



## REPORT OF THE ADJUDICATOR

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<b>WASPA Member (SP):</b>	Buongiorno
<b>Service Type:</b>	Subscription Service
<b>Source of Complaint:</b>	Public
<b>Complainant:</b>	Niek Bernard de Greef
<b>Complainant Mobile Number</b>	0825483497
<b>Complaint Number:</b>	10533
<b>Date Received:</b>	20 October 2010
<b>Code Version:</b>	9.0
<b>Advertising Rules Version:</b>	Not applicable

### Complaint

The complaint is the escalation of an unsubscribe request logged via the WASPA unsubscribe facility in respect of the complainant's subscription to the SP's Fun Club service.

The salient aspects of the complainants initial correspondence is as follows:

- (i) *The complainant denied ever subscribing to this service. Pertaining to the complainant's interest in the content provided by the service, the complainant noted that since the dated of alleged subscription, the complainant has not downloaded any content offered by the SP's relevant service.*
- (ii) *The complainant does not deny receipt of unsubscribe reminder messages but notes that such messages were regarded by the complainant as "spam" due to never having subscribed to the service in question and due to the informal wording of the message.*
- (iii) *The complainant further drew attention to the content of the unsubscribe reminder messages which the complainant stated was not in compliance with section 11.5.2. of the WASPA Code of Conduct.*

Following the unsubscribe request submitted by the complainant, the SP was requested to:

- (i) *unsubscribe the complainant (customer);*
- (ii) *provide the complainant with an SMS confirmation that the complainant has been unsubscribed;*
- (iii) *produce proof of the complainant's subscription to the service in question; and*
- (iv) *contact the customer regarding a refund.*

**The SP:**

- (i) *unsubscribed the complainant;*
- (ii) *sent the complainant an SMS to confirm such action; and*
- (iii) *provided the complainant with proof of subscription.*

The unsubscribe request was escalated because the SP failed to refund the complainant. The complainant reiterated that he did not request the subscription service and that the SP's billing (frequency and amounts) was questionable.

Service provider's response

The SP responded to the complaint on the 17<sup>th</sup> of September by producing detailed subscription records of the complainant and an explanation of the subscription process as well as detailed logs of communications sent to the complainant.

It appears from the information contained in the SP's records that an opt-in request to subscribe for the service was received via WAP from the complainant's number on the 10<sup>th</sup> of September 2010. The SP provided screenshots of the WAP banner through which the subscription service appeared to be initiated, details of the typical subscription procedures following, and the information typically provided to the customer who progresses through the subscription processes.

In respect of such logs, the following subscription message(s) were sent to the complainant:

*U r subscribed to Fun Club. You get unlimited downloads. Cost R6/day. For help call 0214178001. To unsubscribe sms STOP FUN to 31194.*

*U r subscribed to Sexy Cherry Lesbian. Cost R6/ day subscription service. For help call 0214178001. To unsubscribe sms STOP L to 31191. HOT new items EVERY DAY.*

The SP noted the sending of reminder messages thereafter. The SP sent the complainant reminder messages confirming the complainant's subscription service between October 2009 – August 2010, with the exception of June 2010, during which month no subscription reminder message was sent.

The SP was unable to trace the complainant's download history but noted that billing in respect of the subscription service is not dependent on actual downloading of content offered by the subscription service.

The SP was of the view that owing to the complainant's subscription to the service as it appears from the SP's logs, that a refund was unjustified.

The logs provided further indicate (i) the entry of two further message codes in October and November 2010; and (ii) that the subscription reminder message sent on the 05<sup>th</sup> of March pertained to subscription to the "Sexy Cherry Lesbian" service and not the "Fun Club" service; (iii) the Welcome Message in respect of the subscription to the Fun Club subscription service provided that the subscription cost was R10 per day and not R 6 per day as indicated in all other subscription reminder messages.

Complainant's Reply:

The complainant responded on 05 October 2010 to WASPA's query on the satisfactory resolution of his complaint by the SP by providing as follows:

- (i) *more generally that the matter was not resolved;*
- (ii) *that notwithstanding the logs produced and description of typical subscription procedures produced by the SP, the complainant had not clicked on any banners or entered any codes;*
- (iii) *the complainant questioned the plausibility of proceeding with subscription and not downloading content;*

- (iv) *the complainant drew attention to the breaks in subscription and the change in the costs of the service thereafter; and*
- (v) *the complainant further requested that the content of the sms be examined for compliance with the Code of Conduct.*

Sections of the Code considered

### **Reference has been made to sections of the Code of Conduct**

#### **2. Definitions**

**2.8. A “commercial message” is a message sent by SMS or MMS or similar protocol that is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient.**

**2.22 “Spam” means unsolicited commercial communications, including commercial messages as referred to in section 5.2.1.**

**2.24 “subscription service” is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.**

#### **4.1. Provision of information to customers**

**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.**

#### **5.2. Identification of spam**

**5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:**

- a. the recipient has requested the message;**
- b. the message recipient has a direct and recent (within the last six months) prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or**
- c. the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.**

### 5.3. Prevention of spam

**5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.**

**5.3.2. Members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.**

### 11. Subscription services

**11.1.1 Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility or information promoted in that material.**

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

**11.1.8 It is acceptable to use the "@" sign in place of "at" in any activation message, welcome message or similar communication. Similarly, "u" may be used in place of "you" ..., and "r" may be used in place of "are".**

### 11.2 Subscription process

**11.2.1 Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.**

**11.2.4 If a subscription service is initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation message must be sent to the customer's mobile handset in order to prove that the number entered matches the customer's mobile handset number. This message may either:**

- (a) contain a PIN number which is then confirmed or validated on the web page; or**
- (b) contain a URL with a unique identifier, which, when clicked, validates the handset number.**

**11.5 Reminder messages**

**11.5.1 A monthly reminder message must be sent within 30 days of the initial notification message and once per calendar month thereafter.**

**11.5.2 The reminder message specified in 11.5.1 must adhere exactly to the following format, flow, wording and spacing:**

**You are subscribed to [name of service provider] [content/ service description]. Cost [cost of service and frequency of billing]. For help, sms HELP [optional keyword] to [short code] or call [call centre number + (VAS) if applicable]. To unsubscribe, sms STOP [service keyword] to [shortcode].**

**or**

**You are subscribed to [[name of service provider] [content/ service description]. Cost [cost of service and frequency of billing]. For help, call [call centre number + (VAS) if applicable]. To unsubscribe, sms STOP [service keyword] to [shortcode].**

**11.9 Subscription service directory and logs**

**11.9.2 When requested to do so by WASPA, a member must provide logs for any subscription service customer which include the following information:**

- (a) proof that the customer has opted in to a service or services;**
- (b) proof that all required reminder messages have been sent to that customer;**
- (c) a detailed transaction history indicating all charges levied and the service or content item applicable for each charge; and**
- (d) any record of successful or unsuccessful unsubscribe requests.**

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her.

*With reference to (i) the complaint, (ii) the SP's response to the complaint, (iii) the complainant's reply and (iv) the sections of the Code considered:*

**The complainant raised several concerns about the plausibility of having subscribed to the service and the SP's compliance with the Code. With the facts presented before me, I cannot rule out that a person would have subscribed to a service and not downloaded any content. I cannot on this basis speak specifically to issue of plausibility. Further in view of the service being billable irrespective of the downloading of content, I find this fact only of service for the purpose of inference as to whether the complainant had any interest in the service offered by the SP.**

**Regarding the SP's compliance with specific sections of the Code of Conduct, I have reviewed sections of the Code of Conduct pertaining to subscription services, subscription processes, the billing discrepancies, the contents of reminder messages, the provisions pertaining to spam, and the content of the logs to be produced by the SP which were the concerns raised by the complainant.**



I note that the contents of the logs produced by the SP are disputed by the complainant - specifically the details pertaining to the entry of the message codes and the details of the subscription process. Purely with reference to the content of the logs produced by the SP, it emerges that:

- (i) has met its obligations in respect of the provisions pertaining to subscription services and processes in respect of the Fun Club service with the exception of the irregularity of the billing amount specified in the welcome message;
- (ii) has not met its obligations in respect of the provisions pertaining to subscription processes in respect of the Sexy Cherry Lesbian service as the logs make no reference to, *for instance*, the welcome message that is meant to follow subscription by the complainant to service;
- (iii) that the SP has not met its obligation to provide a reminder message to the complainant each month in that the SP did not send the complainant a reminder message in June;
- (iv) should the complainant have subscribed to the Sexy Cherry Lesbian service, that only one reminder message was sent in this respect of this service;
- (v) that the reminder messages sent in respect of the Fun Club service following the introduction of Version 9.0 of the Code on the 30<sup>th</sup> of March 2010 do not comply with the requirements of the Code of Conduct;

The cell-phone billing records of the complainant provide further insights. I find:

- (i) that the fees levied by the SP on the complainant are irregular, inconsistent and curiously, do not correlate with the logs produced by the SP regarding the fees that should have been levied per month for the services to which the complainant was meant to subscribed.

Hence, whilst the SP's response on the 17<sup>th</sup> of September intends to depict an accurate and thorough system in use by the SP to ensure proper procedures in compliance with the Code of Conduct, the billing records produced by the complainant are less convincing of the accuracy of the SP's internal processes. Read with the failure to follow proper subscription processes in respect of the Sexy Cherry Lesbian service, I find the SP's practices fall short of the requirements of the Code of Conduct to an unacceptable extent. Further, on the basis of the conflicting information presented by the parties and the inference drawn that the complainant has in fact no interest in the service, I question the integrity of the SP's records. I find that the complainant did not legitimately subscribe to any of the services.

#### Sanctions

Having reviewed numerous other complaints against the SP and the issue of the questionable content of the records and logs produced by the SP, the SP is:

- (i) **Ordered to refund the complainant in full in respect of the Fun Club service and the Sexy Cherry Lesbian service** send proof of the refund to the WASPA Secretariat within 7 (seven) days of receiving notice of this Report;
- (ii) **Fined an amount of R 30 000.00 payable to the WASPA Secretariat within ten (10) days of receipt of this report;**
- (iii) **Ordered to ensure that all future reminder messages sent to the SP's customers are compliant with the requirements of the current Code of Conduct;**

Further, the WASPA Secretariat is to instruct the WASPA Monitor to investigate and report to the Secretariat regarding the accuracy of the logs produced by the SP in this complaint. In this regard, the SP shall:

- (i) *Provide the WASPA Monitor with access to all logs and information necessary for the WASPA Monitor to determine to the Monitor's satisfaction the accuracy or inaccuracy of the logs produced by the SP in this complaint.*