

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, by
ANDREW CUOMO, Attorney General of the State of
New York,

Petitioners,

-against-

BRIGHT PAGES, L.L.C. Michael L. Smith and Shannon
Courtney Mabry, Individually, and as principals of Bright
Pages L.L.C.,

Respondents.

CONSENT ORDER
AND JUDGMENT

Index No.: 400301/08
(Edmead, J.)

Upon the order to show cause dated February 14, 2008; the verified petition dated February 3, 2008; the affirmation of Assistant Attorney General Melissa Saren dated February 13, 2008, together with the exhibits thereto; the affidavit of Postal Inspector Christopher R. Cizin sworn to on January 25, 2008, together with the exhibits thereto; the verified answer of respondents dated March 14, 2008; and the affidavit of respondent Michael L. Smith sworn to March 13, 2008, with exhibits thereto;

IT NOW APPEARS that Bright Pages LP,¹ Michael L. Smith and Shannon Courtney Mabry are willing to enter into this Consent Order and Judgment, without admitting any of the allegations contained in the petition. Bright Pages, LP, Michael L. Smith and Shannon Courtney Mabry expressly deny that their conduct constituted any violation of law, but they are nevertheless willing to enter into this Consent Order and Judgment so that this matter may be resolved without further litigation. Further, to the extent that any changes in Bright Pages, LP's

¹ Bright Pages LLC was converted to a limited partnership in 2007 and its name was changed to Bright Pages, LP. BRIGHTPAGES.COM is an assumed name under which Bright Pages, LP is authorized to do business pursuant to General Business Law § 130.

business, advertisements or advertising practices are made to achieve or facilitate conformance to the terms of this Consent Order and Judgment, such changes shall not constitute any form of evidence or admission, explicit or implicit, by Bright Pages, LP, Michael L. Smith or Shannon Courtney Mabry of wrongdoing or failure to comply with any statute or regulation or the common law in other litigation to which the Attorney General is not a party.

NOW, on motion of Andrew M. Cuomo, Attorney General for the State of New York, attorney for petitioners herein (Joy Feigenbaum and Melissa Saren, Assistant Attorneys General, of counsel) and upon the consent of respondents, Bright Pages, LP, Michael L. Smith and Shannon Courtney Mabry, and their attorney, Daniel J. Buzzetta, Esq., and the Consent and Stipulation dated April 22, 2008, it is hereby:

PARTIES SUBJECT TO ORDER

ORDERED, ADJUDGED AND DECREED that this Consent Order and Judgment shall extend to Bright Pages, LP, its principals, directors, officers, shareholders, employees, successors, assignees and agents acting in concert or in participation with it who are involved in the conduct of Bright Pages LP's internet yellow pages business which is the subject of this litigation (the "Business"); and, to Michael L. Smith and Shannon Courtney Mabry, individually and in their capacity as principals of Bright Pages LP, and their employees and agents acting in concert or in participation with them who are involved in the conduct of the Business; and, to any corporation, company, business entity or other entity or device through which Bright Pages, LP, Michael L. Smith and Shannon Courtney Mabry may now or hereafter act or conduct the Business (hereinafter collectively referred to as "Respondents"); and it is further

DEFINITIONS

1. **ORDERED, ADJUDGED AND DECREED** that for purposes of this Consent Order and Judgment, the following terms shall have the following meanings:

- a) “Clearly or Conspicuously” or “Clear and Conspicuous” means that the statement, representation or term being disclosed is of such size, color, contrast and/or audibility and is so presented as to be readily noticed and understood by the person to whom it is being disclosed. If such statement is necessary as a modification, explanation or clarification to other information with which it is presented, it must be presented in close proximity to the information it modifies, in a manner so as to be readily noticed and understood. In addition to the foregoing, in interactive media, the disclosure shall also be unavoidable (i.e., no click-through required to access it), and shall be presented prior to the customer incurring any financial obligation.
- b) “Eligible Restitution Customer” shall mean any customer who purchased and paid for a listing in Respondents’ Business from November 1, 2006 through the date of entry of this Order, and who has not received a full refund from Respondents; and it is further

PROHIBITED PRACTICES

2. **ORDERED, ADJUDGED AND DECREED** that Respondents are hereby permanently enjoined from engaging in any acts or practices in violation of New York Executive Law § 63(12) and New York General Business Law § 350, including all of the following acts or practices in connection with Respondents’ Business.

- a) Distributing solicitations, order forms and invoices that contain reference to or representation of the term “Yellow Pages” and/or the “walking fingers logo,” without Clearly and Conspicuously disclosing that the solicitation, order forms and invoices are from Respondents;

- b) Distributing solicitations, order forms and invoices that represent, directly or by implication,² that Respondents have an existing business relationship with the recipients, unless such is the case;
- c) Distributing solicitations and order forms that represent, directly or by implication, that Respondents are seeking confirmation of existing advertising listings rather than selling a new service, unless such is the case;
- d) Distributing solicitations and order forms that represent, directly or by implication, that recipients must respond by a certain deadline date, unless the failure to respond by the deadline date will result in expiration of an offer contained in the solicitations and order forms;
- e) Distributing solicitations and order forms that fail to Clearly and Conspicuously disclose that Respondents are selling listings on Respondents' online directory;
- f) Distributing solicitations, order forms and invoices that list a price for Respondents' service based upon a specific billing period when, in fact, Respondents charge customers based upon a different billing period;
- g) Distributing or publishing solicitations and/or order forms that fail to Clearly and Conspicuously disclose all material terms of the offer; and
- h) Failing to timely honor requests received for refunds and/or cancellations; and it is further

² Wherever the phrase "represent, directly or by implication" is used in this Consent Order and Judgment, it shall refer to representations that may be implied from the totality of the solicitation, invoice, order form or other medium in which the representation is made.

RESPONDENTS' BUSINESS FORMS

3. **ORDERED, ADJUDGED AND DECREED** that in all solicitations, order forms and invoices distributed by Respondents for Respondents' Business that contain a reference to or representation of the term "Yellow Pages" and/or the "walking fingers" logo:

- i) Respondents' company name shall precede and shall be as prominent, taking into account the type size, color, contrast and spacing, as any reference in that section to the term "Yellow Pages" or the "walking fingers logo".
- ii) Respondents shall Clearly and Conspicuously disclose on its solicitations the phrase "online listing order form" in close proximity to a reference to or representation of the term "Yellow Pages" or the "walking fingers" logo and in type as large and as prominent in color, contrast, and spacing, relative to the size of the solicitation, as the first reference to "ONLINE LISTING ORDER FORM" on the solicitation annexed here as Exhibit A; and it is further

4. **ORDERED, ADJUDGED AND DECREED** that:

- i) The document annexed as Exhibit A is an example of a document which complies with the applicable provisions of paragraph 2 and with paragraph 3 of this Consent Order and Judgment.
- ii) The distribution by Respondents of solicitations, order forms or invoices that are different from Exhibit A shall not be deemed a violation of this Consent Order and Judgment provided such materials comply fully with the terms of this Consent Order and Judgment; and it is further

RESTITUTION

5. **ORDERED, ADJUDGED AND DECREED** that Respondents are hereby directed to timely make full refunds to all customers who request a refund and cancellation of Respondents' service, either by contacting Respondents directly, or by filing a complaint with the New York Attorney General's Office, the United States Postal Inspection Service, any other government agency, or the Better Business Bureau; and it is further

6. **ORDERED, ADJUDGED AND DECREED** that The Garden City Group, Inc., shall serve as the third party administrator (hereinafter "the Administrator") for purposes of making restitution to Eligible Restitution Customers in accordance with the terms of this Consent Order and Judgment, whose fees shall be borne by Respondents; and it is further

7. **ORDERED, ADJUDGED AND DECREED** that Respondents shall provide to the Administrator and the Attorney General within ten (10) business days of the entry of this Consent Order and Judgment a database setting forth a list of Eligible Restitution Customers of Bright Pages, which shall include the customers' names, addresses, telephone numbers and zip codes, the total amount of all monies paid by each Eligible Restitution Customer to Respondents by check, credit card, or other method; and the total amount of any refunds that Respondents paid to each Eligible Restitution Customer to date; and it is further

8. **ORDERED, ADJUDGED AND DECREED** that within thirty (30) days after delivery of the database of information regarding the Eligible Restitution Customers from Respondents as required by the preceding paragraph, the Administrator shall mail to all Eligible Restitution Customers included on the database, a notice in the form annexed hereto as Exhibit B in an envelope whose return address shall be "Garden City Group, Inc., as Settlement Administrator for the Attorney General of the State of New York"; and it is further

9. **ORDERED, ADJUDGED AND DECREED** that the Administrator shall review all claims for restitution received from Eligible Restitution Customers, make a determination as to customers' entitlement to restitution, and make restitution payments to those Eligible Restitution Customers who are determined by the Administrator to be entitled to restitution as further set forth herein; and it is further

10. **ORDERED, ADJUDGED AND DECREED** that the Administrator's decision as to an Eligible Restitution Customer's entitlement to restitution shall be based upon an evaluation of the claim forms to determine whether the customers did not understand the terms of the offer to which they responded when purchasing Respondents' online directory services. If the Administrator determines that customers did not understand the terms of the offer, the customers will be paid restitution of the full amount of all monies they paid to Respondents minus any refunds they already received, subject to the limitation set forth in paragraph 14 below regarding a potential pro rata distribution. Any questions that the Administrator has about the claims form process must be directed to the Attorney General's Office in writing with a copy to Respondents; and it is further

11. **ORDERED, ADJUDGED AND DECREED** that claim forms completed by customers must be postmarked within thirty-five (35) days of the date of mailing by the Administrator to be eligible for restitution pursuant to this Consent Order and Judgment, which date may be extended by the Administrator for an additional forty-five (45) days for good cause based on the volume of claim form responses; and it is further

12. **ORDERED, ADJUDGED AND DECREED** that the Administrator shall review all the returned claim forms within forty-five (45) days of the last date for customers to return said claim forms to the Administrator, which date may be extended for good cause based upon

the volume of claim form responses, shall calculate the total amount due customers as restitution pursuant to this Consent Order and Judgment, and shall provide Respondents with an electronic list of the names and account numbers of the customers entitled to refunds in the same electronic database format as provided to the Administrator, which shall certify the amount necessary to make the restitution payments as calculated by the Administrator. Within five (5) days following receipt by Respondent of the electronic list of the names and account numbers of the customers entitled to refunds, Respondent shall cancel the accounts of all such customers; and it is further

13. **ORDERED, ADJUDGED AND DECREED** that the sum of \$3,236,471.40 presently on deposit at JP Morgan Chase, Account Number 0913862506-65 and 2736017753, shall be distributed as follows: (i) the sum of \$150,000 shall be released payable to the State of New York and shall be delivered to the Attorney General's office to pay the penalty amount as set forth in Paragraph 15 below; and (ii) the balance shall be paid to the Administrator within ten (10) days following entry of this Consent Order and Judgment to be held and disbursed by the Administrator as set forth below. After those payments are made, the above referenced accounts and any balances therein shall be released from the terms of the Temporary Restraining Order; and it is further

14. **ORDERED, ADJUDGED AND DECREED** that the Administrator shall hold the funds received in an interest bearing account to be disbursed by the Administrator as follows: (i) to pay the Administrator's expenses including all expenses incurred in mailing the notices called for by this Consent Order and Judgment; and (ii) to make payments to all Eligible Restitution Customers who have been determined by the Administrator as being entitled to restitution which shall be made by the Administrator within thirty (30) days after the Administrator determines the total amount due to all Eligible Restitution Customers entitled to

restitution. In the event that the amount of restitution due Eligible Restitution Customers plus the Administrator's expenses exceeds the sum of \$3,086,471.40, the Administrator is directed to make restitution on a pro-rata basis to Eligible Customers based on the amount available after deduction of the Administrator's expenses. In the event that the amount due Eligible Restitution Customers plus the Administrator's expenses does not exceed the sum of \$3,086,471.40 the difference up to the amount of \$1,078,823.80 shall continue to be held by the Administrator for a period of eighty (80) days from the last date of the mailing of the claim forms by the Administrator and the balance in excess of \$1,078,823.80, if any, shall be paid to Bright Pages, LP. Following the eighty (80) days, the Administrator shall determine the amount necessary to pay its expenses in concluding its obligations under the Consent Order and Judgment and the amount necessary to pay all outstanding checks sent to Eligible Customers, and shall retain an amount sufficient to cover payment of such anticipated expenses and the outstanding checks, and any remaining balance in excess thereof shall be paid to Bright Pages, LP. The Administrator shall continue to honor restitution checks for one (1) year from the date issued. Any funds remaining in the Administrator's control after one (1) year after the date of the last check issued to an Eligible Restitution Customer, following the payment of the Administrator's expenses, shall be paid to Bright Pages, LP. The Administrator shall provide to the New York Attorney General's office and to Respondents monthly statements of the activity in the Administrator's account and copies of the monthly bank statements for the account in which the Respondents' funds are deposited until all funds have been disbursed; and it is further

PENALTY

15. **ORDERED, ADJUDGED AND** that within ten (10) days following entry of this Consent Order and Judgment, Respondent shall pay from the JP Morgan Chase accounts, Account Number 0913862506-65 and 2736017753 to the Attorney General's Office, as

penalties, the sum of one hundred and fifty thousand dollars (\$150,000) made payable to the State of New York and JP Morgan Chase is authorized and directed to issue such payment ; and it is further

COMPLIANCE

16. **ORDERED, ADJUDGED AND DECREED** that in order to assure compliance with this Consent Order and Judgment Respondents shall:

- a) Maintain, for a period of twenty-four (24) months from the date the record is produced, the following records relating to Respondents' Business:
 1. All solicitation forms, order forms, invoice forms and other forms sent to customers soliciting customers to purchase an internet yellow page directory listing from Respondents and/or payment for such purchases;
 2. The name and last known address of each customer who purchases an internet yellow page listing from Respondents, the date of purchase, the dates such service was provided, and the amounts paid by the customer for the service.
- b) Maintain procedures with regard to the handling of oral and written customer complaints and/or requests for cancellation and/or refunds, relating to Respondents' Business including maintaining for a period of at least twenty-four (24) months from the date of receipt of the complaint or request (i) a copy of all written complaints or requests for cancellation and/or refunds received, (ii) a record of all oral requests for cancellation and/or refunds, including the name, address and telephone number of the customer from whom each request was received, (iii) the amount of refund

requested, and (iv) Respondents' responses, if any, to all requests for cancellation and/or refunds as maintained by Respondents in the ordinary course of its business.

- c) Make such records, complaints, and responses available for review by the Attorney General, upon request by the Attorney General; and it is further

17. **ORDERED, ADJUDGED AND DECREED** that in order to assure compliance with this Consent Judgment and Order, Respondents, through their principal Michael Lee Smith, are hereby directed to:

- a) Within three (3) months following entry of this Consent Order and Judgment, and then one (1) year thereafter, submit to the Attorney General an affidavit confirming that Respondents are in full compliance with each and every term of this Consent Judgment and Order, including, but not limited to, the injunctive and remedial terms; and
- b) Provide to the Attorney General such other documents as the Attorney General shall reasonably determine are necessary to assure compliance with this Consent Order and Judgment; and it is further

18. **ORDERED, ADJUDGED AND DECREED** that nothing contained in this Consent Order and Judgment and Order shall be construed to deprive any person or entity of any private right under the law; and it is further

19. **ORDERED, ADJUDGED AND DECREED** that this Consent Order and Judgment is in full settlement and resolution of the proceeding commenced by Petitioners on February 14, 2008, pursuant to Executive Law § 63(12) and General Business Law § 350 against Respondents. Petitioners will not bring any further action or proceeding based on the acts and

practices alleged in the verified petition that violate those statutes. The terms of the Temporary Restraining Order dated February 14, 2008 are hereby dissolved except as to the disbursement of the sum of \$3,236,471.40 presently on deposit at JP Morgan Chase, Account Number 0913862506-65 and 2736017753 which shall be disbursed pursuant to the terms of paragraph 13 of this Consent Order and Judgment; and it is further

FURTHER AND OTHER RELIEF

20. **ORDERED, ADJUDGED AND DECREED** that this Court shall retain jurisdiction of this proceeding for the purpose of carrying out the terms of this Consent Order and Judgment and any party to this Consent Order and Judgment may apply to this Court for such other and further relief as may be necessary to effectuate the terms of this Consent Judgment and Order, upon five (5) days notice to all other parties.

DATED: New York, New York
April 22, 2008

ENTER


J.S.C.
HON. CAROL EDMOAD
SU ORDERED


Clerk

FILED
APR 30 2008
NEW YORK
COUNTY CLERK'S OFFICE