

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

WEBSOURCE MEDIA, L.L.C., et al.,

Defendants.

Civ. No.: H-06-1980

**STIPULATED FINAL JUDGMENT AND ORDER FOR PERMANENT INJUNCTION
AGAINST JAMES E. McCUBBIN, JR.**

Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), filed its Amended Complaint for a permanent injunction and other equitable relief in this matter pursuant to Sections 5(a) and 13(b) of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 53(b) charging the Defendants WebSource Media, L.L.C., WebSource Media L.P., BizSitePro, L.L.C., Eversites, L.L.C., Telsource Solutions, Inc., Telsource International, Inc., Marc R. Smith, Kathleen A. Smalley, Keith D. Hendrick, Steven L. Kennedy, John O. Ring, and James E. McCubbin, Jr. (“Named Defendants”), with unfair and deceptive acts and practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. The Named Defendants have all denied the allegations in the Amended Complaint.

Plaintiff Commission, by and through its attorneys, and Defendant James E. McCubbin, Jr., have agreed to entry of this Stipulated Final Judgment and Order for Permanent Injunction (“Final Judgment and Order”) by this Court in order to resolve all claims against Defendant

James E. McCubbin, Jr., in this action. The Commission and Defendant James E. McCubbin, Jr., have consented to entry of this Final Judgment and Order without trial or adjudication of any issue of law or fact herein and without Defendant James E. McCubbin, Jr., admitting liability for any of the violations alleged in the Amended Complaint.

Being fully advised in the premises and acting upon the joint motion of the parties to enter this Final Judgment and Order,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. This Court has jurisdiction over the subject matter of this case and personal jurisdiction over Defendant James E. McCubbin, Jr.;
2. The Complaint states a claim upon which relief may be granted against Defendant James E. McCubbin, Jr., under Sections 5 and 13(b) of the FTC Act, 15 U.S.C. §§ 45 and 53(b);
3. Venue in this district is proper under 28 U.S.C. § 1391(b) and 15 U.S.C. § 53(b);
4. The activities of Defendant James E. McCubbin, Jr., are “in or affecting commerce” as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44;
5. Entry of this Final Judgment and Order is in the public interest;
6. Defendant James E. McCubbin, Jr., has read and fully understands the Complaint against him and the provisions of this Final Judgment and Order, and he freely enters into this Final Judgment and Order; and
7. Defendant James E. McCubbin, Jr., has waived all claims under the Equal Access to Justice Act, 28 U.S.C. § 2412, and all rights to seek judicial review or otherwise challenge the validity of this Final Judgment and Order. The parties shall each bear their own costs and attorney’s fees incurred in this action. Nothing herein shall prohibit any Named Defendant from

pursuing any claims it may have against any other Named Defendant for any other legal and/or equitable relief, including but not limited to attorneys' fees, indemnity, and contribution.

DEFINITIONS

For the purpose of this Final Judgment and Order, the following definitions shall apply:

A. **"Assets"** means any legal or equitable interest in, right to, or claim to, any real and personal property, including but not limited to "goods," "instruments," "equipment," "fixtures," "general intangibles," "inventory," "checks," "notes" (as these terms are defined in the Uniform Commercial Code), and all chattel, leaseholds, contracts, mail or other deliveries, shares of stock, lists of consumer names, accounts, credits, premises, receivables, funds, and cash, wherever located.

B. **"Named Defendants"** means WebSource Media, L.L.C., WebSource Media L.P., BizSitePro, L.L.C., Eversites, L.L.C., Telsource Solutions, Inc., Telsource International, Inc., Marc R. Smith, Kathleen A. Smalley, Keith D. Hendrick, Steven L. Kennedy, John O. Ring, and James E. McCubbin, Jr.

C. **"Assisting others"** means knowingly providing any of the following goods or services to another entity: (1) performing customer service functions, including, but not limited to, receiving or responding to consumer complaints; (2) formulating or providing, or arranging for the formulation or provision of, any telephone sales script or any other marketing material; (3) providing names of, or assisting in the generation of, potential customers; or (4) performing marketing or billing services of any kind.

D. **"Document"** is synonymous in meaning and equal in scope to the usage of the term "documents or electronically stored information" in Federal Rule of Civil Procedure 34(a),

and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations stored in any medium from which the information can be obtained and translated, if necessary, through detection devices into reasonably usable form. A draft or non-identical copy is a separate document within the meaning of the term.

E. **“Telemarketing”** means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term “further solicitation” does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer’s call or in a substantially similar catalog.

F. **“Telemarketer”** means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

G. **“Person”** means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

H. **“Internet Services”** means any product or service that assists persons to access, use, search, browse, advertise on, communicate through, or do business on the Internet, including

but not limited to: design, hosting and maintenance of web pages and websites, providing Internet access or e-mail accounts, and establishing domain names and virtual domain names.

I. **“Authorized Purchaser”** means any person who has the authority to bind the person who would be responsible for payment of any charges associated with the telemarketing transaction.

J. **“Material terms of the offer”** means all terms material to an authorized purchaser’s decision to purchase, including, but not limited to:

1. the fact that the authorized purchaser will be billed unless the authorized purchaser takes affirmative action to cancel;
2. the account which will be billed if the authorized purchaser does not cancel;
3. the length of any trial period before a charge is assessed;
4. the amount of each charge and the frequency of each charge if the authorized purchaser does not cancel within the trial period;
5. a toll-free telephone number which may be utilized by the authorized purchaser to cancel prior to any billing; and
6. the terms and conditions of any refund policies.

K. **“Express written authorization”** means written authorization signed by the authorized purchaser which evidences clearly both the authorized purchaser’s receipt of all of the material terms of the offer of goods or services and the authorized purchaser’s subsequent authorization of payment from a specific account for the goods or services which are the subject of the telemarketing transaction. For purposes of this Final Judgment and Order, the term

“signed” shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

L. **“Express oral authorization”** means oral authorization which is audio-recorded by an independent third-party and made available upon request to the authorized purchaser, the authorized purchaser’s bank, credit card company, or telephone company, and which evidences clearly both the authorized purchaser’s authorization of payment from a particular account for the goods or services which are the subject of the telemarketing transaction and the authorized purchaser’s receipt of all of the material terms of the offer of goods or services prior to the authorization. An audio recording of the entire telemarketing transaction must be made and maintained, and the telemarketer may not participate in that portion of the telemarketing call which is recorded for the purpose of documenting the authorized purchaser’s express oral authorization to be billed for goods and services.

M. **“Express informed consent”** means either express written authorization or express oral authorization.

N. **“Verification recording”** means an audio-recording of some or all of a telemarketing transaction which is created for the purpose of documenting an authorized purchaser’s express oral authorization to purchase goods or services and to be billed for those goods or services.

O. **“Active concert and participation”** means “active concert and participation” as that term is used in and construed under Rule 65(d), Fed. R. Civ. P.

ORDER

I. PROHIBITED MISREPRESENTATIONS

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that in connection with the telemarketing, advertising, promotion, offering for sale, or sale of any Internet services, Defendant James E. McCubbin, Jr., his agents, servants, employees, and attorneys, and all other persons or entities in active concert or participation with him who receive actual notice of this Final Judgment and Order by personal service or otherwise, whether acting directly or through any business entity, corporation, subsidiary, affiliate, division, or other device, are hereby permanently restrained and enjoined from misrepresenting, expressly or by implication, any material fact, including, but not limited to, misrepresenting:

- A. That a free trial service will be cancelled automatically if the authorized purchaser does not affirmatively approve the continuation of the service;
- B. That a verification recording is being made for any purpose other than to document the authorized purchaser's express informed consent; and
- C. That an authorized purchaser is obligated to pay any charge for which the authorized purchaser has not given express informed consent.

II. PROHIBITED BILLING PRACTICES

IT IS FURTHER ORDERED that in connection with the telemarketing, advertising, promotion, offering for sale, or sale of any Internet services, Defendant James E. McCubbin, Jr., his agents, servants, employees, and attorneys, and all other persons or entities in active concert or participation with him who receive actual notice of this Final Judgment and Order by personal service or otherwise, whether acting directly or through any business entity, corporation,

subsidiary, affiliate, division, or other device, are hereby permanently restrained and enjoined from, directly or indirectly, billing or receiving money, or assisting others in billing or receiving money, from any authorized purchaser without the authorized purchaser's express informed consent.

III. INJUNCTION AGAINST PROVIDING CUSTOMER LISTS

IT IS FURTHER ORDERED that Defendant James E. McCubbin, Jr., is hereby permanently restrained and enjoined from selling, renting, leasing, transferring, or otherwise disclosing the name, address, telephone number, social security number, or other identifying information of any person who purchased services from the Named Defendants at any time prior to the date this Final Judgment and Order is entered. *Provided*, however, that Defendant James E. McCubbin, Jr., may disclose such identifying information to a law enforcement agency or as required by any law, regulation, or court order.

IV. MONETARY JUDGMENT

IT IS FURTHER ORDERED that:

A. Judgment in the amount of TWENTY-FOUR MILLION, SEVEN HUNDRED THOUSAND DOLLARS (\$24,700,000) is entered against Defendant James E. McCubbin, Jr.; *provided*, however, that upon the fulfillment of the payment obligations of Paragraphs IV.B. and IV.C. of this Final Judgment and Order by Defendant James E. McCubbin, Jr., this judgment shall be suspended until further order of the Court, and *provided* further that this judgment shall be subject to the conditions set forth in Paragraph V of this Final Judgment and Order.

B. Defendant James E. McCubbin, Jr., shall be liable for payment of equitable monetary relief, including, but not limited to, consumer redress and/or disgorgement, and for

paying any attendant expenses of administration of any redress fund, in the amount of ONE HUNDRED AND FORTY-SEVEN THOUSAND DOLLARS (\$147,000).

C. Within ten (10) days of the entry of this Final Judgment and Order, Defendant James E. McCubbin, Jr., shall turn over the entire payment of ONE HUNDRED AND FORTY-SEVEN THOUSAND DOLLARS (\$147,000) to the Commission in the form of a wire transfer or certified or cashier's check made payable to the Commission, or such agent as the Commission may direct.

D. Time is of the essence for the payment specified above. In the event that Defendant James E. McCubbin, Jr., does not fulfill, or only partially fulfills, the payment obligations set forth in this Paragraph, Defendant James E. McCubbin, Jr., shall be immediately liable for payment of TWENTY-FOUR MILLION, SEVEN HUNDRED THOUSAND DOLLARS (\$24,700,000), which is the entire amount of the judgment, plus interest, less any payments already made. Notwithstanding any other provision of this Final Judgment and Order, Defendant James E. McCubbin, Jr., agrees that, if he fails to meet the payment obligations set forth in this Paragraph, the facts as alleged in the Complaint filed in this matter shall be taken as true in any subsequent litigation filed by the Commission to enforce its rights pursuant to this Final Judgment and Order, including, but not limited to, a nondischargeability complaint in any subsequent bankruptcy proceeding.

E. All funds paid pursuant to this Final Judgment and Order 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 information remedies) as it determines to be reasonably related to the Defendants' practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited to the Treasury of the United States as disgorgement.

Defendant James E. McCubbin, Jr., shall have no right to challenge the Commission's choice of remedies under this Section.

F. Defendant James E. McCubbin, Jr., shall have no right to contest the manner of distribution chosen by the Commission. No portion of any payments under the judgment herein shall be deemed a payment of any fine, penalty, or punitive assessment.

V. FINANCIAL STATEMENTS

IT IS FURTHER ORDERED that:

A. The Commission's agreement to and the Court's approval of this Final Judgment and Order are expressly premised upon the truthfulness, accuracy, and completeness of the financial statements and information provided to the Commission by Defendant James E. McCubbin, Jr., on or about August 14, 2006, January 23, 2007, February 16, 2007, March 16, 2007, March 21, 2007, April 3, 2007, April 9, 2007, April 10, 2007, and April 11, 2007, which contain material information relied upon by the Commission in negotiating and agreeing to the terms of this Final Judgment and Order.

B. If the Commission should have evidence that the above-referenced financial statements and information failed to disclose any material asset the value of which exceeds \$1,000, materially misrepresented the value of any asset, or made any other material misrepresentation or omission, the Commission may move that the Court reopen this Final

Judgment and Order for the sole purpose of allowing the Commission to modify the monetary liability of Defendant James E. McCubbin, Jr. If the Court finds that Defendant James E. McCubbin, Jr., failed to disclose any material asset, materially misrepresented the value of any asset, or made any other material misrepresentation or omission in the above-referenced financial statements and information, the Court shall reinstate the suspended judgment against him, in favor of the Commission, in the amount of TWENTY-FOUR MILLION, SEVEN HUNDRED THOUSAND DOLLARS (\$24,700,000), which he and the Commission stipulate is the amount of consumer injury caused by the Named Defendants, as set forth in Paragraph IV.A. of this Final Judgment and Order. *Provided*, however, that in all other respects this Final Judgment and Order shall remain in full force and effect unless otherwise ordered by the Court. Any proceedings instituted under this Paragraph shall be in addition to and not in lieu of any other proceedings the Commission may initiate to enforce this Final Judgment and Order. Solely for the purposes of reopening or enforcing this Paragraph, Defendant James E. McCubbin, Jr., hereby waives any right to contest any of the allegations set forth in the Complaint filed in this matter and agrees that the facts as alleged in the Complaint filed in this matter shall be taken as true, without further proof, in any subsequent litigation filed by or on behalf of the Commission to collect any unpaid amount or otherwise enforce its rights pursuant to this Final Judgment and Order, including a nondischargeability complaint filed in any bankruptcy case.

C. Proceedings initiated under this Paragraph are in addition to, and not in lieu of, any other civil or criminal penalties that may be provided by law, including any other proceedings the Plaintiff may initiate to enforce this Final Judgment and Order.

VI. COMPLIANCE MONITORING

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

A. Within twenty (20) days of receipt of written notice from a representative of the Commission, Defendant James E. McCubbin, Jr., shall submit additional written reports, sworn to under penalty of perjury; produce documents for inspection and copying; appear for deposition; and/or provide entry during normal business hours to any business location in his possession or under his direct or indirect control to inspect the business operation;

B. In addition, the Commission is authorized to monitor compliance with this Final Judgment and Order by all other lawful means, including, but not limited to, the following:

1. obtaining discovery from any person, without further leave of court, using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, and 45;
2. Posing as consumers and suppliers to Defendant James E. McCubbin, Jr., his employees, or the employees of any entity he manages or controls in whole or in part, without the necessity of identification or prior notice; and

C. Defendant James E. McCubbin, Jr., shall permit representatives of the Commission to interview any employer, consultant, independent contractor, representative, agent, or employee who has agreed to such an interview, relating in any way to any conduct subject to this Final Judgment and Order. The person interviewed may have counsel present.

Provided, however, that nothing in this Final Judgment and Order shall limit the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49 and 57b-1, to obtain any documentary material, tangible things, testimony, or