

REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Blinck Mobile
Information Provider (IP): (if applicable)	N/A
Service Type:	Subscription
Complainant:	Consumer
Complaint Number:	5479 & 6133
Code version:	Code v6.2 and Ad Rules v3.2
Date of Report:	27 September 2009

1. These complaints involve very similar facts; while different complainants are involved, their similarity calls for their being dealt with together. As complaint 6133 sets out the facts most comprehensively, I will deal with it first, and refer to the facts of complaint 5479 thereafter.

Complaint 6133

2. On the 26th of March 2009 the complainant, a member of the public, entered an unsubscribe request in WASPA's online unsubscribe service in respect of a subscription service offered by the Member. After successfully unsubscribing from the service, the Complainant elected to continue with a complaint against the Member in terms of the WASPA Code of Conduct.
3. Before continuing with a discussion of the facts, it is important to note that several persons seem to be involved in this matter on the Complainant's side. The complaint itself is made by the Complainant's husband, and there is considerable input by a third party whose email address is in the "fontera.com" domain. As Fontera is an affiliate member of WASPA, I was tempted to treat this complaint as a "competitor" complaint; however, after perusing the documents I am satisfied that this third party was merely assisting the Complainant in good faith. As there is nothing in the complaints procedure set out in the WASPA Code of Conduct forbidding third parties from assisting complainants in lodging complaints, I will take the submissions made by this third party as being made on behalf of the Complainant. Reference to the "Complainant" for simplicity's sake refers to submissions by any of these parties.
4. The submissions on the part of the Complainant can be summarised in the following terms:

- 4.1. The Complainant began receiving premium-rated SMSes on the 4th of January 2009 from the Member, which she did not request.
- 4.2. After unsubscribing, the Complainant made enquiries as to how she was subscribed in the first place. The Complainant describes the process as follows:

I was contacted by someone at Blink mobile who said that Sharlene "had subscribed" to the service via the following banner ad. Sharlene thinks it may have been via Facebook but is not sure and can't remember what the banner actually said. It was something along the lines of do a free IQ test.

<http://www.celldorado.com/ZA/ADS/1151146916/>

One clicks on this link, and fill in your name and do the IQ test (5 easy questions and takes 2 secs) At the end it asks for your cell phone number to send the results to. (It does not give you the results unless you fill in your cellphone number). What happens is that they send you a pin number to fill in to the website to get your results.

There is a lot of blurb around the questions about a subscription service to receive 3 games a week. What I can not see however is a statement saying that playing the IQ game subscribes you automatically to the service. It also never actually asks you if you want the service. By playing the "free IQ game", you get fooled into giving your cellphone number and hey presto you are subscribed. It advertises a subscription service at R60 a week but clearly the question "do you want to subscribe" or the statement that playing the game automatically subscribes you is not obvious to me.

- 4.3. The Complainant says that the Member made contact on the 1st of April 2009 and promised a full refund of monies debited in respect of the subscription service, but that this was never effected.
5. Further submissions were made on behalf of the Complainant and in sum the Member is alleged to have infringed the Code of Conduct in the following respects:
 - 5.1. The subscription service subscription was unsolicited, in that the Complainant was not aware that she was subscribing to a subscription service when she played the "IQ Test" game.
 - 5.2. No welcome message was sent to the Complainant as contemplated in section 11.1.7 of the Code of Conduct; nor were monthly notifications sent as required by section 11.1.8.
 - 5.3. The unsubscribe message received by the Complainant does not adhere to the requirements set out in the Code of Conduct.
 - 5.4. The Member's offer of a refund was not carried through.
6. The WASPA Secretariat supplied a screenshot of the first page of the "IQ Test" but it had been removed from the URL supplied when I attempted to view it online at the URL given by the Complainant. The supplied screenshot is attached as Annexure "A".

Response

7. On the 7th of April 2009 the Member responded to the complaint, and the points made in respect of each element of the complaint are set out below.
8. On the question of the unsolicited subscription, the Member stated that:

The fact that this service is a subscription service for games is clearly mentioned on the landing page on which the customer fills in its MSISDN. In the below left hand corner and upper right hand corner of the Landing Page we mention 'subscription service - R60 / week' and we also clearly state 'Join now and Get Mobile Games'. The IQ Test game is the first game the customer will get once subscribed to this service. The simple and short IQ Test the customer plays before subscribing is a preview of the IQ test the customer will get once subscribed.

Secondly, before the customer is subscribed we mention again in the SMS message in which the pin code to confirm a subscription is provided to the customer, that it is a subscription service. This message was sent to this customer on the 4th of January 2009.

Thirdly, on the webpage on which the customer has to enter his pin code in order to confirm the subscription service ('double opt-in), we mention again that it is a subscription service, in the same way as we do on the Landing Page

Fourthly, in the welcome message we mention again that it is a subscription service. This welcome message was sent to this customer on the 4th of January, 2009.

Fifthly, in the monthly reminder message, we again remind the customer that he/she is subscribed. These monthly reminder messages were sent to this customer on the 4th of February, 2009 and the 4th of March, 2009.

9. In response to the second and third elements of the complaint, the Member referred to its MO/MT Report which it attached to the response. The relevant entries are as follows (in reverse order):

>>	1	2009-03-26 13:00:57	31631	ZA_31631_GAME _W1_WGAME8	You have been unsubscribed from WGAME8.If you want to subscribe again txt WGAME8 to 31631.For cool sounds join BEEP(R10/sms,3sms/wk)Txt BEEP to 31631
>>	31	2009-02-04 19:36:35	31631	ZA_31631_GAME _W1_WGAME8	Reminder: you are subscribed to WGAME8. Info? 0800 980963. R20/sms, max 3sms/wk.For the best MP3 hits on your cell join TIP(R20/sms,3sms/wk)Txt TIP to 31631
>>	52	2009-01-04 10:04:32	31631	ZA_31631_GAME _W1_WGAME8	Welcome to WGAME8! You will get yourfirst game now! Info? za.celldorado.com/0800980963 (R20/sms) subscription service. Stop?

WGAME8 stop. (max 3sms/week).ENJOY

<< 53 2009-01-04 31631 10:04:27 WGAME8 OK PIN=11134 1151146916 434471034 41.6.231.175 confirm

>> 54 2009-01-04 31631 10:03:31 ZA_31631_GAME_W1_WGAME8 Fill in this game code 11134 to get ur IQ test! Or reply OK. You'll also get a BONUS GAME in the WGAME8 club! Info:za.celldorado.com/0800980963R20/sms 3sms/

<< 55 2009-01-04 31631 10:03:29 WGAME8 ON PIN=11134 1151146916 434471034 41.6.231.175 subscribe

10. The Member advised in response to the final element that it had contacted the Member on the 1st of April and offered a full refund of R540.

Portion of the Code Considered

11. As the conduct complained of took place between January and March 2009, version 6.2 of the WASPA Code of Conduct is applicable, of which the following portions are of relevance to this complaint:

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.

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.

11.1.2. 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.

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

11.1.7. 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.

Decision

Unsolicited entry into a subscription service

12. It is the Complainant's contention that she was not aware that participation in the "IQ Test" game would lead her to be subscribed to a subscription service. The process that emerges from the account of both parties is that a banner advertisement would be placed in a website (possibly on the Facebook website in this case but the Complainant is not certain). Upon clicking on the banner advertisement, the consumer would be taken to a website operated by the Member. The first page of that website looked substantially similar to that set out in annexure "A". To play the "IQ Test" game, consumer would fill in the required fields on that and subsequent web pages. Upon completion of the test, the consumer would be requested to enter his/her MSISDN into a field in the website. The Member's system would then send the consumer an SMS with a PIN number to be filled in on the website. Upon the consumer entering the PIN in the website, the results of the "IQ Test" would be revealed, and the Member would subscribe the consumer to a subscription service for R60 per week.

13. I accept that the Member complies with the letter of the Code of Conduct by displaying "Subscription Service" where required on its promotional material. However, as I have stated in previous adjudications, mere use of the words "subscription service" is not a talisman which allows Members to use otherwise misleading methods to subscribe consumers to their subscription services. In this case the Member seems to have pasted the words "subscription service" on all pages of the "IQ test" website and then proceeded on a course of blatant deception. The method used by the Member in this matter was misleading for two reasons:

13.1. The call to action in promotional material for subscription services must be in respect of the services being advertised, not something else such as a

promotional game. If the game had ended with the consumer having to view a page promoting the Member's services before the results of the IQ test could be accessed there would probably be no infringement of the Code of Conduct. In this case however, playing a promotional game lead directly to subscription, when the promotional material gave little overt notice that such a subscription would be effected.

- 13.2. The second misleading aspect relates to the first: the "IQ Test" did not relate to the service that the Complainant was ultimately subscribed to, despite the Member's protestations to the contrary. The "IQ test" is an online game set up on a website. The games to which the subscription service applied however were games to be downloaded and run on a handset. They are distinct classes of product, and a consumer who plays an online game would firstly not associate it with a handset game, and would certainly not expect playing such a game to result in subscription to a service.
14. In summary, the Member misled the Complainant by disguising a subscription process as a game, happy in the knowledge that many consumers would not read the fine print and hence be subscribed to their service. See also adjudication 6868 in this regard.
15. The gravity of the Member's conduct would have been ameliorated (but by no means excused) if the message sent to the Complainant with the PIN (see MO/MT log number 54) had contained an adequate warning that response would lead to subscription. It did not, and "R20/sms 3sms/" is certainly not adequate.
16. The Member's submission that SMSes sent to the Complainant after the subscription had been effected contained the words "subscription service" are irrelevant as the damage had by then already been done.
17. I accordingly find that the Member has infringed clause 4.1.2 of the Code of Conduct in that its promotional material was likely to mislead by inaccuracy, ambiguity, exaggeration or omission.
18. The Member is also guilty of infringing clause 11.1.2 in that consumers do not subscribe to the service with that intention, but rather with the intention of playing the "IQ Game", and the Member has also infringed clause 11.1.4 for the same reason.

Lack of a welcome message and no monthly notifications sent

19. The Complainant is correct in identifying the Member's welcome message as being in contravention of the Code of Conduct – clause 11.1.7 thereof to be precise; however, this issue has already been dealt with in adjudication 6034. As this complaint took place before the Member had received notice of that adjudication, it would be unfair to sanction it again for this contravention.

Unsubscribe message received by the Complainant in violation of the Code of Conduct

20. The Code of Conduct sets no requirement for the format of an unsubscribe message. The Member has thus not infringed the Code in this case.

The Member promised a refund to the Complainant but this was never fulfilled

21. The Member contends that it made a telephonic offer of a full refund to the Complainant on the 1st of April 2009; the Complainant concurs but says that it has not heard anything from the Member since then. This constitutes a possible infringement of section 3.1.1 of the Code of Conduct in that such conduct is unprofessional; under the circumstances however the reasonable possibility exists that the Member was awaiting the outcome of this complaint before making what could be interpreted as an admission of guilt. I thus find that the Member has not infringed the Code of Conduct in this respect.

Complaint 5479

22. The facts of complaint 5479 are very similar to those of complaint 6133. The complaint was made on or about 5 January 2009 and relate to the same "IQ Test" game involved in complaint 6133:

Affiliations: I am not employed by, or otherwise associated with one of

WASPA's member companies

Affiliation_Information:

Name_WASP: Unknown

OtherID: Celldorado

Code_Breached:

Detailed_Description_Complaint: They are using people's ignorance and naivete to subscribe them into R20 a game subscriptions. I played a joke IQ game on Facebook and then find myself subscribed - an sms in nerd-speak mentions sms-ing back but it took me some minutes of re-reading it and checking the website to realise I must immediately send the stop sms. Most people won't realise this. Do something about this or I am going to take it wider.

Middle aged IT savvy South African

23. The WASPA Secretariat transmitted the complaint to the Member on the 1st of April 2009. The Member's response, received on the 7th of April, is materially the same as that in complaint 6133; the Member confirms however, that the Complainant did not incur any charges. A MO-MT report was attached to the Member's response, which is also materially the same as that listed in complaint number 6133, and further confirms that the subscription process relates to the same service as that in complaint number 6133.
24. I am satisfied that the complaint in this instance is identical to the first element of complaint 6133, and that the Member has infringed clauses 4.1.2, 11.1.2 and 11.1.4 of the WASPA Code of Conduct.

Sanction

25. I will apply sanction for both complaints together as they arise from the same set of facts.
26. The Member is quite aware of the potential for abuse where “bundling” of subscription services is concerned, and should be equally aware of the dim view taken of such behaviour by WASPA. While I have dealt with previous examples of bundling on the part of the Member which took place around the same time as conduct complained of, this particular conduct is sufficiently distinct from the other complaints against the Member to warrant special treatment. The Member can thus not benefit from the argument that other similar misconduct took place at the same time and that a separate sanction in this case would amount to “double jeopardy”.
27. The following sanctions are imposed on the Member in respect of its infringement of sections 4.1.2, 11.1.2 and 11.1.4 of the Code of Conduct:
- 27.1. The Member is fined the amount of R75 000, payable to the WASPA Secretariat within 5 working days of receipt of notification of this report, and
- 27.2. The member is to provide a full refund to all consumers who began their subscriptions to the service described as “ZA_31631_GAME_W1_WGAME8” from the 4th of January 2009 up until the date on which the “IQ Test” game banner ad was last flighted and the “IQ Test” web site was taken off-line, or the 31st of March 2009, whichever date is the later. The network operator(s) concerned should if necessary give effect to such a refund as contemplated in clause 13.4.3(g) of the Code of Conduct.
28. I realise that the refund describe above may include many consumers who did not subscribe to this service by means of the “IQ Test” game, but as there is presumably no way of differentiating them from those that DID, I have little option but to make the above order. If the Member can satisfy the WASPA Secretariat that the distinction CAN be made, then the refund can be made to consumers who subscribed to the service between the above dates by way of the “IQ Test” game.

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Annexure A

Celldorado IQ Test IQ Test

http://www.celldorado.com/ZA/ADS/1151146916/

Apple Yahoo! Google Maps YouTube Wikipedia News (179) Popular

SUBSCRIPTION SERVICE - R60/WEEK.

Are you a donkey
or an Einstein?

IQ test

Fill in your name here:

next

Subscription service - R60/Week.

This subscription service is available for all networks. You will receive 3 games per week which will be charged at R 20 per item. Download charges may apply. The shown item(s) form(s) part of the subscription service and is/are indicative of the content items that will be received. To cancel the service, send STOP WGAME8 to 31631. Bill payer's permission required. Min. age 18+ or with permission of parent or guardian. Celldorado operates according to the South African Wireless Application Service Providers Association Code of Conduct. Celldorado offers innovative information and entertainment for your mobile, such as ringtones, Javagames and wallpapers. Celldorado offers original, unique services with the highest standards. IP: Blinck. Helpdesk: 0800 980 963.

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