



## ADJUDICATOR'S REPORT

<b>WASPA Member (SP):</b>	Buongiorno SA
<b>Information Provider (IP):</b>	Not applicable
<b>Service Type:</b>	Subscription service
<b>Complainant:</b>	Competitor
<b>Complaint Number:</b>	#11626
<b>Code Version:</b>	10.0
<b>Advertising Rules Version:</b>	2.3

### Complaint

This Complaint is the third of three complaints which deal with substantially the same issue: whether banners used by the SP to facilitate subscriptions to its subscription service (“the Service”) are non-compliant with the Code. The other two complaints, 11258 and 11582, were assigned to me for review together with this Complaint given their similarities both on the facts and their alleged non-compliance with the Code.

### Service provider's response

One concern which the SP raised in its submissions to WASPA in complaint 11582 as well as in this Complaint is apparent collusion between the WASPA Monitor (the complainant in complaints 11258 and 11582) and the anonymous competitor which is the complainant in this Complaint. This allegation is based on the similarities between the complaints:

*28 We would like to place on record that in receiving complaints #11582 and #11626 we are concerned that these appears to be collusion between the monitor and our competitors. The text of these complaints is virtually identical, even though the “anonymous” complaint appears to post-date the monitor’s complaint.*

*29 The only inference that can reasonably be drawn is that the monitor furnished the text of her complaint to the so – called “anonymous” complainant – if this is what happened then the conduct of the monitor is highly irregular. The monitor is not entitled to abuse her position to attempt to procure complaints against our client. This is an issue our client will take up with*

*the secretariat, but an adjudicator dealing with these matters should take into account this apparent conduct by the monitor in these matters. We would be interested to receive an explanation from the monitor as to how the so-called "anonymous " complaint came about.*

*In the meantime, we trust that our response is sufficient in proving that we in no way infringed the Code as alleged by the monitor or the anonymous complainant. However, should the adjudicator not be clear on anything and wishes us to provide anything further to assist him/her in their deliberation of this matter, we are more than willing to provide same.*

Neither the Complainant or Monitor responded to this aspect of the Complaint. In fact, there is no response from the Complainant at all and, similarly, no record of correspondence between the Complainant and the Secretariat in this regard.

The text of complaint 11582 was as follows:

*Date of breach: 11 January 2010 WASP or service: Buongiorno Clauses breached: 11.2.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz. 11.2.3. Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition.*

*Description of complaint: Buongiorno are promoting a subscription service making use of a competition to promote the sub service.*

*Buongiorno have previously been informed that this practice is in breach of the WASPA Code. Web campaigns are requested to be removed with immediate effect.*

*The WASPA Monitor has indicated that this is a repeat offence and cannot be resolved informally. The service provider is requested to provide a formal response to the alleged breaches so that this matter can be reviewed by an independent adjudicator.*

The text of this Complaint is as follows:

*Complaint #11626 (lodged via the WASPA website): Affiliation\_Information: Complainant wish to remain anonymous WASPName: 35050 OtherID:*

*Code\_Breached: 11.2.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content*

*item and may not be an entry into a competition or quiz.*

*11.2.3. Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition.*

*Detailed\_Description\_Complaint: The service provider has a Ballerina Quiz Campaign (web campaign) running. After clicking through from the first to the second banner and inserting the correct answer, the banner informs the customer that he/she can now get an iPhone 3G S\* by choosing their operator "NOW YOU CAN GET AN IPHONE 3G S\*".*

*The process to entice the customer to subscribe to the service via a Quiz is misleading as the customer and does not comply to the WASPA code of conduct.*

*Tick\_as\_appropriate: I have not contacted the service provider and believe this matter requires WASPA's attention*

*Declaration\_Good\_Faith: Information provided is true and correct and provided in good faith*

While both complaints deal with the same issues and the same banners, they are worded differently.

## **Sections of the Code considered**

Version 10.0 of the Code applies to this complaint. I have considered the following provisions of the Code:

*3.1.1. Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.*

*11.2.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.*

*11.2.3. Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition.*

The Complainant highlighted sections 11.2.2 and 11.2.3 specifically.

### **Sections of the Advertising Rules considered**

Not applicable

### **Decision**

Given that I have determined that the banners which form the subject matter of this Complaint are non-compliant with the Code in my reports on complaints 11258 and 11582, there is no need for me to deal with this further in this report.

Having regard to the SP's concerns about collusion between the Monitor and the unnamed Complainant, there is no evidence that such collusion has, in fact, taken place. Such an allegation is a serious allegation and must be considered. That said, the two complaints are substantially the same and arose around the same time. These factors may establish a correlation but do not prove causation. I am unable to make a finding on this point in the absence of further evidence but do caution both WASPs and the Monitor that any such collusion would be improper and, in the case of a WASP participating in such collusion, it would almost certainly be a breach of section 3.1.1 of the Code.

I therefore uphold this Complaint in part, namely that the banners which form the subject matter of this Complaint are not compliant with sections 11.2.2 and 11.2.3 of the Code. My reasons for such a determination may be found in my report on complaints 11258 and 11582.

### **Sanctions**

One of the SP's primary concerns and its motivation for asking that complaints 11258, 11626 and this Complaint be adjudicated together is that it should not be penalised more than once for what it contends are the same or similar complaints. This is assuming that the complaints are all upheld, of course. That said, I have upheld complaint 11258 and that report will likely be made available by the WASPA Secretariat in the ordinary course. Where there are similarities between this Complaint and complaint 11258, I have pointed these out. I have further remained mindful of the SP's "double jeopardy" concerns.

I therefore reiterate my order which I made in my report on complaints 11258 and 11582, in part:

The SP is ordered to -

1. Desist from publishing the banners which form the subject matter of this complaint and any derivatives of those banners which fail to address the cause of this Complaint as described above;
2. Send a reminder message to all subscribers to the Service in the format specified by section 11.6.2 of the Code within 48 hours of being notified of these findings.