



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP):</b>	Buongiorno UK
<b>Information Provider (IP):</b>	Not applicable
<b>Service Type:</b>	Unsubscribe Request
<b>Complainants:</b>	Nicola Walters
<b>Complaint Number:</b>	7008
<b>Code Version:</b>	6.2
<b>Advertising Rules Version:</b>	N/A

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### Complaint

This complaint is the escalation of unsubscribe request.

The Complainant wrote:

“The mobile number \*\*\*\*\* is used as a G3 sim card ONLY so only the "bundle" should be charged recently. SMSs were sent to me which I deleted and my account was then with NO AUTHORISATION FROM ME debited. No itemised billing has been issued just a "content charge" all have now been unsubscribed but this experience has cost me over R900.00”

The Complainant was not satisfied with the SP’s response and provided the following reason for escalation:

“However, I did NOT authorise their or subscribe in any way to for any of their services, and I would like copies from them of proof of authorisation, they cost me considerable money and HUGE inconvenience in that the cell phone ran over the limit and was stopped and as I only ever use this number for the G3 system I was unable to send e mails for 3 days, this grossly effected my business.

I don’t consider that, whilst I did receive some SMSs I deleted all of them that anyone should have the right to debit my account for anything that I have not signed for, or for which they do not have a recording of authorisation.

I don’t consider that this issue should just be resolved and closed, how many other people are going to do this to, and how much money are

they deducting from innocent people by their unauthorised and dubious business practises? I believe that they should have to give me proof of authorisation, which they will not be able to do, or refund me all moneys deducted.”

The Complainant responded to the SP's reply:

“I totally dispute this I clicked on the mail and deleted it and later clicked on the mail to send SMS to say STOP, I have NEVER seen these sites nor do I wish to, so NO I don't consider that it is satisfactorily resolved, but I thank you for your efforts. This matter is being disputed by so many people, and I think it likely that a leading TV programme and consumer watch people will run with it.”

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

The SP states the following:

“We thank you making this matter known to us.

After investigation this matter we discovered that the user had subscribed to the Sexy Cherry mobile subscription service and the Fun Club.

The Sexy Cherry banner that the user clicked on and subscribed is shown below:

Further below is the Leona Lewis Banner that the user clicked on, which lead to the user's subscription to the fun club.

After selecting these banners, the user click the join now links of the pages that followed, which is how the various subscriptions was started. All pages accessed by the user shows the Terms and conditions of Subscription clubs the user subscribed too. The terms and conditions inform the user of the mobile device at the time of interaction with these services that the user needs to obtain the bill payers permission.

In the detail options window it is shown that the user selected the media key displayed in the detail options windows below.

Accessing of these sites would possibly be verified by the user's network carrier, as per the user the card is intended for Internet browsing only and 3G connectivity. The onus does however fall on the account holder to safeguard his or her items and internet usage.

Messages sent to the user informed the user of the subscription to the fun club and Sexy Cherry.

In this regard we do not deem a refund justified, as interaction with these services are clearly shown in the system generated logs provided.

Please note that the user is no longer subscribed to any of Buongiorno mobile content subscription services and billing has stopped.”

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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.

The SP has provided proof of the fact that the Complainant in this matter has requested to stop its subscription services. Logs were also provided to indicate the sending of subsequent reminder messages. No other information was provided by the SP.

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 real evidence on behalf of the Complainant, the facts would under normal circumstances amount to mere speculation.

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 period 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, complainants uttering their frustrations with either

the “IQ test”, “Brain-age” or other fun club services such as the Sexy Cherry service in this case, stating that they 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 and whether there might be a case of bundling and an instance of the SP misleading its customers?

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 decisions provided in Adjudication 5921, 6039, 6112 and several others, leaves the Adjudicator with no alternative but to find the SP in breach of sections 4.1.2, 11.1.2, 11.1.4 and 11.1.5 of version 7.0 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;

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.

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