

FILED

MAY 14 2008

PATRICK E. DUFFY, CLERK
By DEPUTY CLERK, MISSOULA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FEDERAL TRADE COMMISSION,)
)
 Plaintiff,)
 vs.)
 YOUR MAGAZINE PROVIDER, INC.,)
 a corporation, also D.B.A. PERIODICALS)
 and U.S. MAGAZINE SERVICES; and)
 JASON W. ELLSWORTH,)
)
 Defendants.)
 _____)

Case No. CV 08-64-M-DWM

**TEMPORARY RESTRAINING
ORDER WITH ASSET FREEZE,
LIMITED EXPEDITED DISCOVERY,
AND ORDER TO SHOW CAUSE
WHY A PRELIMINARY INJUNCTION
SHOULD NOT ISSUE**

Plaintiff, the Federal Trade Commission (“FTC”), having filed its Complaint for Injunctive and Other Equitable Relief, including restitution to consumers, pursuant to 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. §§ 6101-08, and having moved for a Temporary Restraining Order With Asset Freeze and Order to Show Cause Why Preliminary Injunction Should Not Issue pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 65(b), and the Court having considered

the Complaint, declarations, exhibits, and memorandum of law filed in support thereof, and now being advised in the premises, it is the finding of this Court that:

1. This Court has jurisdiction of the subject matter of this case and there is good cause to believe it will have jurisdiction over all parties hereto.
2. Venue lies properly with this Court.
3. There is good cause to believe that Plaintiff will ultimately succeed in establishing that Defendants Your Magazine Provider, Inc., d.b.a. Periodicals and U.S. Magazine Services ("US Magazine"), and Jason W. Ellsworth ("Ellsworth"), individually and as president and as a director of US Magazine, have engaged in, and are likely to engage in, acts and practices that violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and Sections 310.3(a) and 310.4(a) of the Telemarketing Sales Rule, 16 C.F.R. §§ 310.3(a) and 310.4(a), and therefore, there is good cause to believe that the FTC is likely to prevail on the merits of this action.
4. There is good cause to believe that immediate and irreparable harm will result from Defendants' ongoing violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and Sections 310.3(a) and 310.4(a) of the Telemarketing Sales Rule, 16 C.F.R. §§ 310.3(a) and 310.4(a), absent entry of this Temporary Restraining Order ("Order").
5. There is good cause to believe that immediate and irreparable damage to the Court's ability to grant effective final relief for consumers in the form of monetary redress will occur from the sale, transfer, assignment, or other disposition or concealment by Defendants of their assets or records unless they are immediately restrained and enjoined by Order of this Court.

6. Weighing the equities and considering the Commission's substantial likelihood of ultimate success on the merits, entry of this Order is in the public interest.

7. No security is required of any agency of the United States for the issuance of a restraining order. Fed. R. Civ. P. 65(c).

ORDER

Definitions

1. **"Assets"** means any legal or equitable interest in, right to, or claim to, any real or personal property including, but not limited to, chattel, goods, instruments, equipment, fixtures, general intangibles, effects, leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits, receivables (as those terms are defined in the Uniform Commercial Code), and all cash, wherever located.

2. **"Clearly and conspicuously"** means:

- i. if presented in writing, the information shall be in a type size and location sufficient for an ordinary consumer to read and comprehend it, and shall be disclosed in a manner that would be easily recognizable and understandable in language and syntax to an ordinary consumer. If the information is contained in a multi-page print document, the disclosure shall appear on the first page;
- ii. if presented orally, the information shall be disclosed in a volume, cadence, and syntax sufficient for an ordinary consumer to hear and comprehend; and

iii. nothing contrary to any information disclosed shall be imparted at or near the time of the disclosure. Further, a subsequent disclosure made orally or in writing only limits or qualifies a prior disclosure and cannot cure a false claim.

3. **"Consumer"** means an actual or potential purchaser, customer, licensee, or lessee, regardless of whether that person is a corporation, limited liability corporation, partnership, association, other business entity, or natural person, and regardless of whether the purchase is made for business purposes or for personal or household purposes.

4. **"Corporate Defendant"** means Your Magazine Provider, Inc., d.b.a. Periodicals and U.S. Magazine, by whatever names it might be known.

5. **"Defendants"** means Jason W. Ellsworth and Your Magazine Provider, Inc., d.b.a. Periodicals and U.S. Magazine Services, and each of them, by whatever names each might be known.

6. **"Document"** is synonymous in meaning and equal in scope to the usage of the term 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 from which 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.

7. **"Financial institution"** means any bank, savings and loan institution, credit union or any financial depository of any kind including, but not limited to, any brokerage house, trustee, broker-dealer, escrow agent, title company, commodity trading company, precious metal

dealer, commercial check cashing facility, or any entity or person that holds, controls, or maintains custody of any account or asset of any Defendant.

8. **"Individual Defendant "** means Jason W. Ellsworth, whether acting directly or through any successor, assign, agent, employee, entity, corporation, subsidiary, division, or other device, unless specified otherwise.

9. **"Material"** means likely to affect a person's choice of, or conduct regarding, goods or services.

10. **"Person"** means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

11. **"Prize promotion"** means:

- i. A sweepstakes or other game of chance; or
- ii. An oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.

I. PROHIBITED PRACTICES

IT IS THEREFORE ORDERED that Defendants, and their officers, agents, directors, servants, employees, and attorneys, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any corporation, subsidiary, division, or other device, or any of them, in connection with telemarketing magazine subscriptions and prize promotions, are hereby temporarily restrained and enjoined from:

A. Violating, or assisting others in violating, Section 5 of the FTC Act including, but not limited to, failing to disclose truthfully, clearly, and conspicuously before consumers provide their credit or debit card account numbers or other billing information:

1. The amount, frequency, and duration of any payments; and
2. Defendants' cancellation policy, including the terms and conditions of such policy;

B. Violating, or assisting others in violating, any provision of the Telemarketing Sales Rule, 16 C.F.R. Part 310, including, but not limited to:

1. Section 310.3(a)(1)(ii), 16 C.F.R. § 310.3(a)(1)(ii), by failing 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 the amount, frequency, and duration of any payments;
2. Section 310.3(a)(1)(iii), 16 C.F.R. § 310.3(a)(1)(iii), by failing to disclose truthfully, in a clear and conspicuous manner, before a consumer pays for the goods or services offered, a statement informing the consumer of Defendants' policy of not offering refunds, cancellations, exchanges, or repurchases, if that is the case;
3. Section 310.3(a)(1)(iv), 16 C.F.R. § 310.3(a)(1)(iv), by failing 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 a prize promotion and that any purchase or

payment will not increase the consumer's chances of winning a prize in a prize promotion; and

4. Section 310.4(a)(6), 16 C.F.R. § 310.4(a)(6), by causing billing information to be submitted for payment without the express informed consent of the consumer.

II. COLLECTION OF PAYMENTS

IT IS FURTHER ORDERED that:

A. Defendants, and their officers, agents, directors, servants, employees, and attorneys, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any corporation, subsidiary, division, or other device, or any of them, are hereby temporarily restrained and enjoined from collecting, attempting to collect, or obtaining payment, directly or through a debt collector, from any person (1) enrolled in Defendants' magazine subscription and prize promotion program prior to the date of entry of this Order, or (2) first contacted by Defendants prior to the date of entry of this Order, but not enrolled in Defendants' magazine subscription and prize promotion program until after the date of entry of this Order.

Provided, however, that Defendants may perform the activities in Subparagraph II.A for those persons from whom Defendants obtain or have obtained a signed agreement that discloses truthfully, clearly, and conspicuously the rate, frequency, and duration of payments; and

B. Defendants shall submit to Plaintiff's counsel within five (5) days of entry of this Order, or if obtained after entry of this Order, within five (5) days of receipt:

1. Copies of all signed agreements referenced in Subparagraph II.A; and
2. A written report, sworn to under penalty of perjury, setting forth in detail the manner and form in which Defendants have complied with this Paragraph.

III. ASSET FREEZE

IT IS FURTHER ORDERED that Defendants, and their officers, agents, directors, servants, employees, and attorneys, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any corporation, subsidiary, division, or other device, or any of them, except as stipulated by the parties or as directed by further order of the Court, are hereby temporarily restrained and enjoined from:

A. Selling, liquidating, assigning, transferring, converting, loaning, encumbering, pledging, concealing, dissipating, spending, disbursing, withdrawing, or otherwise disposing of any assets wherever located, including any assets outside the territorial United States, that are:

1. In the actual or constructive possession of any Defendant;
2. Owned or controlled by, or held, in whole or in part for the benefit of, or subject to access by, or belonging to, any Defendant; or
3. In the actual or constructive possession of, owned or controlled by, subject to access by, or belonging to any corporation, partnership, trust or any other entity directly or indirectly owned, managed or controlled by, or under common control with, any Defendant including, but not limited to, any assets held by or for any Defendant at any bank or savings and loan

institution, credit union, independent service organization, credit or debit card processing company or agent, or with any broker-dealer, escrow agent, title company, commodity trading company, precious metal dealer, common carrier, customs broker, commercial mail receiving and/or forwarding agency, commercial freight holding and/or forwarding agency, or other financial institution or depository of any kind including, but not limited to, assets at the following financial institutions or any branches thereof: Key Bank, N.A.; Bank of America, N.A.; Elavon, Inc. (formerly Nova Information Systems; Farmers State Bank; Heritage Bank;

B. Opening or causing to be opened any safe deposit boxes or storage facilities titled in the name of any Defendant, or subject to access by any Defendant or under any Defendant's control, without providing Plaintiff prior notice and a reasonable opportunity to first inspect the contents in order to determine whether they contain any assets covered by this Paragraph;

C. Failing to hold and account for all assets including, without limitation, payments, loans, and gifts, received after the date of entry of this Order;

D. Incurring charges or cash advances on any credit card issued in the name, singly or jointly, of any Defendant; and

E. Incurring liens or other encumbrances on real property, personal property or other assets in the name, singly or jointly, of any Defendant.

Notwithstanding the provisions of Subparagraphs III.A-E, above, Defendants may pay reasonable and necessary living expenses or business expenses, as applicable, upon satisfaction of the following conditions:

1. Each Defendant shall designate the account(s) (by account number and financial institution) from which they will pay these expenses and fees. Each Defendant shall disclose to the Plaintiff the account balance(s) at the time this Order becomes effective;
2. Each Defendant shall fully comply with Paragraph V (Financial Statements and Accounting), below;
3. Each Defendant shall provide the Plaintiff with a list of reasonable and necessary living or business expenses, as applicable; and
4. No expenditure may be made pursuant to this Subparagraph III.D without stipulation of the parties or further order of the Court.

IV. DUTIES OF THIRD PARTIES HOLDING DEFENDANTS' ASSETS

IT IS FURTHER ORDERED that, pending determination of the FTC's request for a preliminary injunction, any financial institution, or any person or other entity served with a copy of this Order shall:

A. Hold and retain within such entity's or person's control, and prohibit the withdrawal, removal, assignment, transfer, pledge, hypothecation, encumbrance, disbursement, dissipation, conversion, sale, liquidation, or other disposal of any assets held by or under such entity's or person's control:

1. On behalf of, or for the benefit of, any Defendant;
2. In any account maintained in the name of, or subject to withdrawal by, any Defendant; or

3. That are subject to access or use by, or under the signatory power of, any Defendant;

B. Deny access to any safe deposit boxes that are either:

1. Titled in the name, individually or jointly, of any Defendant; or
2. Subject to access by any Defendant;

C. Provide to counsel for the Commission, within three (3) business days, by email, facsimile, or overnight delivery, a sworn statement setting forth:

1. The identification of each account or asset titled in the name, individually or jointly, or held on behalf of, or for the benefit of, any Defendant, whether in whole or in part;
2. The balance of each such account, or a description of the nature and value of such asset;
3. The identification of any safe deposit box that is either titled in the name of, individually or jointly, or is otherwise subject to access or control by, any Defendant, whether in whole or in part; and
4. If the account, safe deposit box or other asset has been closed or removed, the date closed or removed and the balance on said date;

D. The accounts and assets subject to this Paragraph include existing accounts and assets, and assets deposited or accounts created after the effective date of this Order. This Paragraph shall not prohibit transfers in accordance with any provision of this Order, or any further order of the Court; and

E. The FTC is granted leave, pursuant to Fed. R. Civ. P. 45, to subpoena documents immediately from any such financial institution, account custodian or other entity concerning the nature, location, status, and extent of Defendants' assets, and compliance with this Order, and such financial institution, account custodian or other entity shall respond to such subpoena within five (5) business days after service.

V. DEFENDANTS' FINANCIAL STATEMENTS AND ACCOUNTING

IT IS FURTHER ORDERED that, within five (5) business days following the service of this Order:

A. The Individual Defendant shall prepare and deliver to counsel for the Commission a completed financial statement on the form captioned "Financial Statement of Individual Defendant," which is attached to this Order as Attachment A;

B. The Individual Defendant shall also prepare and deliver to counsel for the Commission a completed financial statement on the form captioned "Financial Statement of Corporate Defendant," which is attached to this Order as Attachment B, for US Magazine, and for each business entity owned, controlled or managed by the Individual Defendant, regardless of whether it is a Defendant in this case. The financial statements shall be accurate as of the date and time of entry of this Order; and

C. Each Defendant shall also prepare and deliver to counsel for the Commission:

1. A completed statement, verified under oath:

a. specifying the name and address of each financial institution and brokerage firm at which the Defendant has accounts or safe deposit

- boxes. Said statements shall include assets held in foreign as well as domestic accounts; and
- b. listing all persons who have received payments, transfers, or assignment of funds, assets, or property which total \$5,000 or more in any twelve-month period since January 1, 2005. This list shall specify: (a) the amount(s) transferred or assigned; (b) the name of each transferee or assignee; (c) the date of the assignment or transfer; and (d) the type and amount of consideration paid to the Defendant;
2. For all magazine subscriptions advertised, marketed, promoted, offered for sale, distributed, or sold by the Defendant, a detailed accounting, verified under oath, of:
- a. all gross revenues obtained from the sale or distribution of each magazine subscription (broken down by month and year) from January 1, 2005, through the date of the issuance of this Order;
 - b. all net profits obtained from the sale or distribution of each such magazine subscription (broken down by month and year) from January 1, 2005, through the date of the issuance of this Order; and
 - c. the full names, addresses, and telephone numbers of all purchasers or recipients of each such product, and the amount paid by each from January 1, 2005, through the date of the issuance of this Order; and

D. The Defendants shall each provide the Commission access to any records and documents pertaining to Defendants that are held by financial institutions outside the territory of the United States by signing the "Consent to Release of Financial Records," which is attached to this Order as Attachment C.

VI. MONITORING

IT IS FURTHER ORDERED that the FTC is hereby authorized to monitor the Defendants' compliance with this Order. For purposes of the compliance monitoring authorized by this Paragraph, Defendants shall provide the FTC, every two (2) weeks or at other intervals agreed upon by the parties, a list of all consumers who have agreed to purchase goods or services from Defendants during that time period in connection with Defendants' magazine subscription and prize promotion program. The FTC may contact such customers to determine whether Defendants have complied with Paragraph I of this Order.

VII. CONSUMER LISTS

IT IS FURTHER ORDERED that Defendants, and their officers, agents, directors, servants, employees, and attorneys, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any corporation, subsidiary, division, or other device, are hereby temporarily restrained and enjoined from selling, renting, leasing, transferring, or otherwise disclosing the name, address, telephone number, Social Security number, credit card number, bank account number, e-mail address, or other identifying information of any person who paid any money to Defendants or any one of them at any time prior to entry of this Order for card processing goods or services. *Provided that*, Defendants may disclose such identifying

information in the ordinary course of business or to a law enforcement agency or as required by any law, regulation, or court order.

VIII. RECORD KEEPING/BUSINESS OPERATIONS

IT IS FURTHER ORDERED that Defendants are hereby temporarily restrained and enjoined from:

A. Failing to create and maintain documents that, in reasonable detail, accurately, fairly, and completely reflect their incomes, disbursements, transactions, and use of money, beginning as of the date and time of effective service of this Order;

B. Failing to make and keep books, records, accounts, bank statements, current accountants' reports, general ledgers, general journals, cash receipt ledgers, cash disbursement ledgers and source documents, documents indicating title to real or personal property, and any other data which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of Defendants;

C. Destroying, mutilating, concealing, altering, transferring, or otherwise disposing of, in any manner, any books, records, tapes, discs, accounting data, checks (fronts and backs), correspondence, forms, advertisements, brochures, manuals, electronically stored data, banking records, customer lists, customer files, invoices, telephone records, ledgers, payroll records, or other documents of any kind, including information stored in computer-maintained form, in the possession, custody, or control of Defendants, or that relate to the business practices or business or personal finances of Defendants, or to the business practices or finances of entities directly or indirectly under the control, in whole or in part, of Defendants; and

D. Creating, operating or exercising any control over any business entity, including any partnership, limited partnership, joint venture, sole proprietorship or corporation, without first providing the Commission with a written statement disclosing: (1) the name of the business entity; (2) the address and telephone number of the business entity; (3) the names of the business entity's officers, directors, principals, managers, and employees; and (4) a detailed description of the business entity's intended activities.

IX. CONSUMER CREDIT REPORTS

IT IS FURTHER ORDERED that pursuant to Section 604(a)(1) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(1), any consumer reporting agency may furnish a consumer report concerning any Defendant to Plaintiff.

X. LIMITED EXPEDITED DISCOVERY

IT IS FURTHER ORDERED that the Plaintiff is granted leave, at any time after service of this Order, to take the deposition of any person or entity for the purpose of discovering the nature, location, status, and extent of assets of any Defendant, and the location of documents reflecting the business transactions of any Defendant, and to demand the production of documents from any person or entity relating to the nature, status, and extent of any Defendant's assets and the location of documents reflecting the business transactions of any Defendant. Notice of forty-eight (48) hours shall be deemed sufficient for any such deposition and five (5) days notice shall be deemed sufficient for the production of any such documents. Expedited discovery for any other purpose shall not be allowed except by order of the Court for good cause shown. The limitations and conditions set forth in Fed. R. Civ. P. 30(a)(2) regarding subsequent depositions of an individual shall not apply to depositions taken pursuant to this Paragraph.

XI. REPATRIATION OF ASSETS

IT IS FURTHER ORDERED that Defendants shall, within five (5) business days following service of this Order:

A. Repatriate to the United States all funds, documents, or assets in foreign countries held either: (1) by them; (2) for their benefit; or (3) under their direct or indirect control, jointly or individually;

B. On the same business day as any repatriation under Paragraph XI.A above, (1) notify counsel for the Commission of the name and location of the financial institution or other entity that is the recipient of such funds, documents, or assets; and (2) serve this Order on any such financial institution or other entity;

C. Provide Plaintiff with a full accounting of all funds, documents and assets outside of the territory of the United States held either: (1) by them; (2) for their benefit; or (3) under their direct or indirect control, jointly or individually; and

D. Except for such transfers as authorized in writing by Commission counsel, hold and retain all repatriated funds, documents, and assets and prevent any transfer, disposition, or dissipation whatsoever of any such assets or funds.

XII. DISTRIBUTION OF ORDER BY DEFENDANTS

IT IS FURTHER ORDERED that Defendants shall immediately provide a copy of this Order to each affiliate, subsidiary, division, sales entity, successor, assign, officer, director, employee, independent contractor, agent, attorney, and representative of any Defendant, and to all financial institutions that may be in possession of any documents, records, assets, property, or property right of any Defendant. Within ten (10) days from the date of entry of this Order, each

Defendant shall provide Plaintiff with a sworn statement that the Defendant has complied with this provision of the Order, which statement shall include the names and addresses of each such person or entity who received a copy of the Order.

XIII. SHOW CAUSE

IT IS FURTHER ORDERED that Defendants shall appear before this Court on the 29th day of May, 2008, at 1:30 p.m., to show cause, if any there be, why this Court should not enter a preliminary injunction, pending final ruling on the Complaint against these Defendants, enjoining them from further violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and Sections 310.3(a)(1)(ii)-(iv) and 310.4(a)(6) of the Telemarketing Sales Rule, 16 C.F.R. §§ 310.3(a)(1)(ii)-(iv) and 310.4(a)(6), continuing the freeze of their assets, and imposing whatever additional relief may be appropriate.¹

XIV. EXAMINATION OF WITNESSES

IT IS FURTHER ORDERED that there will be no direct examination of witnesses at the preliminary injunction hearing in this matter, unless specifically ordered by this Court. In the event this Court permits direct examination of witnesses at the preliminary injunction hearing in this matter, the parties shall exchange and file with the Court the names of those witnesses to testify at the hearing and a summary of the substance of the witnesses' testimony to be proffered at the hearing no later than four (4) business days prior to the scheduled hearing.

XV. SERVICE OF DOCUMENTS AND EVIDENCE

¹This hearing is set within ten (10) days of entry of the temporary restraining order pursuant to Federal Rule of Civil Procedure 65(b)(2). The date of the preliminary injunction hearing will not be continued unless the parties agree that the temporary restraining order shall remain in effect for a longer period. See Fed. R. Civ. P. 65(b)(2).

IT IS FURTHER ORDERED that Defendants, in responding to this Court's Order to Show Cause, shall serve all memoranda, affidavits, and other evidence on which they intend to rely not later than 4:00 p.m. (MT) of the fourth day prior to the preliminary injunction hearing set in this matter. Service on the Commission shall be performed by personal delivery, e-filing, or confirmed facsimile delivery, to Mary T. Benfield and Kathryn C. Decker, at the following address: Federal Trade Commission, 915 Second Ave., Suite 2896, Seattle, WA 98174, (206) 220-6366 (fax number). The Commission shall serve and file a proposed Preliminary Injunction and any supplemental memorandum of points and authorities by no later than 4:00 p.m. (MT) of the fourth day prior to the preliminary injunction hearing, and may serve and file a reply to Defendants' opposition by no later than 4:00 p.m. (MT) on the day prior to the preliminary injunction hearing.


XVI. SERVICE OF ORDER

IT IS FURTHER ORDERED that Plaintiff may serve copies of this Order by any means, including facsimile transmission, upon any financial institution, or other entity or person that may have possession, custody, control, or knowledge of any documents or assets of either Defendant or any other entity or person that may otherwise be subject to any provision of this Order. Service without Attachments shall effect service of the Order. Service upon any branch or office of any financial institution shall effect service upon the entire financial institution.

XVIII. RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes.

SO ORDERED, this 14th day of May, 2008.



The Honorable Donald W. Molloy
United States District Judge

11:00 a.m.

