com, and
20 GreatAmericanGiveaways.com,
and
Chris Sommer, individually and
as Manager of Member Source
Media LLC,
21 Defendants.

Case No. _____

COMPLAINT FOR CIVIL
PENALTIES, PERMANENT
INJUNCTION, AND OTHER
EQUITABLE RELIEF

22
23
24 Plaintiff, the United States of America, acting upon
25 notification and authorization to the Attorney General by the
26 Federal Trade Commission ("FTC" or "Commission"), pursuant to
27 Section 16(a)(1) of the Federal Trade Commission Act ("FTC Act"),
28 15 U.S.C. § 56(a)(1), for its complaint alleges:

1 1. Plaintiff brings this action under Sections 5(a),
2 5(m)(1)(A), 13(b), 16(a) and 19 of the FTC Act, 15 U.S.C.
3 §§ 45(a), 45(m)(1)(A), 53(b), 56(a), and 57b, and under Section
4 7(a) of the Controlling the Assault of Non-Solicited Pornography
5 and Marketing Act of 2003 ("CAN-SPAM" or the "CAN-SPAM Act"),
6 15 U.S.C. § 7706(a), to obtain monetary civil penalties, a
7 permanent injunction, and other equitable relief for defendants'
8 violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and
9 Section 5(a) of CAN-SPAM, 15 U.S.C. § 7704(a).

10 **JURISDICTION AND VENUE**

11 2. This Court has subject matter jurisdiction over this
12 matter pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355 and
13 15 U.S.C. §§ 45(m)(1)(A), 53(b), 56(a), and 57b. This action
14 arises under 15 U.S.C. §§ 45(a) and 7706(a).

15 3. Venue is proper in this District under 28 U.S.C.
16 §§ 1391(b) and (c), 1395(a), and 15 U.S.C. § 53(b).

17 **INTRADISTRICT ASSIGNMENT**

18 4. The events giving rise to the United States' claims
19 occurred in substantial part in San Mateo County.

20 **DEFENDANTS**

21 5. Defendant Member Source Media LLC ("Member Source
22 Media") is a Limited Liability Company organized under the laws
23 of California with its principal place of business located at 204
24 East 2nd Avenue, Suite 517, San Mateo, CA 94401.

25 6. Member Source Media LLC does business as
26 ConsumerGain.com, PremiumPerks.com, FreeRetailRewards.com, and
27 GreatAmericanGiveaways.com. Since November 2004, Member Source
28

1 Media has formulated, directed, controlled, or participated in
2 the acts and practices set forth in this complaint. Member
3 Source Media resides in the Northern District of California and
4 transacts business within this District and throughout the United
5 States.

6 7. Defendant Chris Sommer is the Manager and sole owner of
7 Member Source Media. At all times material to this complaint,
8 acting alone or in concert with others, he has formulated,
9 directed, controlled, or participated in the acts and practices
10 set forth in this complaint. Chris Sommer transacts or has
11 transacted business in this District and throughout the United
12 States.

13 DEFINITIONS

14 8. "Electronic mail message" (or "email") means a message
15 sent to a unique email address. 15 U.S.C. § 7702(6).

16 9. "Electronic mail address" means a destination, commonly
17 expressed as a string of characters, consisting of a unique user
18 name or mailbox (commonly referred to as the "local part") and a
19 reference to an Internet domain (commonly referred to as the
20 "domain part"), whether or not displayed, to which an email message
21 can be sent or delivered. 15 U.S.C. § 7702(5).

22 10. "Commercial electronic mail message" means any email
23 message the primary purpose of which is the commercial
24 advertisement or promotion of a commercial product or service
25 (including the content on an Internet website operated for
26 commercial purposes). 15 U.S.C. § 7702(2).

28

1 11. "Initiate," when used with respect to a commercial email
2 message, means to originate or transmit such message or to procure
3 the origination or transmission of such message. 15 U.S.C.
4 § 7702(9).

5 12. "Landing page" means, in online marketing, a specific web
6 page that a visitor reaches after clicking a link or advertisement.
7 This page usually showcases content that is an extension of the
8 link or ad.

9 13. "Procure," when used with respect to the initiation of a
10 commercial email message, means intentionally to pay or provide
11 other consideration to, or induce, another person to initiate such
12 a message on one's behalf. 15 U.S.C. § 7702(12).

13 14. "Protected computer" means a computer which is used in
14 interstate or foreign commerce or communication, including a
15 computer located outside the United States that is used in a manner
16 that affects interstate or foreign commerce or communication of the
17 United States. 15 U.S.C. § 7702(13); 18 U.S.C. § 1030(e)(2)(B).

18 15. "Sender" means a person who initiates a commercial
19 email message and whose product, service, or Internet website is
20 advertised or promoted by the message. 15 U.S.C. § 7702(16).

21
22 **DEFENDANTS' BUSINESS ACTIVITIES**

23 16. Since November 2004, and continuing to the present,
24 Defendants, in connection with promotions and advertisements on
25 their websites, have offered consumers purportedly free
26 merchandise, such as iPods, laptop computers, and Visa gift
27 cards.

1 17. Defendants advertise and market their offers through
2 email and Web-based ads. Defendants' emails contain subject
3 lines such as: "Congratulations. You've won an iPod Video
4 Player"; "Here are 2 free iPod Nanos for You: confirm now";
5 "Nascar Tickets Package Winner"; "Confirmation required for your
6 \$500 Visa Gift Card"; or "Second Attempt: Target Gift Card
7 Inside." Defendants' Web-based ads contain similar
8 representations: "CONGRATULATIONS! You Have Been Chosen To
9 Receive a FREE GATEWAY LAPTOP." (Such products and items are
10 referred to herein as "promised free merchandise.")

11 18. Many of Defendants' emails and Web-based ads represent,
12 expressly or by implication, that the consumer viewing the
13 message has won a contest, or has been specially selected to
14 receive a gift or prize.

15 19. Defendants' emails and Web-based ads contain links
16 that, when clicked on, take one to a "landing page" operated by
17 Defendants or their affiliates. Each landing page recapitulates
18 and expands upon Defendants' initial promised free merchandise
19 offer. For example, the landing page for Defendants' email offer
20 notifying consumers that their "Target Gift Card [is] Inside"
21 encourages consumers to "Claim Your FREE \$500 Target Gift Card
22 Now!"

23
24 20. Defendants do not clearly and conspicuously disclose
25 that to obtain the promised free merchandise one must incur
26 expenses or other obligations. A consumer must accept and pay
27 for - in the Defendants' parlance, "complete" or "participate in"
28 - a certain number of goods or services promoted by third parties

1 to qualify for the promised free merchandise that Defendants
2 promote in their emails and Web-based ads. Moreover, Defendants
3 do not clearly and conspicuously disclose the costs and
4 obligations associated with participating in third-party
5 promotions, such as applying and qualifying for credit cards.

6 21. On each landing page, Defendants request the consumer
7 to enter his or her email address, followed by his or her name
8 and mailing address. Defendants use this information, in part,
9 to send to the consumer a "welcome" email containing a password
10 and information on how to access the consumer's account on
11 Defendants' websites. A consumer must have access to his or her
12 account to obtain the promised free merchandise. However, in
13 numerous instances, the consumer does not receive Defendants'
14 "welcome" email because the consumer's email provider treats
15 Defendants' email as spam, blocking it or filtering it so that it
16 never reaches the consumer's inbox.

17 22. Once the consumer has submitted his or her personal
18 information to "start the claim process," Defendants lead the
19 consumer through a series of web pages containing advertisements
20 for various goods and services from third parties. Unbeknownst
21 to the consumer, this is only an introductory tier of "optional"
22 advertisements and offers, after which are three additional tiers
23 of offers that the consumer will have to navigate before he or
24 she can qualify for the promised free merchandise. "Optional"
25 offers do not qualify the consumer for the promised free
26 merchandise.

27 23. After the consumer navigates Defendants' "optional
28

1 promotions" - often so multitudinous as to take up five or six
2 consecutive computer screens, each with multiple offers - he or
3 she eventually reaches a link that, when clicked, takes the
4 consumer to the first of three tiers of offers in which the
5 consumer must participate to obtain the promised free
6 merchandise.

7 24. Defendants group the tiers of offers that qualify the
8 consumer for the promised free merchandise into three categories.
9 In each category, there are numerous offers. Defendants require
10 the consumer to "participate in" multiple offers from each
11 category to obtain the promised free merchandise.

12 25. Clicking on each offer reveals what the consumer must
13 do to "participate in" the offer. In some cases, "participating
14 in" an offer entails paying money or incurring some other
15 detriment, such as qualifying and applying for credit cards.
16 Defendants require the consumer to participate in multiple offers
17 before he or she can progress to the next tier of offers.

18 26. Some of the offers have free trial periods, but require
19 the consumer to participate for a minimum period of time to
20 qualify for Defendants' promised free merchandise. Moreover,
21 many such offers contain negative option components in which the
22 consumer who does not cancel will be billed automatically.

23 27. In many instances, the consumer stops trying to qualify
24 for Defendants' promised free merchandise, either because of the
25 cost involved or the time and effort required. Although the
26 consumer has expended money or incurred other obligations in
27 pursuit of Defendants' promised free merchandise, because he or
28

1 she has not completed all of Defendants' required third-party
2 promotions, the consumer does not receive the promised free
3 merchandise.

4 28. In most instances, it is impossible for the consumer to
5 qualify for Defendants' promised free merchandise without
6 spending money.

7 DEFENDANTS' EMAIL PRACTICES

8
9 29. Since November 2004, and continuing to the present,
10 Defendants have initiated the transmission of commercial email
11 messages to protected computers. The primary purpose of these
12 commercial email messages has been the commercial advertisement
13 or promotion of Internet websites operated for a commercial
14 purpose by Defendants.

15 30. Defendants are "initiators" with respect to an email
16 message when they have either originated or transmitted a message
17 themselves or have procured the origination or transmission of a
18 message through payments or other consideration, or inducements,
19 to others.

20 31. Defendants are "senders" with respect to an email
21 message when they have initiated a message and it is Defendants'
22 websites that are being advertised or promoted by such message.

23 32. In numerous instances, to induce consumers to open and
24 read their commercial emails, Defendants have initiated
25 commercial email messages that contain subject headers that
26 misrepresent the content or subject matter of the message,
27 including, but not limited to, false representations that
28

1 consumers have won a contest.

2 VIOLATIONS OF THE FTC ACT

3 33. As set forth below, Defendants have violated Section
4 5(a) of the FTC Act in connection with advertising, offering,
5 marketing, and promoting of promised free merchandise.

6 COUNT I

7
8 34. In numerous instances, Defendants have represented,
9 expressly or by implication, that Defendants' promised free
10 merchandise is without cost or obligation.

11 35. Defendants have failed to disclose or to disclose
12 adequately to consumers the material terms and conditions of
13 their program, including:

- 14 a. that consumers must pay money or other
15 consideration to participate in Defendants'
16 program; and
17 b. the costs and obligations for participating in
18 Defendants' program.

19
20 36. As a result of the representation set forth in
21 Paragraph 33, Defendants' failure to disclose or to disclose
22 adequately the material information set forth in Paragraph 34 is
23 deceptive, and violates Section 5(a) of the FTC Act, 15 U.S.C.
24 § 45(a).

25 VIOLATION OF THE CAN-SPAM ACT

26 37. The CAN-SPAM Act, 15 U.S.C. § 7701 et seq., became
27 effective on January 1, 2004, and has since remained in full
28

1 force and effect.

2 38. Section 5(a)(2) of CAN-SPAM, 15 U.S.C. § 7704(a)(2),
3 states:

4 It is unlawful for any person to initiate the
5 transmission to a protected computer of a
6 commercial electronic mail message if such
7 person has actual knowledge, or knowledge
8 fairly implied on the basis of objective
9 circumstances, that a subject heading of the
10 message would be likely to mislead a
11 recipient, acting reasonably under the
12 circumstances, about a material fact
13 regarding the contents or subject matter of
14 the message (consistent with the criteria
15 used in enforcement of section 45 of this
16 title).

17 39. Section 7(e) of CAN-SPAM, 15 U.S.C. § 7706(e), states
18 that in any action to enforce compliance through an injunction
19 with Section 5(a)(2) and other specified sections of CAN-SPAM,
20 the FTC need not allege or prove the state of mind required by
21 such sections.

22 40. Section 7(a) of the CAN-SPAM Act, 15 U.S.C. § 7706(a),
23 states:

24 [T]his chapter shall be enforced by the
25 [FTC] as if the violation of this chapter
26 were an unfair or deceptive act or practice
27 proscribed under section 18(a)(1)(B) of the
28 [FTC Act] (15 U.S.C. 57a(a)(1)(B)).

29 COUNT II

30 41. In numerous instances, Defendants have initiated the
31 transmission, to protected computers, of commercial email
32 messages that contained subject headings that would be likely to
33 mislead a recipient, acting reasonably under the circumstances,
34 about a material fact regarding the contents or subject matter of

1 the message.

2 42. Therefore, Defendants' acts or practices violate
3 Section 5(a)(2) of CAN-SPAM, 15 U.S.C. § 7704(a)(2).

4 CONSUMER INJURY

5 43. Consumers throughout the United States have been
6 injured as a result of Defendants' unlawful acts or practices.
7 Absent injunctive relief by this Court, Defendants are likely to
8 continue to injure consumers and to harm the public interest.

9 THIS COURT'S POWER TO GRANT RELIEF

10 44. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b),
11 empowers this Court to grant injunctive and other ancillary
12 relief to prevent and remedy any violation of any provision of
13 law enforced by the FTC.

14 45. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C.
15 § 45(m)(1)(A), as modified by Section 4 of the Federal Civil
16 Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as
17 amended, and as implemented by 16 C.F.R. § 1.98(d) (1997),
18 authorizes this Court to award monetary civil penalties of not
19 more than \$11,000 for each violation of CAN-SPAM. Defendants'
20 violations of CAN-SPAM were committed with the knowledge required
21 by Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A).

22 46. This Court, in the exercise of its equitable
23 jurisdiction, may award ancillary relief to remedy injury caused
24 by Defendants' violations of CAN-SPAM and the FTC Act.
25
26
27
28

1 PRAYER FOR RELIEF

2 WHEREFORE, Plaintiff requests that this Court, as authorized
3 by Sections 5(a), 5(m)(1)(A), 13(b) and 19 of the FTC Act,
4 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), and 57b, and pursuant to
5 its own equitable powers:

6 1. Enter judgment against Defendants and in favor of
7 Plaintiff for each violation alleged in this complaint;

8 2. Award Plaintiff monetary civil penalties from
9 Defendants for every violation of CAN-SPAM;

10 3. Award Plaintiff such relief as the Court finds
11 necessary to redress injury to consumers resulting from
12 Defendants' violations of Section 5(a) of the FTC Act, 15 U.S.C.
13 § 45(a), including, but not limited to, rescission of contracts,
14 restitution, the refund of monies paid, and the disgorgement of
15 ill-gotten monies;

16 4. Enter a permanent injunction to prevent future
17 violations of the FTC Act and CAN-SPAM by Defendants;

18 5. Order Defendants to pay the costs of this action; and

19 6. Award Plaintiff such other and additional relief as the
20 Court may determine to be just and proper.
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1 Dated: January 28, 2008


2 OF COUNSEL:
3 LOIS C. GREISMAN
4 Associate Director for
Marketing Practices
5 FEDERAL TRADE COMMISSION

6 STEPHEN L. COHEN
7 ETHAN ARENSON
8 Attorneys
9 Federal Trade Commission
600 Pennsylvania Ave., N.W.,
Washington, DC 20580
PHONE: 202-326-3222; 326-
2204
FAX: 202-326-3395

Respectfully submitted,

FOR THE UNITED STATES OF AMERICA
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
Civil Division
U.S. DEPARTMENT OF JUSTICE

EUGENE M. THIROLF
Director,
KENNETH L. JOST
Deputy Director,
Office of Consumer Litigation



JOHN W. BURKE
Trial Attorney
Office of Consumer Litigation
U.S. Department of Justice
P.O. Box 386
Washington, D.C. 20044
Telephone: 202-353-2001
Facsimile: 202-514-8742
Email: josh.burke@usdoj.gov

1 JEFFREY S. BUCHOLTZ
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2 EUGENE M. THIROLF
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5 JOHN W. BURKE (VA. BAR NO. 72780)
6 Trial Attorney, Office of Consumer Litigation
Civil Division
7 United States Department of Justice
P.O. Box 386
8 Washington, D.C. 20044
Telephone: 202-353-2001
9 Facsimile: 202-514-8742
Email: josh.burke@usdoj.gov

10 Attorneys for Plaintiff United States of America

11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**

14 **UNITED STATES OF AMERICA,**

15 **Plaintiff,**

16 **v.**

17 **Member Source Media LLC, doing**
18 **business as ConsumerGain.com,**
19 **PremiumPerks.com,**
20 **FreeRetailRewards.com, and**
21 **GreatAmericanGiveaways.com,**
and
22 **Chris Sommer, individually and**
as Manager of Member Source
Media LLC,

23 **Defendants.**

Case No. CV 08-642

STIPULATED FINAL JUDGMENT
FOR CIVIL PENALTIES AND
PERMANENT INJUNCTIVE
RELIEF

24 Plaintiff, the United States of America, acting upon
25 notification and authorization to the Attorney General by the
26 Federal Trade Commission ("FTC" or the "Commission"), pursuant to
27 Section 16(a)(1) of the Federal Trade Commission Act ("FTC Act"),
28 15 U.S.C. § 56(a)(1), has filed a complaint pursuant to Sections

1 5(a)(1), 5(m)(1)(A), 13(b), 16(a), and 19 of the FTC Act,
2 15 U.S.C. §§ 45(a)(1), 45(m)(1)(A), 53(b), 56(a), and 57b and
3 under Section 7(a) of the Controlling the Assault of Non-
4 Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM" or
5 the "CAN-SPAM Act"), 15 U.S.C. § 7706(a), to secure civil
6 penalties, a permanent injunction, and other equitable relief for
7 Defendants' violations of Section 5(a) of the FTC Act, 15 U.S.C.
8 § 45(a), and Section 5(a) of CAN-SPAM, 15 U.S.C. § 7704(a).

9 Defendants have waived service of the Summons and Complaint;
10 the parties have been represented by the attorneys whose names
11 appear hereafter; and the parties have agreed to settlement of
12 this action upon the following terms and conditions, without
13 adjudication of any issue of fact or law and without Defendants
14 admitting liability for any of the matters alleged in the
15 Complaint.

16 THEREFORE, on the joint motion of the parties, it is hereby
17 ORDERED, ADJUDGED AND DECREED as follows:

18 **FINDINGS**

19 1. This Court has jurisdiction over the subject matter of this
20 action pursuant to 15 U.S.C. §§ 45(m)(1)(A), 53(b), 56(a), 57b,
21 and 7706(a), and 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355.

22 2. Plaintiff and Defendants consent to jurisdiction and venue
23 in this District.

24 3. The activities of Defendants are in or affecting commerce,
25 as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

26 4. The Complaint states a claim upon which relief may be
27 granted against Defendants under Section 5(a) of the CAN-SPAM
28

1 Act, 15 U.S.C. § 7704(a), and Sections 5(a), 5(m)(1)(A), 13(b)
2 and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b),
3 and 57b.

4 5. Defendants have entered into this Stipulated Final Judgment
5 For Civil Penalties And Permanent Injunctive Relief ("Order")
6 freely and without coercion.

7 6. Defendants hereby waive all rights to appeal or otherwise
8 challenge or contest the validity of this Order.

9 7. Defendants agree that this Order does not entitle Defendants
10 to seek or to obtain attorneys' fees as a prevailing party under
11 the Equal Access to Justice Act, 28 U.S.C. § 2412, and Defendants
12 further waive any rights to attorneys' fees that may arise under
13 said provision of law.

14 8. Entry of this Order is in the public interest.

15 **DEFINITIONS**

16 For the purpose of this Order, the following definitions
17 shall apply:

18 1. "Commercial electronic mail ('email') message" means
19 any email message the primary purpose of which is the commercial
20 advertisement or promotion of a commercial product or service
21 (including content on an Internet website operated for a
22 commercial purpose) and that further satisfies the requirements
23 of 16 C.F.R. §§ 316.1 - 316.5, as they exist now and may be
24 amended.

25 2. Unless otherwise specified, "Defendants" means Member
26 Source Media LLC, d/b/a ConsumerGain.com, PremiumPerks.com,
27 FreeRetailRewards.com, and GreatAmericanGiveaways.com, Chris

28

1 Sommer, and their successors and assigns.

2 3. "Document" is synonymous in meaning and equal in scope
3 to the usage of the term in Federal Rule of Civil Procedure
4 34(a), and includes writings, drawings, graphs, charts,
5 photographs, audio and video recordings, computer records, and
6 other data compilations from which information can be obtained
7 and translated, if necessary, into reasonably usable form through
8 detection devices. A draft or non-identical copy is a separate
9 document within the meaning of the term.

10 4. "Electronic mail ('email') address" means a
11 destination, commonly expressed as a string of characters,
12 consisting of a unique user name or mailbox (commonly referred to
13 as the "local part") and a reference to an Internet domain
14 (commonly referred to as the "domain part"), whether or not
15 displayed, to which an email message can be sent or delivered.

16 5. "Electronic mail ('email') message" means a message
17 sent to a unique email address.

18 6. "Initiate," when used with respect to a commercial
19 email message, means to originate or transmit such message or to
20 procure the origination or transmission of such message, but
21 shall not include actions that constitute routine conveyance of
22 such message. For purposes of this Order, more than one person
23 may be considered to have initiated a message.

24 7. "Landing page" means, in online marketing, a specific
25 web page that a visitor reaches after clicking a link or
26 advertisement in an email or banner ad. This page usually
27 showcases content that is an extension of the link or ad.

28

1 8. "Person" means a natural person or a corporation,
2 partnership, proprietorship, limited liability company, or other
3 organization or legal entity, including an association,
4 cooperative, or agency, or other group or combination acting as
5 an entity.

6 9. "Procure," when used with respect to the initiation of
7 a commercial email message, means intentionally to pay or provide
8 other consideration to, or induce, another person to initiate
9 such a message on one's behalf.

10 10. "Recipient," when used with respect to a commercial
11 email message, means an authorized user of the email address to
12 which the message was sent or delivered. If a recipient of a
13 commercial email message has one or more email addresses in
14 addition to the address to which the message was sent or
15 delivered, the recipient shall be treated as a separate recipient
16 with respect to each such address. If an email address is
17 reassigned to a new user, the new user shall not be treated as a
18 recipient of any commercial email message sent or delivered to
19 that address before it was reassigned.

20 11. "Sender," when used with respect to a commercial email
21 message, means a person who initiates such a message and whose
22 product, service, or Internet website is advertised or promoted
23 by the message.

24 **ORDER**

25 **I. PROHIBITION AGAINST FAILING TO DISCLOSE MATERIAL INFORMATION**

26 IT IS THEREFORE ORDERED that Defendants, their successors,
27 assigns, affiliates, subsidiaries, officers, agents, servants,
28

1 and employees, and those persons in active concert or
2 participation with them who receive actual notice of this Order
3 by personal service or otherwise are hereby permanently
4 restrained and enjoined from:

5 A. In any email and online advertisement, and on any
6 landing page associated with such email or online advertisement,
7 that contains any direct or implied representation made by
8 Defendants, or made by any authorized agent on behalf of
9 Defendants, that a product or service is free, failing to
10 disclose, in the same color, font, and size, and within close
11 proximity to such representation that a purchase is required, or
12 that purchases are required, to obtain such product or service,
13 when such is the case;

14 B. On any landing page associated with any direct or
15 implied representation made by Defendants, or made by any
16 authorized agent on behalf of Defendants, that a product or
17 service is free, failing to disclose, in a clear and conspicuous
18 manner:

- 19 1. A list of the monetary obligations a consumer is
20 likely to incur to obtain the advertised product
21 or service, when such is the case;
- 22 2. A list of any non-monetary obligations a consumer
23 is likely to incur to obtain the advertised
24 product or service, such as having to apply and
25 qualify for credit cards or an automobile loan,
26 when such is the case.

27 The disclosures specified in subparagraphs 1 and 2 of this
28

1 Part may be made from such landing page via a hyperlink, provided
2 that the hyperlink is labeled to convey the nature and relevance
3 of the information to which it leads, and is clearly and
4 conspicuously disclosed.

5 **II. PROHIBITION AGAINST VIOLATING THE CAN-SPAM ACT**

6 IT IS FURTHER ORDERED that Defendants, their successors,
7 assigns, affiliates, subsidiaries, officers, agents, servants,
8 and employees, and those persons in active concert or
9 participation with them who receive actual notice of this Order
10 by personal service or otherwise are hereby permanently
11 restrained and enjoined from violating the CAN-SPAM Act,
12 15 U.S.C. §§ 7701 *et seq.*, attached hereto as Attachment A, and
13 as it may be amended, by, including, but not limited to,
14 initiating the transmission of a commercial email message that
15 misrepresents the content or subject matter of the message.

16 **III. CIVIL PENALTIES**

17 IT IS FURTHER ORDERED that Defendants shall pay to Plaintiff
18 a civil penalty, pursuant to Section 5(m)(1)(A) of the Federal
19 Trade Commission Act, 15 U.S.C. § 45(m)(1)(A), in the amount of
20 \$200,000 as follows:

21 A. Defendants shall make the payment required by this Part
22 within ten (10) business days of the date of entry of this Order
23 by electronic fund transfer or certified or cashier's check in
24 accordance with the instructions provided by the Office of
25 Consumer Litigation, Civil Division, U.S. Department of Justice,
26 Washington, D.C. 20530, for appropriate disposition;

27 B. In the event of any default in payment, which default
28

1 continues for ten (10) business days beyond the due date of
2 payment, the entire unpaid penalty, together with interest, as
3 computed pursuant to 28 U.S.C. § 1961, from the date of default
4 to the date of payment, shall immediately become due and payable;

5 C. This judgment represents a civil penalty owed to the
6 United States Government and is not compensation for actual
7 pecuniary loss. The Defendants agree that the facts as alleged
8 in the Complaint filed in this action shall be taken as true,
9 without further proof, in any subsequent litigation filed by or
10 on behalf of the Commission to collect any unpaid amount or
11 otherwise enforce its rights pursuant to this Order, including a
12 nondischargeability complaint filed in any bankruptcy case; and

13 D. Proceedings initiated under this Part are in addition
14 to, and not in lieu of, any other civil or criminal penalties
15 that may be provided by law, including any other proceedings the
16 Plaintiff may initiate to enforce this Order.

17 **IV. COMPLIANCE MONITORING**

18 **IT IS FURTHER ORDERED** that, for the purpose of monitoring
19 and investigating compliance with any provision of this Order:

20 A. Within ten (10) days of receipt of written notice from
21 a representative of the Commission or Plaintiff, Defendants each
22 shall submit additional written reports, sworn to under penalty
23 of perjury; produce documents for inspection and copying; appear
24 for deposition; and/or provide entry during normal business hours
25 to any business location in such Defendants' possession or direct
26 or indirect control to inspect the business operation;

27 B. In addition, the Commission and Plaintiff are
28

1 authorized to monitor compliance with this Order by all other
2 lawful means, including but not limited to the following:

- 3 1. Obtaining discovery from any person, without
4 further leave of court, using the procedures
5 prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36,
6 and 45;
- 7 2. Posing as consumers and suppliers to Defendants,
8 Defendants' employees, or any other entity managed
9 or controlled in whole or in part by Defendants,
10 without the necessity of identification or prior
11 notice; and

12 C. Defendants shall permit representatives of the
13 Commission or Plaintiff to interview any employer, consultant,
14 independent contractor, representative, agent, or employee who
15 has agreed to such an interview, relating in any way to any
16 conduct subject to this Order. The person interviewed may have
17 counsel present.

18 **Provided, however,** that nothing in this Order shall limit
19 the Commission's lawful use of compulsory process, pursuant to
20 Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to
21 obtain any documentary material, tangible things, testimony, or
22 information relevant to unfair or deceptive acts or practices in
23 or affecting commerce (within the meaning of 15 U.S.C.
24 § 45(a)(1)).

25 **V. COMPLIANCE REPORTING BY DEFENDANTS**

26 IT IS FURTHER ORDERED that, in order that compliance with
27 the provisions of this Order may be monitored:
28

1 A. For a period of five (5) years from the date of entry
2 of this Order:

3 1. Defendant Chris Sommer shall notify the Commission
4 of the following:

5 a. Any changes in his residence, mailing
6 addresses, and telephone numbers within ten
7 (10) days of the date of such change;

8 b. Any changes in his employment status
9 (including self-employment), and any change
10 in his ownership in any business entity,
11 within ten (10) days of the date of such
12 change. Such notice shall include the name
13 and address of each business that he is
14 affiliated with, employed by, creates or
15 forms, or performs services for; a statement
16 of the nature of the business; and a
17 statement of his duties and responsibilities
18 in connection with the business or
19 employment; and

20 c. Any changes in his name or use of any aliases
21 or fictitious names; and

22 2. Defendants shall notify the Commission of any
23 changes in corporate structure that may affect
24 compliance obligations arising under this Order,
25 including but not limited to a dissolution,
26 assignment, sale, merger, or other action that
27 would result in the emergence of a successor
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1 entity; the creation or dissolution of a
2 subsidiary, parent, or affiliate that engages in
3 any acts or practices subject to this Order; the
4 filing of a bankruptcy petition; or a change in
5 the corporate name or address, at least thirty
6 (30) days prior to such change, *provided that*,
7 with respect to any proposed change in the
8 corporation about which Defendants learn less than
9 thirty (30) days prior to the date such action is
10 to take place, Defendants shall notify the
11 Commission as soon as is practicable after
12 obtaining such knowledge;

13 B. One hundred eighty (180) days after the date of entry
14 of this Order, Defendants each shall provide a written report to
15 the FTC, sworn to under penalty of perjury, setting forth in
16 detail the manner and form in which they have complied and are
17 complying with this Order. This report shall include, but not be
18 limited to:

19 1. For Defendant Chris Sommer:

20 a. His then-current residence address, mailing
21 addresses, and telephone numbers;

22 b. His then-current employment and business
23 addresses and telephone numbers, a
24 description of the business activities of
25 each such employer or business, and his title
26 and responsibilities for each such employer
27 or business; and

1 c. Any other changes required to be reported
2 under subparagraph A of this Section; and

3 2. For all Defendants:

4 a. A copy of each acknowledgment of receipt of
5 this Order, obtained pursuant to Part VII.C
6 of this Order; and

7 b. Any changes required to be reported pursuant
8 to subsection A of this Part;

9 C. For the purposes of this Order, Defendants shall,
10 unless otherwise directed in writing by the Commission's
11 authorized representatives, mail all written notifications to the
12 Commission to:

13 Associate Director for the
14 Division of Enforcement
15 Federal Trade Commission
16 601 New Jersey Avenue, N.W.
17 Washington, D.C. 20580
18 Re: United States v. Member Source Media LLC
19 Case No. _____;

20 D. For the purposes of this Order, Defendants shall,
21 unless otherwise directed in writing by a representative of
22 Plaintiff, identify all written notifications required to be sent
23 to Plaintiff as in reference to DJ# 102-3436, and mail them to:

24 Director, Office of Consumer Litigation
25 U.S. Department of Justice - Civil Division
26 P.O. Box 386
27 Washington, D.C. 20044; and

28 E. For purposes of the compliance reporting and monitoring
required by this Order, representatives of Plaintiff and the
Commission are authorized to communicate directly with
Defendants.

1 **VI. RECORD KEEPING PROVISIONS**

2 IT IS FURTHER ORDERED that, for a period of eight (8) years
3 from the date of entry of this Order, Defendants and their
4 agents, employees, officers, corporations, successors, and
5 assigns, and those persons in active concert or participation
6 with them who receive actual notice of this Order by personal
7 service or otherwise, are hereby restrained and enjoined from
8 failing to create and retain the following records in connection
9 with the marketing, advertising, or promotion of any "free"
10 products or services:

11 A. Accounting records that reflect the cost of goods or
12 services sold, revenues generated, and the disbursement of such
13 revenues;

14 B. Personnel records accurately reflecting: the name,
15 address, and telephone number of each person employed in any
16 capacity by such business, including as an independent
17 contractor; that person's job title or position; the date upon
18 which the person commenced work; and the date and reason for the
19 person's termination, if applicable;

20 C. Customer files containing the names, addresses, phone
21 numbers, dollar amounts paid, quantity of items or services
22 purchased, and description of items or services purchased, to the
23 extent such information is obtained in the ordinary course of
24 business;

25 D. Complaints and refund requests (whether received
26 directly, indirectly or through any third party) and any
27 responses to those complaints or requests; and
28

1 E. Copies of all sales scripts, training materials,
2 advertisements, or other marketing materials;

3 F. Records demonstrating reasonable policies and
4 procedures to process and handle customer inquiries and
5 complaints; and

6 G. All records and documents necessary to demonstrate full
7 compliance with each provision of this Order, including but not
8 limited to, copies of acknowledgments of receipt of this Order
9 required by Part VIII, and all reports submitted to the FTC
10 pursuant to Part V of this Order.

11 **VII. DISTRIBUTION OF ORDER BY DEFENDANTS**

12 IT IS FURTHER ORDERED that, for a period of five (5) years
13 from the date of entry of this Order, Defendants shall deliver
14 copies of this Order as directed below:

15 A. Defendant Member Source Media LLC must deliver a copy
16 of this Order to all of its principals, officers, directors, and
17 managers. Defendant Member Source Media LLC also must deliver
18 copies of this Order to all of its employees, agents, and
19 representatives who engage in conduct related to the subject
20 matter of this Order. For current personnel, delivery shall be
21 within (5) days of service of this Order upon Defendants. For
22 new personnel, delivery shall occur prior to them assuming their
23 responsibilities;

24 B. For any business that Defendant Chris Sommer controls,
25 directly or indirectly, or in which Defendant Chris Sommer has a
26 majority ownership interest, Defendant Chris Sommer must deliver
27 a copy of this Order to all principals, officers, directors, and
28

1 managers of that business. Defendant Chris Sommer must also
2 deliver copies of this Order to all employees, agents, and
3 representatives of that business who engage in conduct related to
4 the subject matter of this Order. For current personnel,
5 delivery shall be within (5) days of service of this Order upon
6 Defendants. For new personnel, delivery shall occur prior to
7 them assuming their responsibilities; and

8 C. Defendants must secure a signed and dated statement
9 acknowledging receipt of this Order, within thirty (30) days of
10 delivery, from all persons receiving a copy of this Order
11 pursuant to this Part.

12 **VIII. ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANTS**

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

17 **IX. FEES AND COSTS**

18 IT IS FURTHER ORDERED that each party to this Order hereby
19 agrees to bear its own costs and attorneys' fees incurred in
20 connection with this action.

21 **X. SEVERABILITY**

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

26 **XI. RETENTION OF JURISDICTION**

27 IT IS FURTHER ORDERED that this Court shall retain

1 jurisdiction of this matter for purposes of construction,
2 modification, and enforcement of this Order.

3 **XII. COMPLETE SETTLEMENT**

4 The parties, by their respective counsel, hereby consent to
5 entry of the foregoing Order, which shall constitute a final
6 judgment and order in this matter. The parties further stipulate
7 and agree that the entry of the foregoing Order shall constitute
8 full, complete, and final settlement of this action.

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1 FOR THE PLAINTIFF:

2 UNITED STATES OF AMERICA:

3 JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
4 Civil Division
U.S. Department of Justice

5 EUGENE M. THIROLF
6 Director,
KENNETH L. JOST
7 Deputy Director,
Office of Consumer Litigation

8 _____
/s/
9 JOHN W. BURKE (VA. BAR NO. 72780)
Trial Attorney
10 Office of Consumer Litigation
Civil Division
11 U.S. Department of Justice
P.O. Box 386
12 Washington, D.C. 20044
Telephone: 202-353-2001
13 Facsimile: 202-514-8742
Email: josh.burke@usdoj.gov

14 FOR THE FEDERAL TRADE COMMISSION:

15 _____
/s/
16 LOIS C. GREISMAN
Associate Director for Marketing Practices

17
18 _____
/s/
19 STEPHEN L. COHEN
ETHAN ARENSON
20 Attorneys, Federal Trade Commission
600 Pennsylvania Ave., N.W.
21 Washington, D.C. 20580

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1 FOR THE DEFENDANTS:

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3 _____
/s/

Jeffrey K. Riffer
Jeffers Mangers Butler & Marmaro LLP
1900 Avenue of the Stars, 7th Floor
Los Angeles, CA 90067

5

6 Member Source Media LLC
BY: _____
/s/

7

204 East 2nd Avenue, Suite 517
San Mateo, CA 94401

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9

10 _____
/s/

Chris Sommer,
Individually and as Manager of Member Source Media LLC

11

12 **SO ORDERED** this _____ day of _____, 2008.

13

14 _____
United States District Judge

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