



ADJUDICATOR'S REPORT

Complaint reference number: #18432

WASPA member(s): Buongiorno SA

Membership number(s): 0002

Complainant: Competitor

Type of complaint: Subscription service

Date complaint was lodged: 2012-09-12

Date of the alleged offence: 2012-09-12 (or thereabouts)

Relevant version of the Code: 12.0

Clauses considered: 9.1.1, 11.2.2 and 11.2.3

Relevant version of the Ad. Rules: Not considered

Clauses considered: Not applicable

Related cases considered: Appeal panel's decision ("the Appeal Decision") regarding the appeal against complaints 11258, 11582, 11626, 13038 and 13039 ("the Appeal") and complaint 17910

Complaint

This complaint concerns the SP's subscription service which features an iPhone or iPad giveaway. The complainant is anonymous and is an employee of one of the SP's competitors (or was at the time). The complaint is as follows:

The advert mainly promotes a competition - the subscription services makes up a very small section of the advert.

The competition is not charged at R1.50 either.

The complainant furnished WASPA with screenshots of the Web pages which form the subject matter of the complaint and which I have annexed to this report.

Service provider's response

The SP raised a preliminary concern about the complainant's anonymity and questioned whether the Secretariat had applied sections 14.1.3 and 14.1.4 of the Code appropriately. Whether the Secretariat has done so is not apparent from the information before me and it is, at the same time, largely irrelevant to the complaint before me.

Regarding the complaint itself, the SP pointed out that a similar set of campaigns was, at the time, being considered by an appeal panel hearing the Appeal.

Notwithstanding the above, we confirm that substantively similar complaints to this Complaint are currently in the Appeal process. The main substantive issues raised in this Complaint are shortly to be finally decided at Appeal level. On this premise and in order to avoid inter alia:

- 1. A duplication of complaints;*
- 2. Wasting further costs;*
- 3. A trumping of charges;*
- 4. Double-jeopardy issues; and*
- 5. Possibly conflicting decisions,*

we request that this particular complaint be pended until such time as the Appeals for matters numbered 11258, 11582, 11626, 13039, 13038, 17910 have been finalised, providing our client, as well as the industry, with clarity – at Appeal level - on the compliance of our client's campaigns.

The Appeal has since been decided and the panel's report released and it does, indeed, address substantially similar issues to those raised in this complaint. Given that the complaint appeared to have been placed in abeyance pending the Appeal's determination, I asked the Secretariat to follow-up with the SP and request additional submissions regarding the substance of this complaint. Despite being afforded an opportunity to do so, the SP failed to make any further submissions and I have therefore considered the

submissions before me, the relevant provisions of the Code and the Appeal panel's decision.

Sections of the Code considered

The applicable version of the Code seems to be version 12.0. I have considered the following sections of the Code:

9.1.1. The total cost for any entry into a promotional competition shall not exceed R1.50.

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 reasonably 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.

Sections of the Advertising Rules considered

I did not consider the Advertising Rules.

Decision

The SP raised concerns about double jeopardy, a duplication of complaints, wasting costs and potentially conflicting decisions and asked that this matter be held in abeyance pending the finalisation of appeals against decisions taken in complaints 11258, 11582, 11626, 13039, 13038 and 17910. The appeals for all but 17910 have been resolved and the report published. The appeal against the decision in 17910 appears to be pending. Given that this complaint was lodged in 2012 and was already held in abeyance for almost a year and that this complaint appears to concern a different service to the subject matter of complaint 17910, I do not believe it would be appropriate to hold this matter over until the appeal in 17910 is finalised. As the panel in the Appeal have considered some of the concerns the SP has raised and given the basis on which the Appeal Decision was prepared, it is not appropriate to delay this matter further.

Double Jeopardy

The Appeal panel considered the troubling double jeopardy concern. It framed the issue as follows:

The principle of “double jeopardy” has been raised as a defence in a number of previous appeals. It is true, as the SP submits, that a number of complaints submitted against the same service, especially over a period of time, can lead to the so-called “duplication” of sanctions for what in fact was technically speaking only one breach of the Code.

After considering previous decisions dealing with this issue and related principles, the Appeal panel arrived at the following conclusions:

How to deal with multiple complaints dealing with the same service and the same breach is truly a vexing question and unfortunately one to which there is no clear or ideal answer. The SP’s legal counsel admitted as much at the face-to-face hearing. Ideally, as was stated by the panel quoted above, “as many complaints as possible lodged against the same service within a particular period of time should be considered together, by the same adjudicator. The number of complaints can then be viewed by the adjudicator as an aggravating circumstance in consideration of sanction, rather than numerous sanctions being imposed by two or more adjudicators for what is in essence the same breach.” There should therefore be only one sanction per breach (offence). Adjudicators should, where possible, review the timelines for complaints relating to the breach under consideration, and if there is an overlap, the complaints which overlap should in theory be considered the same breach. The number of complaints can then be considered only in so far as it may be an aggravating factor in determining the severity of the sanction.

...

All involved should do their best to as far as possible avoid such a situation – in this regard members can, for example, immediately point out to adjudicators that a complaint has already been lodged or a sanction has already been issued in terms of the same service, when responding to a complaint referred to formal adjudication.

Although we agree with the SP and although it is generally accepted that only one sanction should be issued per breach, even if cited in numerous complaints, we would like to warn members to be careful of their interpretation of what they themselves, like the SP in this appeal, regard to be “essentially” or “substantively” the same service. Services with the same name, look and feel, of which for example, the subscribing method, content or detail of information provided differ - even if only slightly but in an important respect, cannot always be regarded as “the same service”.

This complaint has similar concerns to those raised in 11258, 11582, 11626, 13038 and 13039 and complaint 17910 and, as I have pointed out below, many of those concerns have been addressed in the Appeal Decision. That said, the Appeal panel did not order sanctions against the SP in the Appeal Decision as the SP succeeded on procedural

grounds. This complaint also differs from complaint 17910 so a finding against the SP in this matter would not necessarily amount to double jeopardy in the context of complaint 17910. As the Appeal panel pointed out –

Services with the same name, look and feel, of which for example, the subscribing method, content or detail of information provided differ - even if only slightly but in an important respect, cannot always be regarded as “the same service”.

The merits of this complaint

This complaint was lodged roughly a year after the Appeal’s subject matter complaints arose. It concerns a campaign which is similar to the campaign considered in complaints 13038 and 13039 which offered an iPhone in the campaign’s marketing materials. The Appeal was upheld on procedural grounds but the panel went on to consider the campaign mechanics in the Appeal’s underlying complaints in order to give guidance on future, similar complaints. The panel traced the origins of clauses 11.2.2 and 11.2.3 in version 10.0 of the Code (the clauses in version 12.0 are practically identical). The panel went on to explore the thinking behind these clauses:

5.7 Reference to concern of the concept of ‘bundled’ offers is explained in the notes to version 7.4 of the Code, which states: “WASPA has received a large number of complaints from consumers who claim to have been tricked into subscribing to services while entering competitions or quizzes. The modification to the above clause is intended to prohibit the practice of “bundling” competitions/quizzes and subscription services. Requiring a specific, separate request from a customer to be subscribed to a service prevents the automatic subscription to a service, when a customer intended only to participate in a quiz or competition.”

5.8 In WASPA’s later amendment of the Code to clarify its intention behind the amendment to clause 11.1.2, it introduced clause 11.2.3 in version 10 of the Code, with notes stating: “This clause was introduced in version 10.0. The original intent of clause 11.2.2 was to prevent customers from being tricked into joining a subscription service when they thought they were entering a competition. However, it was not intended to prevent someone who has deliberately joined a subscription service from being included in a promotional draw. This clause is intended to clarify this.”

5.9 The primary concern of WASPA in considering alleged breaches of clauses 11.2.2 and 11.2.3 is cited in the introduction to the Code, which states in clause 1.2. (Objectives of the Code of Conduct): “The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services.” (Our emphasis).

5.10 This intention is given effect in clauses 4.1.1 and 4.1.2 of the Code: “4.1.1. Members must

have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers. 4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.”

The panel continued with a test focused on the word “ancillary” in section 11.2.3:

5.11 A useful two-step enquiry to determine the so-called ‘bundling’ complaint was suggested by the Adjudicator in his or her Report to complaint 11862, the conclusion of which is cited with approval by the SP in this matter, to determine whether a breach of clause 11.2.2 has occurred. The Adjudicator says, in paragraph 14.4 of that Report: “In considering whether subscription would be an independent transaction made with the requisite intention in a case where a competition or promotional draw is offered as an additional benefit to being a subscriber to the service, an adjudicator is required to decide whether: 14.4.1. it would be clear to that customer that the promotion draw or competition is “ancillary” to the subscription service, and 14.4.2. (whether) the subscription process has or has not been disguised as an entry into a competition.”

5.12 On the first enquiry, regarding whether a promotional draw is ‘ancillary’, it is useful to consider the meaning of this term. We annex to this report the leading information from the top five results to a Google search for the query ‘Dictionary ancillary’. In our understanding, the word ‘ancillary’ clearly means something that is ‘in support of, rather than, the main thing’.

5.13 In the context of a promotional draw which forms a part of a subscription service extended by a Service Provider and which is subject to clauses 11.2.2 and 11.2.3 of the Code, it must be accepted that the term ‘ancillary’ implies that a potential customer must be enticed firstly with the contents of the subscription service, sweetened secondly by the promotional draw.

5.14 This is necessarily an objective enquiry considering the presentation of the offer, and which precedes the question of the potential customer’s subjective ‘intent’ to sign up for the subscription service.

5.15 In other words, even if the potential customer has formally indicated consent by complying with an acceptable opt-in sign-up procedure, a breach of clauses 11.2.2 and 11.2.3 is possible where the presentation of the offer does not clearly indicate that the promotional draw is ancillary to the subscription service offering.

The panel then concluded its analysis as follows:

5.17 With regard to the cases under consideration in this appeal, and having regard to the application of the term ‘ancillary’ in accordance with the definitions cited above, a fair assessment of the SP’s promotional material will reveal that in none of the instances of the offers presented can the promotional draws be considered to be ancillary to the subscription service; if anything, the converse applies.

5.18 On that basis, had the SP's appeal not been upheld on grounds of the 'audi alterem partem' principle, its arguments against the alleged breach of clauses 11.2.2 and 11.2.3 would not have succeeded.

In this present complaint the only indication that the SP's service is a content subscription service are the words "SUBSCRIPTION SERVICE R5/day" on the top left of the two Web pages submitted for review. The text below the large images displaying an iPhone and iPad on one screen and the two devices along with a VW Golf Polo on the second begins as follows:

*Thats right, just by being a member you could be the next person to Win a Prize! Keep checking 35050 mobi for updates on Winners. Prizes and the hottest content ever. **Prizes change often and they become more and more exciting!***

There is certainly no indication that the opportunities to "get a brand new iPhone + iPad2" or "Win a Prize" are "in support of, rather than, the main thing" here and, instead, appear to be the primary focus of the campaign, if not the entire focus of the campaign. I therefore find this campaign in breach of sections 11.2.2 and 11.2.3 of the Code.

The complainant also raised section 9.1.1 of the Code. On the assumption that the SP's service is a promotional competition then it would also be in violation of section 9.1.1 of the Code as the apparent entry fee of "R5/day" would far exceed the prescribed maximum entry cost of a competition, being R1,50. The SP would presumably describe its service as a content subscription service where the "prizes" are potential benefits subscribers would qualify for and not a standalone promotional competition. On this basis section 9.1.1 would not be entirely appropriate.

Sanctions

Given my finding that the campaign which forms the subject matter of this complaint is in violation of sections 11.2.2 and 11.2.3 of the Code, I make the following orders:

1. To the extent this particular iteration of the SP's service remains active, the SP is directed to terminate this iteration of the service no later than 48 hours after receiving this report;
2. The SP shall send a reminder message to subscribers which subscribed for the SP's service on the basis of this particular iteration of the service which is compliant with the Code's formatting and content requirements within 48 hours of receiving this

report;

3. The SP is fined R50 000 for its breach of sections 11.2.2 and 11.2.3 and this amount is payable within 5 business days of a demand for payment by the WASPA Secretariat.

Subject: [WASPA.complaints] [formal] WASPA Code of Conduct complaint Ref:#18432

From: "WASPA Complaints (Charles Reuvers)" <complaints@waspa.org.za>

Date: 2012/10/03 11:28 AM

To: Hans.mol@buongiorno.com, Sharief Holt <sharief.holt@buongiorno.com>

BCC: "Archive@waspa.org.za" <Archive@waspa.org.za>

Dear WASPA member

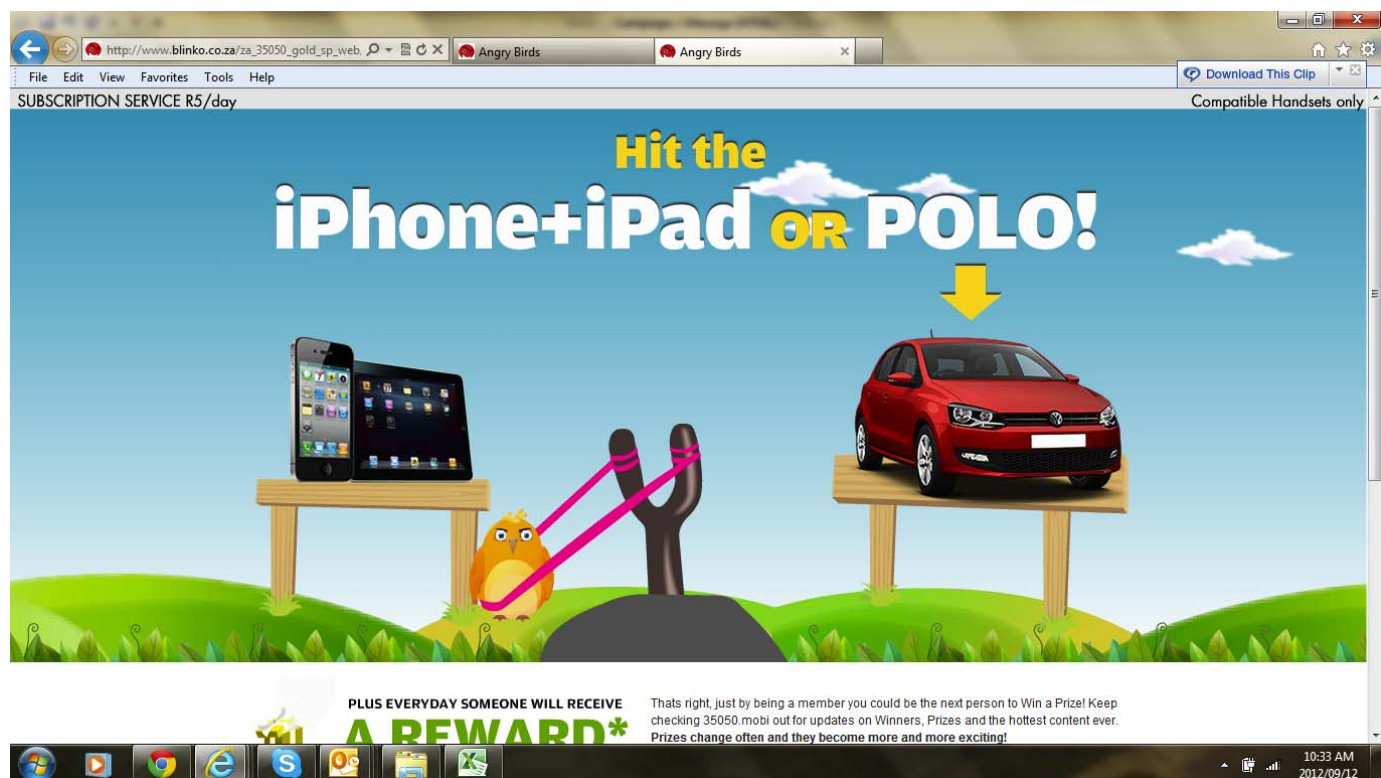
Please see below for screen shots provided by complainant.

Regards

Charles Reuvers

WASPA Secretariat

<http://www.waspa.org.za/>



Dear Anonymous Complainant

Please can you provide the below request from Buongiorno South Africa. -see email below-

Regards

Charles Reuvers
WASPA Secretariat
<http://www.waspa.org.za/>

----- Original Message -----

Subject:Re: [WASPA.complaints] [formal] WASPA Code of Conduct complaint Ref:#18432

Date:Wed, 3 Oct 2012 09:12:46 +0000

From:Sharief Holt <Sharief.Holt@buongiorno.com>

Reply-To:complaints@waspa.org.za <complaints@waspa.org.za>

To:complaints@waspa.org.za <complaints@waspa.org.za>, Hans Mol <Hans.Mol@buongiorno.com>

Dear Waspa,

Please would you be so kind as to request the complainant to furnish us with the campaign referred too.
We await your response in order to address in specific detail on the matter raised by the complainant.

Best Regards
Sharief