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20 FEDERAL TRADE COMMISSION

21 UNITED STATES DISTRICT COURT
22 CENTRAL DISTRICT OF CALIFORNIA

23 FEDERAL TRADE COMMISSION,

24 Plaintiff,

25 v.

26 PHILIP A. FLORA,

27 a.k.a. "Phil P.,"

28 Defendant.

Case No. SACV 11-00299 AG (JEMx)

**NOTICE OF MOTION AND
MOTION FOR ORDER TO SHOW
CAUSE WHY DEFENDANT
PHILIP A. FLORA SHOULD NOT
BE HELD IN CONTEMPT**

Date: March 24, 2014

Time: 10:00 a.m.

Before U.S. District Judge Andrew
Guilford

Please take notice that on March 24, 2014, at 10:00 a.m., Plaintiff Federal Trade Commission will present a Motion for Order to Show Cause Why Defendant Philip A. Flora Should Not Be Held in Contempt before the Honorable Andrew Guilford, United States District Judge, Courtroom 10D, located at 411 West Fourth

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Street, Santa Ana, California, for Defendant Flora’s violation of Section I of the Stipulated Permanent Injunction and Order entered by the Court on August 12, 2011. *See* Dkt. 28.

This motion is based on this notice of motion and motion, the accompanying points and authorities and exhibits thereto, the files and records in this case and in *FTC v. Flora et al., d/b/a Seaside Building Marketing and SB Marketing*, No. SACV 13-00381 AG (C.D. Ca. March 3, 2013), and such further evidence and argument as may be presented at any hearing on this motion. This motion is made following a conference of counsel pursuant to L.R. 7-3, which took place by email between January 1 and January 16, 2014. *See* Declaration of James Davis § __.

Respectfully submitted,

Dated: February 21, 2014

/s/ James Davis
JAMES DAVIS
Attorney for the Plaintiff
Federal Trade Commission

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Federal Trade Commission (“FTC”) returns to Court to enforce an August 2011 Stipulated Permanent Injunction and Order (“2011 Final Order”) that defendant Phillip Flora began violating immediately after signing it. The core provision of this order permanently enjoins Flora from sending unsolicited commercial text messages to consumers. The Court prohibited this conduct based on evidence showing that Flora had sent millions of text messages to consumers promoting a deceptive mortgage modification service.

In flagrant violation of the 2011 Final Order, Flora continued inundating consumers with unsolicited commercial text messages. The new messages falsely informed recipients that they had been specially selected to receive a free \$1,000 gift card. Flora employed a variety of ruses in an attempt to conceal his responsibility for this conduct, hiding behind aliases, family members, and acquaintances. Notwithstanding this subterfuge, the FTC obtained evidence clearly showing Flora’s responsibility for a text spam operation that bombarded consumers with over 29 million messages in 2012 alone. Flora ultimately admitted to an FBI agent that he was solely responsible for this conduct.

After bringing a second law enforcement action against Flora addressing this conduct,¹ the FTC obtained a final judgment finding that Flora violated the Federal Trade Commission Act “in the course of sending, or assisting others in sending, millions of Unauthorized or Unsolicited Commercial Electronic Text Messages to

¹ See *FTC v. Flora et al., d/b/a Seaside Building Marketing and SB Marketing*, No. SACV 13-00381 AG (C.D. Ca. March 3, 2013) (“*Seaside*”). Because this contempt proceeding and the *Seaside* case arise from the same events and call for the determination of substantially similar issues of fact and law, the Commission filed the new case as a related action under Local Rule 83-1.3.

1 mobile telephones....” Because these practices violate clear and definite terms of
2 the Court’s 2011 Final Order, the FTC asks that Flora be held in civil contempt.

3 **II. PROCEDURAL AND FACTUAL BACKGROUND**

4 **A. *FTC v. Flora I* (2011)**

5 In February 2011, the Commission filed its complaint in this case to enjoin
6 unfair and deceptive practices engaged in by Flora in violation of Section 5 of the
7 Federal Trade Commission Act (“FTC Act”). Specifically, the FTC alleged that
8 Flora blasted millions of email and text messages promoting purported mortgage
9 modification services offered through the website, “LOANMOD-GOV.NET.”²

10 Some of Flora’s text spam messages read:

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12 Homeowners, we can lower your mortgage payment by
13 doing a Loan Modification. Late on payments OK. No
14 equity OK. May we please give you a call?
15 loanmod-gov.net.³

16 The website located at LOANMOD-GOV.NET claimed to provide “Official Home
17 Loan Modification and Audit Assistance Information” beneath a graphic of the
18 U.S. flag.⁴ In its complaint, the FTC charged Flora with violating Section 5 of the
19 FTC Act by: 1) engaging in the unfair transmission of text message spam; and
20 2) by deceptively representing that the mortgage modification business promoted
21 in his text message spam was operated by or affiliated with a governmental entity.⁵

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25 ² PX 1, Complaint for Permanent Injunction and Other Equitable Relief ¶
19.

26 ³ *Id.* ¶ 20.

27 ⁴ *Id.* ¶ 21.

28 ⁵ The FTC’s complaint also alleged two violations of the CAN-SPAM Act related to Flora’s email marketing campaigns.

1 Flora signed the 2011 Final Order on June 9, 2011 and the Court entered it
2 on August 12, 2011.⁶ Section I of the order permanently enjoins Flora from
3 “sending, or assisting others in the sending of Unauthorized or Unsolicited
4 Commercial Electronic Text Messages to mobile telephones or other wireless
5 devices.”⁷ The order defines this term to include “unsolicited” text messages
6 promoting “the content on an Internet website operated for commercial purposes.”⁸

7 **B. *FTC v. Flora II (2013)***

8 The FTC filed a second enforcement action against Flora on March 5, 2013,
9 charging him once again with violating the FTC Act by transmitting unsolicited
10 text messages to consumers. On March 6, 2013, the Court entered a Temporary
11 Restraining Order, finding that the Commission was likely to prevail on its claims
12 against Flora.⁹

13 In addition to Flora, the FTC’s complaint named three other individuals
14 allegedly working in concert with him. On September 26, 2013, the FTC
15 voluntarily dismissed all three of Flora’s co-defendants after determining that they
16 played insignificant roles in the misconduct charged. *Seaside* Dkt. 27.

17 On June 17, 2013, the Clerk of the Court entered an order of default against
18 Flora for his failure to answer the FTC’s complaint. *Seaside* Dkt. 26. On October
19 24, 2013, the FTC moved for entry of a default judgment against Flora. *Seaside*
20 Dkt. 30. The FTC based its motion in part on sworn declarations from two of
21 Flora’s former co-defendants, Kevin Beans and Sandra Skipper. In these
22 declarations, Beans and Skipper explained that they signed a fictitious business
23 name application and opened a bank account as a favor to Flora, whom each
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25 ⁶ PX 2, Stipulated Permanent Injunction and Final Order as to Philip A.
26 Flora at 17, 18.

27 ⁷ *Id.* at 5.

28 ⁸ *Id.* at 4.

⁹ PX 3, *Seaside* Temporary Restraining Order at 1.

1 identified as a friend. They claim to have had no knowledge of the conduct alleged
2 in the Commission's complaint. As noted below, Flora eventually confirmed these
3 statements in an FBI interview.

4 In an order dated November 25, 2013, the Court granted the FTC's motion
5 for entry of a default judgment. Citing *Geddes v. United Fin. Group*, 559 F.2d
6 557, 560 (9th Cir. 1997), for the general rule of law that the factual allegations of a
7 complaint, except those relating to damages, are taken as true in the event of a
8 default, the Court found:

- 9
- 10 • Flora had "transmitted at least 29 million unsolicited text messages to
11 United States consumers since March 2012"; and
 - 12 • Messages transmitted by Flora "purport that the recipient has won free
13 merchandise . . . [but] fail to disclose that the consumers must incur costs
14 and other obligations to obtain the purportedly free merchandise."¹⁰

15 Based on these facts and other allegations from the FTC's complaint taken
16 as true, the Court entered an order finding that Flora had sent, "or assist[ed] others
17 in sending, millions of Unauthorized or Unsolicited Commercial Electronic Text
18 Messages to mobile telephones."¹¹ This conduct, the Court concluded, constituted
19 deceptive and unfair practices in violation of Section 5 of the FTC Act.¹² The
20 Court imposed a monetary judgment of \$148,309, the total revenue generated by
21 Flora's 2012 text spam campaigns.¹³

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25 ¹⁰ PX 4, *Seaside* Order Regarding Default Judgment at 1.

26 ¹¹ PX 5, *Seaside* Final Order for Permanent Injunction as to Defendant Philip
27 Flora at 7.

28 ¹² *Id.* at 8.

¹³ *Id.* at 7.

1 **III. FLORA’S CONTEMPTUOUS BUSINESS PRACTICES**

2 Days after signing the 2011 Final Order, Flora hatched an elaborate scheme
3 to begin covertly violating it on a massive scale.¹⁴ Though largely concealed by
4 intermediaries, aliases, and phony addresses, Flora oversaw an operation
5 responsible for inundating consumers with millions of unsolicited text messages.
6 As noted above, the Court has already found that between March 2012 and the
7 filing of the FTC’s second lawsuit against him, Flora transmitted or arranged for
8 the transmission of at least 29 million unsolicited text messages falsely informing
9 recipients that they had been specially selected to receive a \$1,000 gift card from
10 Best Buy, Walmart, or other prominent retailers. These practices constitute a
11 flagrant violation of Section I of the 2011 Final Order permanently banning Flora
12 from sending unsolicited commercial text messages.

13 To disguise involvement in his new text spam business, Flora recruited three
14 friends to open bank accounts that he then used to anonymously run the business
15 and receive its proceeds. The FTC named these three individuals as co-defendants
16 in its complaint, but voluntarily dismissed them after discovering that they had
17 been duped by Flora into assisting him. Two of these individuals provided sworn
18 declarations to the FTC outlining the limited assistance that they provided to Flora
19 and affirming that they had no knowledge of his text spam business.¹⁵

20 Despite going to great lengths to conceal his involvement, Flora did not
21 entirely succeed in doing so. For example, on June 26, 2012, Flora registered a
22 domain name using the alias “Eric Fisher” at a non-existent address, but used his
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24 ¹⁴ Flora signed the order on June 9, 2011. *See* PX 2 at 18. On June 29,
25 2011, Flora’s acquaintance and former co-defendant, Dakota Geffre, opened a
26 bank account subsequently used to purchase goods and services necessary to run
27 Flora’s new text message spam operation. *See* PX 6, Declaration of FTC
Investigator Doug McKenney (“McKenney Dec.”) ¶ 3(b).

28 ¹⁵ PX 7, Declaration of Kevin Beans ¶¶ 3-8 and PX 8, Declaration of Sandra
Skipper ¶¶ 3-5.

1 personal credit card to pay for it.¹⁶ The next day, consumers began filing
2 complaints with the FTC regarding the receipt of unsolicited text messages
3 containing this domain.¹⁷ Records provided by AT&T indicate that its network
4 transmitted over 850,000 of these messages.¹⁸

5 In the end, Flora acknowledged that he is solely responsible for the text
6 message operation that he continued to run after entry of the 2011 Final Order. On
7 July 29, 2013, FBI special agents interviewed Flora at his home.¹⁹ After initially
8 absolving himself of responsibility by blaming the conduct on his co-defendants,
9 Flora admitted that he had convinced these individuals to put the business in their
10 names and stated that they had no knowledge of his activities.²⁰

11 **IV. ARGUMENT**

12 To find a party in civil contempt, the “moving party has the burden of
13 showing by clear and convincing evidence that the contemnor violated a specific
14 and definite order of the court.” *FTC v. Affordable Media*, 179 F.3d 1228, 1239
15 (9th Cir. 1999) (citation omitted). “The burden then shifts to the contemnors to
16 demonstrate why they were unable to comply.” *Id.* at 1239. The Court should
17 hold Flora in civil contempt for violating the core provision of its 2011 Final
18 Order, which unambiguously bars him from sending unsolicited commercial text
19 messages or assisting others in doing so.
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23 ¹⁶ McKenney Dec. ¶ 3(a).

24 ¹⁷ *Id.* ¶ 3(b).

25 ¹⁸ PX 9, Declaration of Cheri Kerstetter ¶ 12. The FTC has not submitted a
26 24-page attachment referred to in this declaration that contains information
27 unrelated to the present motion.

28 ¹⁹ McKenney Dec. ¶ 4, Att. A.

²⁰ *See id.* Although the FBI’s summary of this interview states that “its
contents are not be distributed outside your agency,” the FBI has authorized the
FTC to use the document in support of this motion. *Id.*

1 Section I of the Order could hardly be more specific. It permanently bars
2 Flora from any participation in a distinct business activity -- commercial text
3 messaging. In particular, the Order provides:

4 [Flora,], whether acting directly or through a trust, corporation, subsidiary,
5 division, or other device, is hereby permanently enjoined from sending, or
6 assisting others in the sending of Unauthorized or Unsolicited Commercial
7 Electronic Text Messages to mobile telephones or other wireless devices.

8 The term “Unauthorized or Unsolicited Commercial Electronic Text Messages” is
9 separately defined to mean “an unauthorized or unsolicited text message the
10 primary purpose of which is a commercial advertisement or promotion of a
11 commercial product or service (including the content of an Internet website
12 operated for commercial purposes).”

13 Clear and convincing evidence establishes that Flora willfully engaged in the
14 precise conduct explicitly prohibited under Section I of the 2011 Final Order.
15 Specifically, Flora sent over 29 million unsolicited commercial text messages to
16 consumers’ mobile phones in under a year. A single domain name purchased by
17 Flora appeared in over 850,000 text messages promoting a commercial website.
18 Flora’s attempt to hide behind others is belied by clear evidence of his
19 involvement, including his own admission. This evidence unquestionably shows
20 that Flora violated the 2011 Final Order by “sending, or assisting others in the
21 sending” of prohibited text messages. Flora should therefore be held in civil
22 contempt.

23 The FTC does not recommend imposition of compensatory sanctions for
24 Flora’s contempt because the final order entered by the Court in connection with
25 the FTC’s 2013 action includes a monetary judgment that reflects Flora’s total
26 revenue from his contemptuous conduct.²¹ However, a civil contempt finding is

27 _____
28 ²¹ The Commission has submitted a Proposed Order for Civil Contempt with
this motion.

1 both necessary and appropriate in light of Flora’s brazen, sustained determination
2 to flout the Court’s order. The FTC also requests that the Court refer this matter to
3 the U.S. Attorney’s Office for consideration of a criminal contempt prosecution.

4
5 **V. CONCLUSION**

6 Section I of the Court’s August 2011 Order clearly and unambiguously bars
7 Flora from sending unsolicited commercial text messages to consumers or assisting
8 others in doing so. Flora has deliberately violated this provision on a massive
9 scale. Accordingly, the FTC requests that the Court enter the proposed Order to
10 Show Cause.

11 Respectfully submitted,

12 Dated: February 21, 2014

13 /s/ James Davis
14 JAMES DAVIS
15 Attorney for the Plaintiff
16 Federal Trade Commission
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PROOF OF SERVICE

I, James Davis, hereby certify as follows:

I am an attorney employed by and representing the Plaintiff, Federal Trade Commission. I am not a party to this action. On February 21, 2014, I electronically filed a copy of the foregoing “Notice of Motion and Motion for Order to Show Cause Why Defendant Philip Flora Should Not Be Held in Contempt” as well as supporting exhibits with the Court using the CM/ECF system. I served copies of these documents via Federal Express overnight delivery to:

Bobby Samini, Esq.
Samini Scheinberg PC
949 South Coast Drive, Suite 420
Costa Mesa, CA 92626
Attorney for Defendant Philip Flora

/s/ James Davis
James Davis