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CENTRAL DIST. OF CALIF.
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BY _____

1 THOMAS P. O'BRIEN
United States Attorney
2 LEE WEIDMAN
Assistant United States Attorney
Chief, Civil Division
3 GARY PLESSMAN
Assistant United States Attorney
Chief, Civil Fraud Section
4 California State Bar No. 101233
5 Room 7516, Federal Building
6 300 North Los Angeles Street
Los Angeles, California 90012
7 Telephone: (213) 894-2474
Facsimile: (213) 894-2380
8 Email: gary.plessman@usdoj.gov

9 Attorneys for Plaintiff
UNITED STATES OF AMERICA

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12

13 UNITED STATES OF AMERICA,
14 Plaintiff,
15
16 v.
17 VOICE-MAIL BROADCASTING
CORPORATION, a California
18 corporation, and JESSE CROWE,
19 Defendants.

CV -

CV08-00521

MMM JTLx

COMPLAINT FOR
CIVIL PENALTIES,
PERMANENT INJUNCTION,
AND OTHER RELIEF

20
21 Plaintiff, the United States of America, acting upon notification and
22 authorization to the Attorney General by the Federal Trade Commission ("FTC" or
23 "Commission"), pursuant to Section 16(a)(1) of the Federal Trade Commission
24 Act ("FTC Act"), 15 U.S.C. § 56(a)(1), for its complaint alleges:

- 25 1. Plaintiff brings this action under Sections 5(a), 5(m)(1)(A), 13(b) and 16(a)
26 of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), and 56(a), and
27 Section 6 of the Telemarketing and Consumer Fraud and Abuse Prevention

28 Complaint

1 Act (the "Telemarketing Act"), 15 U.S.C. § 6105, to obtain monetary civil
2 penalties, a permanent injunction, and other equitable relief for Defendants'
3 violations of the FTC's Telemarketing Sales Rule (the "TSR"), 16 C.F.R.
4 Part 310, as amended by 68 Fed. Reg. 4580, 4669 (Jan. 29, 2003), and 68
5 Fed. Reg. 45,134, 45,144 (July 31, 2003).

6 **JURISDICTION AND VENUE**

- 7 2. This Court has subject matter jurisdiction over this action pursuant to 28
8 U.S.C. §§ 1331, 1337(a), 1345, and 1355, and 15 U.S.C. §§ 45(m)(1)(A),
9 53(b), and 56(a). This action arises under 15 U.S.C. § 45(a).
- 10 3. Venue is proper in this District under 28 U.S.C. §§ 1391(b)-(c) and 1395(a),
11 and 15 U.S.C. § 53(b).

12 **DEFENDANTS**

- 13 4. Defendant Voice-Mail Broadcasting Corporation ("VMBC") is a California
14 for-profit corporation with its principal place of business at 575 Anton
15 Blvd., Costa Mesa, California. VMBC is a telemarketer that initiates
16 outbound telephone calls to induce consumers to purchase goods and
17 services. VMBC transacts or has transacted business in this District.
- 18 5. Defendant Jesse Crowe is the founder, owner, and president of VMBC, and
19 one of the directors of the corporation. In connection with the matters
20 alleged herein, Mr. Crowe has transacted business in this District. At all
21 times material to this complaint, acting alone or in concert with others,
22 Crowe has formulated, directed, controlled, or participated in the acts and
23 practices of VMBC, including the acts and practices set forth in this
24 complaint.

THE ABANDONED CALL PROHIBITION
OF THE TELEMARKETING SALES RULE

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3 6. Under the TSR, an “outbound telephone call” is a telephone call that is
4 initiated by a telemarketer to induce the purchase of goods or services, or to
5 solicit a charitable contribution. 16 C.F.R. § 310.2(u).
- 6 7. An outbound telephone call, including a call initiated to deliver a
7 prerecorded message, is “abandoned” under the TSR if a person—rather
8 than an answering machine or voice mail system— answers the call and the
9 telemarketer does not connect the person to a sales representative within
10 two (2) seconds of the person’s completed greeting. *Id.* § 310.4(b)(1)(iv).
- 11 8. Since October 1, 2003, the TSR has prohibited telemarketers subject to the
12 FTC’s authority under the Telemarketing Act from abandoning any
13 outbound telephone calls, and has prohibited sellers from causing
14 telemarketers to abandon outbound telephone calls. *Id.*; 68 Fed. Reg.
15 16,414 (2003).
- 16 9. Telemarketers that are subject to the FTC’s authority are prohibited from
17 abandoning outbound telephone calls, even if the seller on whose behalf the
18 call is made is not subject to the FTC’s authority. *See* 68 Fed. Reg.
19 4589-90.
- 20 10. Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and
21 Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the
22 TSR constitutes an unfair or deceptive act or practice in or affecting
23 commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).
- 24 11. In response to a petition by VMBC to modify the TSR, on November 17,
25 2004, the FTC published a proposal to permit outbound telephone calls that
26 deliver prerecorded messages to persons who have an established business
27 relationship with the seller on whose behalf the call is made, *if certain*

1 conditions were met. *See* 69 Fed. Reg. 67,287. Under the proposal, an
2 outbound telephone call initiated to deliver a prerecorded message to
3 persons with whom the seller has an established business relationship would
4 not be prohibited as an “abandoned call” if the telemarketer gave the person
5 who answered the call an opportunity at the outset to make an entity-
6 specific Do Not Call request, *i.e.*, a request not to receive any further
7 outbound telephone calls made by or on behalf of the seller in question, and
8 satisfied other conditions. *See id.* at 67,289-90. The FTC announced that,
9 during the pendency of the rulemaking proceeding, it would not initiate an
10 enforcement action against a seller or telemarketer that places telephone
11 calls to deliver prerecorded telemarketing messages to consumers with
12 whom the seller on whose behalf the calls are made has an established
13 business relationship, as defined in the TSR, provided the seller or
14 telemarketer conducts this activity in conformity with the safe harbor
15 proposed in the November 2004 notice. *See id.* at 67,290.

- 16 12. On October 4, 2006, as a result of its review of public comments, the FTC
17 published a notice that declined to adopt the safe harbor proposed in
18 November 2004 as an amendment to the TSR and requested additional
19 comment on other proposed amendments to the TSR. 71 Fed. Reg. 58,716
20 (Oct. 4, 2006). The FTC has stated that, pending completion of this
21 rulemaking proceeding, it will continue to forbear from bringing any
22 enforcement action for violation of 16 C.F.R. § 310.4(b)(1)(iv) against a
23 seller or telemarketer that places telephone calls to deliver prerecorded
24 telemarketing messages to consumers with whom the seller on whose behalf
25 the telemarketing call is placed has an established business relationship, as
26 defined in the TSR, provided the seller or telemarketer conducts this activity
27 in complete conformity with the conditions in the safe harbor proposed in

1 the November 2004 notice. 71 Fed. Reg. 77,634, 77,635 (Dec. 27, 2006).

2 **VMBC's BUSINESS PRACTICES**

- 3 13. VMBC sells a computerized message delivery service that makes telephone
4 calls to deliver prerecorded messages to consumers. VMBC markets its
5 service as "voice broadcasting" or "voice message broadcasting."
- 6 14. VMBC is a "telemarketer" as defined by the TSR, 16 C.F.R. § 310.2(bb),
7 because, in connection with telemarketing, it initiates telephone calls to
8 customers and donors. VMBC initiates these calls in connection with plans,
9 programs, or campaigns conducted to induce the purchase of goods or
10 services by use of one or more telephones and these plans, programs or
11 campaigns involve more than one interstate call.
- 12 15. At all times relevant to this complaint, VMBC has maintained a substantial
13 course of trade or business in the offering for sale and sale of goods or
14 services via the telephone, in or affecting commerce, as "commerce" is
15 defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
- 16 16. In providing voice broadcasting services, VMBC uses automated dialers to
17 place calls to telephone numbers contained in a database. When the
18 telephone calls are answered, VMBC uses voice detection technology to
19 determine whether the call has been answered by a person or by an
20 answering machine or voice mail system.
- 21 17. In performing the voice broadcasting services described above, VMBC
22 "abandons" telephone calls under the TSR because it does not connect
23 outbound telephone calls that are answered by a person (rather than an
24 answering machine or voice mail system) to a sales representative within
25 two seconds of the person's completed greeting. Depending on how the
26 service is programmed, upon determining that the call has been answered by
27 a person rather than an answering machine or voice mail system, VMBC

1 either disconnects the call (*i.e.*, “hangs up” on the person) or plays the
2 prerecorded message to the person and then ends the call.

3 18. Since October 1, 2003, VMBC has, in connection with telemarketing,
4 conducted numerous voice broadcasting campaigns in which it made
5 outbound telephone calls that were abandoned whenever a call was
6 answered by a person rather than by an answering machine or voice mail
7 system. These voice broadcasting campaigns include:

- 8 a. Delivering messages to induce the purchase of debt consolidation or
9 mortgage brokerage services;
- 10 b. Delivering messages to induce the purchase of goods or services from
11 a variety of retailers; and
- 12 c. Delivering messages to induce the purchase of goods and services
13 from financial institutions.

14 19. In the campaigns described above, when a person answered an outbound
15 telephone call, VMBC did not connect the call to a sales representative but,
16 instead, disconnected the call or delivered a prerecorded message.

17 20. Since October 1, 2003, VMBC’s voice broadcasting campaigns have caused
18 over 46 million outbound telephone calls to be abandoned.

19 21. In conducting the campaigns described above, VMBC did not comply with
20 the safe harbor proposed by the FTC in November 2004. In particular,
21 VMBC did not provide the persons who answered the telephone calls in
22 these campaigns with an opportunity, at the outset of the message, to make
23 an entity-specific Do Not Call request.

24 **COUNT I**

25 **VIOLATION OF THE TELEMARKETING SALES RULE**

26 22. In numerous instances, in connection with telemarketing, Defendants
27

1 VMBC and Crowe have initiated an outbound telephone call and failed to
2 connect the call to a sales representative within two (2) seconds of the
3 completed greeting of the person answering the call, in violation of the
4 TSR. 16 C.F.R. § 310.4(b)(1)(iv).

5 **CONSUMER INJURY**

- 6 23. Consumers in the United States have suffered and will suffer injury as a
7 result of Defendants' violations of the TSR. Absent injunctive relief by this
8 Court, Defendants are likely to continue to injure consumers and harm the
9 public interest.

10 **THE COURT'S POWER TO GRANT RELIEF**

- 11 24. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to
12 grant injunctive and ancillary relief to prevent and remedy any violation of
13 any provision of law enforced by the FTC.
- 14 25. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), as modified
15 by Section 4 of the Federal Civil Penalties Inflation Adjustment Act of
16 1990, as amended, 28 U.S.C. § 2461 note (2000), and as implemented by
17 16 C.F.R. § 1.98(d) (2007), authorizes this Court to award monetary civil
18 penalties of not more than \$11,000 for each violation of the TSR.
- 19 26. Defendants' violations of the TSR were committed with the knowledge
20 required by Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A).
- 21 27. This Court, in the exercise of its equitable jurisdiction, may award ancillary
22 relief to remedy injury caused by Defendants' violations of the TSR and the
23 FTC Act.
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PRAYER FOR RELIEF

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

- A. Enter judgment against Defendants and in favor of Plaintiff for each violation alleged in this complaint;
- B. Award Plaintiff monetary civil penalties from each defendant for every violation of the TSR;
- C. Permanently enjoin Defendants from violating the TSR and the FTC Act;
- D. Order Defendants to pay the costs of this action; and
- E. Award Plaintiff such other and additional relief as the Court may determine to be just and proper.

1 Dated: January 28, 2008

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

7 MICHAEL E. TANKERSLEY
8 JANIS CLAIRE KESTENBAUM
9 Attorneys
10 FEDERAL TRADE COMMISSION
11 600 Pennsylvania Ave., N.W., Rm.
12 292
13 Washington, DC 20580
14 202-326-3302 phone
15 202-326-3395 fax


Respectfully submitted,

FOR THE UNITED STATES OF
AMERICA

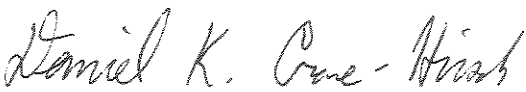
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
Civil Division
U.S. DEPARTMENT OF JUSTICE

THOMAS P. O'BRIEN
United States Attorney

LEE WEIDMAN
Assistant United States Attorney
Chief, Civil Division

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GARY PLESSMAN
Assistant United States Attorney
Chief, Civil Fraud Section
California State Bar No. 101233
Room 7516, Federal Building
300 North Los Angeles Street
Los Angeles, California 90012
Telephone: (213) 894-2474
Facsimile: (213) 894-2380
Email: gary.plessman@usdoj.gov

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


DANIEL K. CRANE-HIRSCH
Attorney
Office of Consumer Litigation
U.S. Department of Justice
P.O. Box 386
Washington, D.C. 20044
PHONE: 202-616-8242
FAX: 202-514-8742
Email: Daniel.Crane-Hirsch@usdoj.gov