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U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

CV 08

0642

13 UNITED STATES OF AMERICA,
14 Plaintiff,
15 v.
16 Member Source Media LLC, doing
17 business as ConsumerGain.com,
18 PremiumPerks.com,
19 FreeRetailRewards.com, and
20 GreatAmericanGiveaways.com,
and
Chris Sommer, individually and
as Manager of Member Source
Media LLC,
21 Defendants.

Case No. _____

COMPLAINT FOR CIVIL
PENALTIES, PERMANENT
INJUNCTION, AND OTHER
EQUITABLE RELIEF

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23
24 Plaintiff, the United States of America, acting upon
25 notification and authorization to the Attorney General by the
26 Federal Trade Commission ("FTC" or "Commission"), pursuant to
27 Section 16(a)(1) of the Federal Trade Commission Act ("FTC Act"),
28 15 U.S.C. § 56(a)(1), for its complaint alleges:

1 Media has formulated, directed, controlled, or participated in
2 the acts and practices set forth in this complaint. Member
3 Source Media resides in the Northern District of California and
4 transacts business within this District and throughout the United
5 States.

6 7. Defendant Chris Sommer is the Manager and sole owner of
7 Member Source Media. At all times material to this complaint,
8 acting alone or in concert with others, he has formulated,
9 directed, controlled, or participated in the acts and practices
10 set forth in this complaint. Chris Sommer transacts or has
11 transacted business in this District and throughout the United
12 States.

13 DEFINITIONS

14 8. "Electronic mail message" (or "email") means a message
15 sent to a unique email address. 15 U.S.C. § 7702(6).

16 9. "Electronic mail address" means a destination, commonly
17 expressed as a string of characters, consisting of a unique user
18 name or mailbox (commonly referred to as the "local part") and a
19 reference to an Internet domain (commonly referred to as the
20 "domain part"), whether or not displayed, to which an email message
21 can be sent or delivered. 15 U.S.C. § 7702(5).

22 10. "Commercial electronic mail message" means any email
23 message the primary purpose of which is the commercial
24 advertisement or promotion of a commercial product or service
25 (including the content on an Internet website operated for
26 commercial purposes). 15 U.S.C. § 7702(2).

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1 11. "Initiate," when used with respect to a commercial email
2 message, means to originate or transmit such message or to procure
3 the origination or transmission of such message. 15 U.S.C.
4 § 7702(9).

5 12. "Landing page" means, in online marketing, a specific web
6 page that a visitor reaches after clicking a link or advertisement.
7 This page usually showcases content that is an extension of the
8 link or ad.

9 13. "Procure," when used with respect to the initiation of a
10 commercial email message, means intentionally to pay or provide
11 other consideration to, or induce, another person to initiate such
12 a message on one's behalf. 15 U.S.C. § 7702(12).

13 14. "Protected computer" means a computer which is used in
14 interstate or foreign commerce or communication, including a
15 computer located outside the United States that is used in a manner
16 that affects interstate or foreign commerce or communication of the
17 United States. 15 U.S.C. § 7702(13); 18 U.S.C. § 1030(e)(2)(B).

18 15. "Sender" means a person who initiates a commercial
19 email message and whose product, service, or Internet website is
20 advertised or promoted by the message. 15 U.S.C. § 7702(16).

21
22 **DEFENDANTS' BUSINESS ACTIVITIES**

23 16. Since November 2004, and continuing to the present,
24 Defendants, in connection with promotions and advertisements on
25 their websites, have offered consumers purportedly free
26 merchandise, such as iPods, laptop computers, and Visa gift
27 cards.

1 17. Defendants advertise and market their offers through
2 email and Web-based ads. Defendants' emails contain subject
3 lines such as: "Congratulations. You've won an iPod Video
4 Player"; "Here are 2 free iPod Nanos for You: confirm now";
5 "Nascar Tickets Package Winner"; "Confirmation required for your
6 \$500 Visa Gift Card"; or "Second Attempt: Target Gift Card
7 Inside." Defendants' Web-based ads contain similar
8 representations: "CONGRATULATIONS! You Have Been Chosen To
9 Receive a FREE GATEWAY LAPTOP." (Such products and items are
10 referred to herein as "promised free merchandise.")

11 18. Many of Defendants' emails and Web-based ads represent,
12 expressly or by implication, that the consumer viewing the
13 message has won a contest, or has been specially selected to
14 receive a gift or prize.

15 19. Defendants' emails and Web-based ads contain links
16 that, when clicked on, take one to a "landing page" operated by
17 Defendants or their affiliates. Each landing page recapitulates
18 and expands upon Defendants' initial promised free merchandise
19 offer. For example, the landing page for Defendants' email offer
20 notifying consumers that their "Target Gift Card [is] Inside"
21 encourages consumers to "Claim Your FREE \$500 Target Gift Card
22 Now!"

23 20. Defendants do not clearly and conspicuously disclose
24 that to obtain the promised free merchandise one must incur
25 expenses or other obligations. A consumer must accept and pay
26 for - in the Defendants' parlance, "complete" or "participate in"
27 - a certain number of goods or services promoted by third parties
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1 to qualify for the promised free merchandise that Defendants
2 promote in their emails and Web-based ads. Moreover, Defendants
3 do not clearly and conspicuously disclose the costs and
4 obligations associated with participating in third-party
5 promotions, such as applying and qualifying for credit cards.

6 21. On each landing page, Defendants request the consumer
7 to enter his or her email address, followed by his or her name
8 and mailing address. Defendants use this information, in part,
9 to send to the consumer a "welcome" email containing a password
10 and information on how to access the consumer's account on
11 Defendants' websites. A consumer must have access to his or her
12 account to obtain the promised free merchandise. However, in
13 numerous instances, the consumer does not receive Defendants'
14 "welcome" email because the consumer's email provider treats
15 Defendants' email as spam, blocking it or filtering it so that it
16 never reaches the consumer's inbox.

17 22. Once the consumer has submitted his or her personal
18 information to "start the claim process," Defendants lead the
19 consumer through a series of web pages containing advertisements
20 for various goods and services from third parties. Unbeknownst
21 to the consumer, this is only an introductory tier of "optional"
22 advertisements and offers, after which are three additional tiers
23 of offers that the consumer will have to navigate before he or
24 she can qualify for the promised free merchandise. "Optional"
25 offers do not qualify the consumer for the promised free
26 merchandise.

27 23. After the consumer navigates Defendants' "optional
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1 promotions" - often so multitudinous as to take up five or six
2 consecutive computer screens, each with multiple offers - he or
3 she eventually reaches a link that, when clicked, takes the
4 consumer to the first of three tiers of offers in which the
5 consumer must participate to obtain the promised free
6 merchandise.

7 24. Defendants group the tiers of offers that qualify the
8 consumer for the promised free merchandise into three categories.
9 In each category, there are numerous offers. Defendants require
10 the consumer to "participate in" multiple offers from each
11 category to obtain the promised free merchandise.

12 25. Clicking on each offer reveals what the consumer must
13 do to "participate in" the offer. In some cases, "participating
14 in" an offer entails paying money or incurring some other
15 detriment, such as qualifying and applying for credit cards.
16 Defendants require the consumer to participate in multiple offers
17 before he or she can progress to the next tier of offers.

18 26. Some of the offers have free trial periods, but require
19 the consumer to participate for a minimum period of time to
20 qualify for Defendants' promised free merchandise. Moreover,
21 many such offers contain negative option components in which the
22 consumer who does not cancel will be billed automatically.

23 27. In many instances, the consumer stops trying to qualify
24 for Defendants' promised free merchandise, either because of the
25 cost involved or the time and effort required. Although the
26 consumer has expended money or incurred other obligations in
27 pursuit of Defendants' promised free merchandise, because he or
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1 she has not completed all of Defendants' required third-party
2 promotions, the consumer does not receive the promised free
3 merchandise.

4 28. In most instances, it is impossible for the consumer to
5 qualify for Defendants' promised free merchandise without
6 spending money.

7 DEFENDANTS' EMAIL PRACTICES

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9 29. Since November 2004, and continuing to the present,
10 Defendants have initiated the transmission of commercial email
11 messages to protected computers. The primary purpose of these
12 commercial email messages has been the commercial advertisement
13 or promotion of Internet websites operated for a commercial
14 purpose by Defendants.

15 30. Defendants are "initiators" with respect to an email
16 message when they have either originated or transmitted a message
17 themselves or have procured the origination or transmission of a
18 message through payments or other consideration, or inducements,
19 to others.

20 31. Defendants are "senders" with respect to an email
21 message when they have initiated a message and it is Defendants'
22 websites that are being advertised or promoted by such message.

23 32. In numerous instances, to induce consumers to open and
24 read their commercial emails, Defendants have initiated
25 commercial email messages that contain subject headers that
26 misrepresent the content or subject matter of the message,
27 including, but not limited to, false representations that
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1 consumers have won a contest.

2 VIOLATIONS OF THE FTC ACT

3 33. As set forth below, Defendants have violated Section
4 5(a) of the FTC Act in connection with advertising, offering,
5 marketing, and promoting of promised free merchandise.

6 COUNT I

7
8 34. In numerous instances, Defendants have represented,
9 expressly or by implication, that Defendants' promised free
10 merchandise is without cost or obligation.

11 35. Defendants have failed to disclose or to disclose
12 adequately to consumers the material terms and conditions of
13 their program, including:

- 14 a. that consumers must pay money or other
15 consideration to participate in Defendants'
16 program; and
17 b. the costs and obligations for participating in
18 Defendants' program.

19
20 36. As a result of the representation set forth in
21 Paragraph 33, Defendants' failure to disclose or to disclose
22 adequately the material information set forth in Paragraph 34 is
23 deceptive, and violates Section 5(a) of the FTC Act, 15 U.S.C.
24 § 45(a).

25 VIOLATION OF THE CAN-SPAM ACT

26 37. The CAN-SPAM Act, 15 U.S.C. § 7701 et seq., became
27 effective on January 1, 2004, and has since remained in full
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1 force and effect.

2 38. Section 5(a)(2) of CAN-SPAM, 15 U.S.C. § 7704(a)(2),
3 states:

4 It is unlawful for any person to initiate the
5 transmission to a protected computer of a
6 commercial electronic mail message if such
7 person has actual knowledge, or knowledge
8 fairly implied on the basis of objective
9 circumstances, that a subject heading of the
10 message would be likely to mislead a
11 recipient, acting reasonably under the
12 circumstances, about a material fact
13 regarding the contents or subject matter of
14 the message (consistent with the criteria
15 used in enforcement of section 45 of this
16 title).

17 39. Section 7(e) of CAN-SPAM, 15 U.S.C. § 7706(e), states
18 that in any action to enforce compliance through an injunction
19 with Section 5(a)(2) and other specified sections of CAN-SPAM,
20 the FTC need not allege or prove the state of mind required by
21 such sections.

22 40. Section 7(a) of the CAN-SPAM Act, 15 U.S.C. § 7706(a),
23 states:

24 [T]his chapter shall be enforced by the
25 [FTC] as if the violation of this chapter
26 were an unfair or deceptive act or practice
27 proscribed under section 18(a)(1)(B) of the
28 [FTC Act] (15 U.S.C. 57a(a)(1)(B)).

29 COUNT II

30 41. In numerous instances, Defendants have initiated the
31 transmission, to protected computers, of commercial email
32 messages that contained subject headings that would be likely to
33 mislead a recipient, acting reasonably under the circumstances,
34 about a material fact regarding the contents or subject matter of

1 the message.

2 42. Therefore, Defendants' acts or practices violate
3 Section 5(a)(2) of CAN-SPAM, 15 U.S.C. § 7704(a)(2).

4 CONSUMER INJURY

5 43. Consumers throughout the United States have been
6 injured as a result of Defendants' unlawful acts or practices.
7 Absent injunctive relief by this Court, Defendants are likely to
8 continue to injure consumers and to harm the public interest.

9 THIS COURT'S POWER TO GRANT RELIEF

10 44. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b),
11 empowers this Court to grant injunctive and other ancillary
12 relief to prevent and remedy any violation of any provision of
13 law enforced by the FTC.

14 45. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C.
15 § 45(m)(1)(A), as modified by Section 4 of the Federal Civil
16 Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as
17 amended, and as implemented by 16 C.F.R. § 1.98(d) (1997),
18 authorizes this Court to award monetary civil penalties of not
19 more than \$11,000 for each violation of CAN-SPAM. Defendants'
20 violations of CAN-SPAM were committed with the knowledge required
21 by Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A).

22 46. This Court, in the exercise of its equitable
23 jurisdiction, may award ancillary relief to remedy injury caused
24 by Defendants' violations of CAN-SPAM and the FTC Act.
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1 PRAYER FOR RELIEF

2 WHEREFORE, Plaintiff requests that this Court, as authorized
3 by Sections 5(a), 5(m)(1)(A), 13(b) and 19 of the FTC Act,
4 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), and 57b, and pursuant to
5 its own equitable powers:

6 1. Enter judgment against Defendants and in favor of
7 Plaintiff for each violation alleged in this complaint;

8 2. Award Plaintiff monetary civil penalties from
9 Defendants for every violation of CAN-SPAM;

10 3. Award Plaintiff such relief as the Court finds
11 necessary to redress injury to consumers resulting from
12 Defendants' violations of Section 5(a) of the FTC Act, 15 U.S.C.
13 § 45(a), including, but not limited to, rescission of contracts,
14 restitution, the refund of monies paid, and the disgorgement of
15 ill-gotten monies;

16 4. Enter a permanent injunction to prevent future
17 violations of the FTC Act and CAN-SPAM by Defendants;

18 5. Order Defendants to pay the costs of this action; and

19 6. Award Plaintiff such other and additional relief as the
20 Court may determine to be just and proper.
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1 Dated: January 28, 2008

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Respectfully submitted,
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