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WHA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

CV 10 00221

FEDERAL TRADE COMMISSION, Plaintiff, v. INC21.com CORPORATION, also d/b/a INC21, INC21.net, INC21 Communications, GlobalYP, NetOpus, MetroYP, JumPage Solutions, GoFaxer.com and FaxFaster.com, JUMPAGE SOLUTIONS, Inc., GST U.S.A., Inc., ROY YU LIN, individually and as an officer and director of the corporate defendants, JOHN YU LIN, individually and as an officer and director of the corporate defendants, Defendants, and SHENG LIN, Relief Defendant.	Case No. ______________ **COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF**

Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), by its undersigned attorneys, alleges as follows:

1. The FTC brings this action under Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b, and the Telemarketing Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. § 6101 *et seq.*, to obtain preliminary and permanent injunctive relief, rescission or reformation of contracts, restitution, the refund of monies paid, disgorgement of ill-gotten monies, and other equitable relief for Defendants' acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, in connection with the marketing and sale of Internet websites and other online services.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c), and 6105(b).

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

INTRADISTRICT ASSIGNMENT

4. A substantial part of the events and omissions that give rise to the claims herein occurred in the county of San Francisco.

PLAINTIFF

5. The FTC is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-58. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The FTC also enforces the Telemarketing Sales Rule, 16 C.F.R. Part 310, which prohibits deceptive or abusive telemarketing acts or practices.

6. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act and the Telemarketing Sales Rule and to secure such equitable relief as may be appropriate in each case, including restitution and disgorgement. 15 U.S.C. §§ 53(b), 56(a)(2)(A), 56(a)(2)(B), 57b, 6102(c), and 6105(b).

DEFENDANTS

7. Defendant INC21.com Corp. ("Inc21"), also doing business as INC21, INC21.com, INC21.net, INC21 Communications, GlobalYP, NetOpus, MetroYP, Jumpage Solutions, GoFaxer.com, and FaxFaster.com, is a California corporation with its principal place of business at 785 Market Street, Suite 900, San Francisco, CA 94103. Inc21 transacts or has transacted business in this district and throughout the United States.

8. Defendant Jumpage Solutions, Inc. ("Jumpage") is a California corporation with its principal place of business at 785 Market Street, Suite 900, San Francisco, CA 94103. Jumpage transacts or has transacted business in this district and throughout the United States.

9. Defendant GST U.S.A., Inc. ("GST U.S.A.") is a California corporation with its principal place of business at 785 Market Street, Suite 900, San Francisco, CA 94103. GST transacts or has transacted business in this district and throughout the United States.

10. Defendant Roy Yu Lin ("Roy Lin"), also known as Chou Yu Lin, is the president, secretary, CEO, CFO, and a director of Inc21, and the secretary and director of GST U.S.A. At all times material to this Complaint, acting alone or in concert with others, he has formulated, directed, controlled, had the authority to control, or participated in, the acts and practices set forth in this Complaint. Defendant Roy Lin resides in this district and, in connection with the matters alleged herein, transacts or has transacted business in this district and throughout the United States.

11. Defendant John Yu Lin ("John Lin") is a director of Inc21, and the CEO, CFO and director of Jumpage. At all times material to this Complaint, acting alone or in concert with others, he has formulated, directed, controlled, had the authority to control, or participated in, the acts and practices set forth in this Complaint. Defendant John Lin resides in this district and, in connection with the matters alleged herein, transacts or has transacted business in this district and throughout the United States.

12. Relief Defendant Sheng Lin is the father of Defendants Roy and John Lin. He has received funds that can be traced directly to Defendants' deceptive, abusive, or unfair acts or practices alleged below, and he has no legitimate claim to those funds. Sheng Lin resides in this

district.

13. Defendants Inc21, Jumpage and GST U.S.A. (collectively, "Corporate Defendants") have operated as a common enterprise while engaging in the unlawful acts and practices alleged below. Defendants have conducted the business practices described below through an interrelated network of companies that have common ownership, officers, managers, business functions, employees, and office locations, and have commingled funds. Because these Corporate Defendants have operated as a common enterprise, each of them is jointly and severally liable for the acts and practices alleged below. Individual Defendants Roy Lin and John Lin have formulated, directed, controlled, had the authority to control, or participated in the acts and practices of the Corporate Defendants that constitute the common enterprise.

COMMERCE

14. At all times material to this Complaint, Defendants have maintained a substantial course of trade in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFENDANTS' BUSINESS ACTIVITIES

15. Since at least July 2002 and continuing thereafter, Defendants have engaged in a plan, program, or campaign to offer or "sell" Internet services including website design, website hosting, Internet yellow pages listings, search engine advertising, and Internet-based faxing nationwide.

16. Defendants charge consumers between $12.95 and $39.95 per month for their Internet services.

17. Defendants, typically through third party telemarketers, make unsolicited calls to verify business contact information and in some instances to offer their Internet services without asking consumers to purchase anything.

18. In many instances, Defendants' calls begin with the telemarketer stating that the purpose of the call is to verify or update business information without informing consumers that the call also involves an offer of Internet services.

19. In some instances, Defendants' telemarketers offer consumers a fifteen-day free trial of

their Internet services. Defendants' telemarketers often fail to disclose that consumers must take specific affirmative steps to cancel the services to avoid automatically being charged upon expiration of the free trial period.

20. In many instances, Defendants charge consumers who have not agreed to purchase Defendants' Internet services or have not authorized the monthly charges. In fact, in many instances, Defendants charge consumers who:

(a) were never contacted by or on behalf of Defendants;

(b) were contacted only to verify business information;

(c) declined Defendants' offer of Internet services; or

(d) were told they would receive a free trial offer but not informed that they would be charged if they did not cancel.

21. Defendants typically obtain payment from consumers by causing the charges to be placed on consumers' telephone bills. Pre-established contractual relationships between Defendants, third party billing aggregators, and the local telephone carriers enable these transactions. Defendants send consumers' billing information to the third-party billing aggregator who then submits Defendants' charges to consumers' local telephone carriers. The local telephone carriers place Defendants' charges onto consumers' telephone bills.

22. Defendants' charges are placed on consumers' local telephone bills and often go unnoticed by consumers. Often unaware that they are being billed for Defendants' services, consumers unwittingly pay the charges, sometimes for an extended period of time.

23. Defendants, directly or through their representatives, agents, or third party contractors, make audio recordings of consumer calls that purport to show that consumers have agreed to purchase Defendants' Internet services. In many instances, the audio recordings do not truthfully reflect the calls they purport to have recorded. In many instances, the recordings have been falsified or altered to misrepresent the call as a whole and the consumers' responses in particular. In other instances, the voices on the recordings do not belong to the particular consumers who were purportedly on the calls.

24. In many instances, Defendants do not refund all of their unauthorized charges after

consumers complain about the charges or request refunds.

25. Relief Defendant Sheng Lin has received tens of thousands of dollars derived from Defendants' unlawful activities.

VIOLATIONS OF THE FTC ACT

26. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits "unfair or deceptive acts or practices in or affecting commerce."

27. Misrepresentations or deceptive omissions of material fact constitute deceptive acts or practices prohibited by Section 5(a) of the FTC Act. Acts or practices are unfair under Section 5 of the FTC Act if they cause substantial injury to consumers that consumers cannot reasonably avoid and that is not outweighed by countervailing benefits to consumers or competition. 15 U.S.C. § 45(n).

COUNT I

Deceptive Billing Practices

28. In numerous instances in connection with the marketing, offering for sale, or sale of Internet services, Defendants have represented, directly or indirectly, expressly or by implication, that consumers were obligated to pay for charges for Defendants' Internet services appearing on consumers' local telephone bills.

29. In truth and in fact, in numerous instances in which Defendants have made the representations set forth in Paragraph 28 of this Complaint, consumers were not obligated to pay the charges because the consumers:

(a) were never contacted on behalf of Defendants with an offer for sale of Internet services;

(b) were contacted on behalf of Defendants to verify business information but not with an offer for sale of Internet services;

(c) were contacted on behalf of Defendants with an offer for sale of Internet services and declined the offer; or

(d) were told they would receive a free trial offer of Internet services but not informed that they would be charged if they did not cancel.

30. Therefore, Defendants' representations as set forth in Paragraph 28 of this Complaint are false or misleading and constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT II

Unfair Billing Practices

31. In numerous instances, Defendants have caused consumers' telephone accounts to be billed without having previously obtained the consumers' express informed consent.

32. Defendants' actions cause or are likely to cause substantial injury to consumers that consumers themselves cannot reasonably avoid and that is not outweighed by countervailing benefits to consumers or competition.

33. Therefore, Defendants' practices as set forth in Paragraph 31 constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a) and (n).

VIOLATIONS OF THE TELEMARKETING SALES RULE

34. In the Telemarketing Act, 15 U.S.C. § 6101 *et seq.*, Congress directed the FTC to prescribe rules prohibiting deceptive and abusive telemarketing acts or practices. On August 16, 1995, the Commission promulgated the original Telemarketing Sales Rule, with a Statement of Basis and Purpose, 60 Fed. Reg. 43842 (August 23, 1995). The TSR became effective on December 31, 1995, and since then, although amended, has remained in full force and effect.

35. Defendants are "seller(s)" or "telemarketer(s)" engaged in "telemarketing" as those terms are defined in the TSR. 16 C.F.R. §§ 310.2(z), (bb), and (cc).

36. The TSR defines "preacquired account information" as "any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer." 16 C.F.R. § 310.2(w).

37. Defendants possess consumers' telephone numbers as well as information, via their contractual relationships with billing aggregators and local telephone carriers, that allows them to place charges on consumers' telephone bills. Thus, Defendants possess "preacquired account information," as defined by the TSR.

38. The TSR defines "free-to-pay conversion" as a provision of an offer or agreement

"under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of the trial period." 16 C.F.R. § 310.2(o).

39. Defendants offer their Internet services as a part of a free trial that results in automatic charges to customers' telephone bills if they do not cancel within the trial period, typically fifteen days. Therefore, Defendants' offer involves a "free-to-pay conversion," as defined by the TSR.

40. The TSR defines "negative option feature" as a provision, in an offer or agreement to sell or provide any goods or services, under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer. 16 C.F.R. § 310.2(t).

41. Defendants offer their Internet services with a provision under which customers' silence or failure to take affirmative action to reject the services or to cancel the agreement is interpreted by Defendants as acceptance of their offer. Therefore, Defendants' offer involves a "negative option feature," as defined by the TSR.

42. The TSR prohibits sellers and telemarketers from "failing to disclose truthfully, in a clear and conspicuous manner" and "[b]efore a customer pays for goods or services offered . . . if the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s)." 16 C.F.R. § 310.3(a)(1)(vii).

43. In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the TSR requires that sellers and telemarketers obtain "express informed consent" by:

(a) obtaining from the customer at least the last four digits of the account number to be charged;

(b) obtaining the customer's express agreement to be charged for goods or services using that account number; and

(c) making and maintaining an audio recording of the entire telemarketing transaction.

16 C.F.R. § 310.4(a)(6)(i).

44. Where the method of payment is other than a credit or debit card, and the transaction involves preacquired account information and a free-to-pay conversion feature, the TSR prohibits sellers and telemarketers from causing billing information to be submitted for payment without the customer's "express verifiable authorization." 16 C.F.R. § 310.3(a)(3). If the seller or telemarketer chooses to obtain oral authorization, the authorization must be audio-recorded and must evidence clearly the customer's authorization of payment as well as the customer's receipt of all of the following information:

(a) the number of debits, charges, or payments (if more than one);

(b) the date(s) the debit(s), charge(s), or payment(s) will be submitted for payment;

(c) the amount(s) of the debit(s), charge(s), or payment(s);

(d) the customer's name;

(e) the customer's billing information, identified with sufficient specificity that the customer understands what account will be used to collect payment for the goods or services that are the subject of the telemarketing transaction;

(f) a telephone number for customer inquiry that is answered during normal business hours; and

(g) the date of the customer's oral authorization.

16 C.F.R. § 310.3(a)(3)(ii).

45. Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), violations of the TSR constitute unfair or deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT III

Failure to Disclose Negative Option

46. In numerous instances in the course of telemarketing Internet services, Defendants,

directly or through their third party telemarketers, have failed to disclose truthfully, in a clear and conspicuous manner, before consumers pay for the services offered, all material terms and conditions of the negative option feature of their offer, including, but not limited to:

(a) the fact that the customers will be charged unless they take an affirmative action to avoid the charge(s);

(b) the date(s) the charge(s) will be submitted for payment on their telephone bills; and

(c) the specific steps the customers must take to avoid the charge(s).

47. Therefore, Defendants' acts and practices as set forth in Paragraph 46 of this Complaint violate the TSR. 16 C.F.R. § 310.3(a)(1)(vii).

COUNT IV

Failure to Obtain Express Informed Consent

48. In numerous instances in the course of telemarketing Internet services, Defendants, directly or through their third party telemarketers, have failed to obtain "express informed consent" to charge consumers' telephone bills for their services. Specifically, in numerous instances, Defendants caused customer billing information to be submitted for payment without obtaining consent at all. Additionally, in numerous instances, in transactions involving "preacquired account information" and a "free-to-pay conversion" as those terms are defined in the TSR, Defendants caused customer billing information to be submitted for payment without:

(a) obtaining from the customer at least the last four digits of the account number to be charged;

(b) obtaining the customer's express agreement to be charged for the services using that account number; and

(c) making and maintaining an oral recording of the entire telemarketing transaction.

49. Therefore, Defendants' acts and practices as set forth in Paragraph 48 of this Complaint violate the TSR. 16 C.F.R. § 310.4(a)(6)(i).

COUNT V

Failure to Obtain Express Verifiable Authorization

50. In numerous instances in the course of telemarketing Internet services, Defendants, directly or through their third party telemarketers, have failed to obtain "express verifiable authorization" to charge consumers' telephone bills for their services. Specifically, in numerous instances, Defendants caused customer billing information to be submitted for payment without obtaining any authorization at all. Additionally, in numerous instances, Defendants caused customer billing information to be submitted for payment without communicating, and audio-recording the communication of, all of the following:

(a) the number of debits, charges, or payments (if more than one) to be submitted for payment;

(b) the dates the debit(s), charge(s), or payment(s) would be submitted for payment;

(c) the amount(s) of the debit(s), charge(s), or payment(s);

(d) the customer's name;

(e) the customer's billing information identified with sufficient specificity that the customer understands what account will be used to collect payment for the goods or services that are the subject of the telemarketing transaction;

(f) a telephone number for customer inquiry that is answered during normal business hours; and

(g) the date of the customer's oral authorization.

51. Therefore, Defendants' acts and practices as set forth in Paragraph 50 of this Complaint violate the TSR. 16 C.F.R. § 310.3(a)(3)(ii).

COUNT VI

Relief Defendant

52. Relief Defendant Sheng Lin, has received, directly or indirectly, funds or other assets from Defendants that are traceable to funds obtained from Defendants' customers through the deceptive and unfair acts or practices described herein.

53. Relief Defendant Sheng Lin is not a bona fide purchaser with legal and equitable title to

Defendants' customers' funds or other assets, and Relief Defendant Sheng Lin will be unjustly enriched if he is not required to disgorge the funds or the value of the benefit he received as a result of Defendants' deceptive, abusive, or unfair acts or practices.

54. By reason of the foregoing, Relief Defendant Sheng Lin holds funds and assets in constructive trust for the benefit of Defendants' customers.

CONSUMER INJURY

55. Consumers have suffered and will continue to suffer substantial injury as a result of Defendants' violations of the FTC Act and the TSR. In addition, Defendants have been unjustly enriched as a result of their unlawful acts or practices. Absent injunctive relief by this Court, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

56. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and such other relief as the Court may deem appropriate to halt and redress violations of any provision of law enforced by the FTC. The Court, in the exercise of its equitable jurisdiction, may award ancillary relief, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies, to prevent and remedy any violation of any provision of law enforced by the FTC.

57. Section 19 of the FTC Act, 15 U.S.C. § 57b, and Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), authorize this Court to grant such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the TSR, including the rescission or reformation of contracts, and the refund of money.

PRAYER FOR RELIEF

Wherefore, Plaintiff FTC, pursuant to Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, and Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), and the Court's own equitable powers, requests that the Court:

A. Enter such preliminary and ancillary relief as may be necessary to avert the likelihood of consumer injury during the pendency of this action and to preserve the possibility of effective final relief, including, but not limited to, temporary and preliminary injunctions;

B. Enter a permanent injunction to prevent future violations of the FTC Act and the TSR by Defendants;

C. Award such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the FTC Act and the TSR, including but not limited to, rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies;

D. Enter an order requiring Relief Defendant to disgorge all funds and assets, or the value of the benefit he received from the funds or assets, which are traceable to Defendants' deceptive, abusive, or unfair acts or practices; and

E. Award Plaintiff the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

Respectfully submitted,

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