



## REPORT OF THE ADJUDICATOR

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| <b>WASPA Member (SP):</b>         | Buongiorno UK       |
| <b>Information Provider (IP):</b> | Not applicable      |
| <b>Service Type:</b>              | Unsubscribe request |
| <b>Complainants:</b>              | Linda Moss          |
| <b>Complaint Number:</b>          | 6609                |
| <b>Code Version:</b>              | 6.2                 |
| <b>Advertising Rules Version:</b> | 2.3                 |

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### Complaint

The Complainant lodged the following complaint:

“Recently discovered charges on my Vodacom cell phone contract account from the above company to which I have not subscribed. After discussing this matter with Vodacom who say they are unable to help me, I called the company concerned who insist that I have subscribed to 2 of their websites via my cell phone, being: Fun/Games Sexy Cherry Pornography. They advised that the subscription was requested at 23:47:41 on Tuesday, 21st April 2009. I do recall receiving an sms from this company late that night which I rejected and immediately after doing that I called Vodacom Customer Care to enquire what was going on, I was advised that if I had rejected the subscription I should not worry. Obviously that is not true! Vodacom and the subscription company concerned have blatantly refused to assist me with this error and I do not know what to do from here. I have never subscribed to either of these two websites and talking with this company has got me nowhere. Is there anything else I can do other than lay a charge of Fraudulent Activity with the SAPS? Thank you for your assistance.”

The Complainant provided the following reason for escalation:

“Please advise if you have any further information as I received a voice message from this company insisting that I did subscribe to them and that they will not be reimbursing my money!!!! I will be taking this matter further legally.”

In its response to the SP’s reply the Complainant wrote:

"No I am not happy at all! I did not subscribe to this Company and I am not accepting responsibility for their charges! I do not know what Age of Empires is and have not got anything to do with that name on my cell phone.

Not sure what they mean by UA cell phone Nokia 5200, I assume it is supposed to be my make of phone which is incorrect! I have a Sony Erickson. With regards to the other information they have provided, this makes absolute no sense to me and I have no idea where they get the information from.

As you can see from their letter where they admit making an error with other subscriptions, I am 100% positive this is an error as well and I am not letting this go until it is resolved properly."

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### **Service provider's response**

The SP provided a reply with billing logs:

"The user of mobile number +27825570942 only subscribed to the fun club service. Information regarding two subscriptions on the mobile number +27825570942 was in fact incorrect. Billing had only taken place in the Fun Club Service. This can be confirmed by the billing logs which are attached to this correspondence. We had also noticed that the customer downloaded Age of Empires II from our fun club services as can be seen in the Customer download Report Attached.

Messages Sent to the user was sent from our Fun Club Service only and no other services within our company hence the subscription and billing was only for the fun club service.

Please note that the user had subscribed via Wap Interaction with the fun club service. In order to have been subscribed the user would have needed to click the joining link as per the wap advertisement to join the fun club.

In light of the above, we are unable to pass a refund in this regard. Messages sent to the user upon subscription informed the user that they were in fact interacting with a Mobile Subscription Service at R10p/day. These sms communication messages that were sent to the user also inform the user of his or her unsubscribing option from the fun club as well as our call centre contact number.

As noted in the mobile traffic reports, it was noted that the user had received the correct unsubscribe instructions as given per the messages sent to the user. Also please note that messages sent to the user was not an invitation to join the fun club but initial welcome messages after the user had joined the Fun Club and not as the user stated that he or she rejected message invitations. The messages would not have been sent to the user if the user

had not accepted the Terms and Conditions and by clicking the joining link, he or she had agreed to the T&C's, wap advertised.

We trust that this resolves the situation and thank you for making this matter known to us."

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### **Sections of the Code considered**

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.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".

11.1.2. 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.

11.1.3. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

11.1.4. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

11.1.5. Subscription services with different billing frequencies should not have a subscription mechanism likely to cause a customer to accidentally subscribe to a more frequent service.

11.1.6. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

11.1.7. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) Clear and concise instructions for unsubscribing from the service;
- (d) The service provider's telephone number.

11.1.8. A monthly reminder SMS must be sent to all subscription service customers containing the following information:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;

(c) The service provider's telephone number.

11.1.9. The monthly reminder SMS must adhere to the following format:

(a) The monthly reminder must begin with either "Reminder: You are a member of NAME OF

SERVICE" or "You are subscribed to NAME OF SERVICE".

(b) Any marketing for a new service must appear after the cost and frequency of the existing service and the service provider's telephone number.

11.1.10. Once a customer has subscribed to a subscription service, neither the amount nor frequency of the charges nor the frequency of the service may be increased without the customer's explicit permission.

11.1.11. The format of the both the initial notification message and the monthly reminder should comply with the relevant section of the WASPA Advertising Rules.

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## Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the SP's subsequent response.

The SP has provided proof of the fact that the Complainant in this matter has indeed subscribed to its services through a website.

As can be seen on the logs and the SP's database, this was logged and subsequent services started.

Although the Adjudicator is not implying that the Complainant in this matter is not providing facts true to the best of his knowledge and hence his subsequent recollection of events, it has to be stated that in the absence of any evidence on behalf of the Complainant proving otherwise as to what was logged by the SP, it is difficult for the Adjudicator to make a finding, based on the words of the Complainant alone.

However, should there be some overriding factor(s) which might alter the opinion of the Adjudicator, mention thereof must be made, and this is indeed what is unfolding here.

It has come to the attention of the Adjudicator that there have been several complaints in the same month pertaining to the same services.

These were all lodged as formal complaints against the SP in this matter.

All complaints have its origins based on the same allegations alleged by the Complainant in this matter, uttering their frustrations with the fun club service and/or "brain age" stating that they either did not receive a pin, or when

receiving the pin, did not enter the pin and therefore did not consent to a subscription service.

In light of these circumstances and the occurrence of similar events, manifesting itself over the same time period, having regard to evidence supplied by the SP, the Adjudicator has to ask him / herself whether such evidence can be relied upon.

Without having sufficient access to the said systems generating these logs, and therefore any mechanism to guarantee the fail-save operation of the SP's operational system, the Adjudicator can also not merely imply that the SP is in breach of any section of the Code of Conduct.

The Adjudicator is however of the opinion, taking all the relevant circumstances into consideration, based on circumstantial evidence alone, that there must be an instance of malfunction on behalf of the SP, or at the very least, something to that extend.

This read together with the decision provided in Adjudication 5921, leaves the Adjudicator with no alternative but to find the SP in breach of sections 4.1.2, 11.1.2, 11.1.4 of version 6.2 of the Code and 11.1.5 of version 7.4 of the Code.

The Complaint is upheld.

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### **Sanctions**

In determining an appropriate sanction, the following factors were considered:

- The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct;

In determining an appropriate sanction, the following factors were considered:

- The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct;

The SP is instructed to refund the Complainant in full;

In addition, the sanctions provided in Adjudication 5921 refer:

1. The SP is required to suspend the service and access to the site it is hosted on until such time as it complies with the orders set out below. The SP may not initiate any new or existing billing transactions for the service during such period of suspension; however it may process any unsubscription requests;
2. The SP shall send an sms notification to all existing subscribers of the service in the format prescribed in 11.4 of the current Code (the SP shall

furnish the WASPA Secretariat with confirmation that it has notified its subscribers);

3. The SP shall ensure that welcome messages sent to the service's subscribers comply with the requirements of 11.1.10 of the current Code;

4. The SP shall clearly indicate at the first point of contact with the service and all subsequent pages and sites that the service is a subscription service and further precisely what the subscription entails. These indications must be clearly visible and unambiguous.

5. The SP shall ensure that any reference to or implication of the availability of single items is removed from the service's site such that the site only makes reference to its subscription content in clear and unequivocal terms;

6. The SP shall ensure that its terms of use are amended in accordance with Rule 9.2 of the Advertising Rules;

7. The SP is fined:

7.1. R20 000 for its breach of 4.1.2 on the basis set out above; and

7.2. R30 000 for its non-compliance with 11.1.2 and 11.1.4 in that it bundled a single item with a subscription service and its failure to adequately differentiate between single items and subscription services.

The WASPA Secretariat is also ordered to instruct the WASPA Monitor to ensure that the SP is indeed complying with this.