

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

PRESENT: Hon. Eileen Bransten
Justice

PART 6

People of NY

INDEX NO.

403543/02

- v -

MOTION DATE

1-7-03

Student Marketing

MOTION SEQ. NO.

01 (01)

MOTION CAL. NO.

09

The following papers, numbered 1 to 2 were read on this motion to/for

then to enjoin
union
to
Enforce
Law

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

EXHIBIT NUMBERED

2

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ prayer is decided in accordance with the parties' settlement embodied in the Consent Order and Judgment entered by the Court on 1-7-03.

This constitutes the Decision, Order and Judgment of the Court.

MOTION/ORDER IS RESPECTFULLY REFERRED TO

JUSTICE

DATED:

Dated:

1-7-03



J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION
HON. EILEEN BRANSTEN
J.S.C.

At Part 6 of the Supreme Court of the State of New York, in and for the County of New York at 60 Centre Street, New York, NY this 7th day of January, 2003

PRESENT:

**Hon. Eileen Bransten
Justice**

-----X
**THE PEOPLE OF THE STATE OF NEW YORK, by
ELIOT SPITZER, Attorney General of the State
of New York,**

Petitioners

-against-

**STUDENT MARKETING GROUP, INC. and
EDUCATIONAL RESEARCH CENTER OF
AMERICA, INC.,**

Respondents
-----X

**CONSENT ORDER
AND JUDGMENT
Index # 403543102**

This is a special proceeding commenced by the Attorney General of the State of New York pursuant to General Business Law Article 22-A and Executive Law §63(12) seeking a permanent injunction, penalties and costs.

Upon the reading and filing of the Notice of Verified Petition and the Verified Petition with exhibits, dated August 29, 2002, Respondents' Motion to Dismiss the Petition dated September 23, 2002, the affidavit of Jan Stumacher in Support of Respondents' Motion to Dismiss, with exhibits, sworn to October 30, 2002, and the Consent and Stipulation dated January 2, 2003, and Respondents being represented by their counsel, Kirkpatrick & Lockhart LLP (Patrick J. McElhinny, Esq. of counsel), and having considered and agreed to the entry of this Consent Order and Judgment,

NOW, upon motion of Eliot Spitzer, Attorney General of the State of New York, attorney for Petitioners herein (Stephen Mindell, Herbert Israel and Melissa Saren, Assistant

wrongdoing or violation of law or adjudication of any fact or law, it is

Parties Subject to Order

ORDERED, ADJUDGED AND DECREED that this Consent Order and Judgment shall extend to Student Marketing Group, Inc. ("SMG") and Educational Research Center of America, Inc. ("ERCA"), their successors, assignees, officers, agents, representatives, affiliates and employees and any other person under their direction or control, whether acting individually or in concert with others or through any corporate entity or device through which they may now or hereafter act or conduct business (collectively "respondents").

ORDER

DEFINITIONS

For purposes of this Consent Order and Judgment, the following definitions shall apply:

1. "Personally identifiable information" or "personal information" shall mean individually identifiable information from or about an individual including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name that reveals an individual's email address; (d) a telephone number; (e) a Social Security Number; (f) an Internet Protocol ("IP") address or host name that identifies an individual; (g) a persistent identifier, such as a customer number held in a "cookie" or processor serial number, that is combined with other available data that identifies an individual; or (h) any information, including, but not limited to, grade point average, date of birth, academic or occupational interests, athletic or extracurricular interests, racial or ethnic background, or religious affiliation, that is combined with any of (a) through (g) above.
2. "Noneducational-related marketing purpose" shall mean for the purpose of marketing

products or services, or selling personally identifiable information from or about an individual for use in marketing products or services to individuals. Provided, however, that “noneducational-related marketing purpose” does not apply to the collection, disclosure or use of personally identifiable information from or about a student for the exclusive purpose of developing, evaluating, or providing to students or educational institutions (a) college or post secondary education recruitment, or military recruitment; (b) book clubs, magazines, and programs providing access to low-cost literary products; (c) curriculum and instructional materials used by elementary schools and secondary schools; (d) student recognition programs; or (e) any other activity expressly determined under 20 U.S.C. §1232h(c)(4)(A) or its implementing regulations to be an “educational product or service.” Provided further that, for purposes of determining whether any specific activity is covered by subsections (a) through (e) above, or should be deemed to be an “educational product or service,” any official written interpretation disseminated to the public by the Department of Education regarding such activity shall be controlling.

3. “Survey” shall mean the survey that is distributed or caused to be distributed by respondents under the name “Educational Research Center of America.”
4. “Student” shall mean any elementary school or secondary school student.
5. Unless otherwise specified, “respondent” or “respondents” shall mean SMG, ERCA and its successors, assigns, officers, agents, representatives and employees.
6. “Clearly and conspicuously” shall mean as follows:
 - A. In print communications, the message shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.
 - B. In communications disseminated orally, the message shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

c In **communications** made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services and software), the message shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the message may be made through the same means in which the communication is presented. Any audio message shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual message shall be of a size and shade, with a degree of contrast to the background against which it appears, and shall appear on the screen for a duration and in a location, sufficiently noticeable for an ordinary consumer to read and comprehend it.

The message shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the message shall be used in any communication.

I.

IT IS ORDERED that respondents, in connection with the collection of personally identifiable information from an individual residing in this State, shall not misrepresent in any manner, expressly or by implication, how personally identifiable information is collected or will be used or disclosed.

II.

IT IS FURTHER ORDERED that respondents, in connection with the collection of personally identifiable information from students residing in this State, shall not use or disclose such information for any noneducational-related marketing purpose, unless they disclose clearly and conspicuously (a) the existence and nature of such noneducational-related marketing purpose; (b) the types or categories of any entities to which the information will be disclosed; and (c) that the information used or disclosed is personally identifiable. Such disclosures shall be made in the

following locations:

- (1) in all privacy statements published by respondents that refer or relate to the collection of personally identifiable information from students;
- (2) in all communications to students, parents, educators, or educational institutions that refer or relate to the collection of personally identifiable information from students; and
- (3) in all questionnaires, survey instruments, or other documents through which respondents collect personally identifiable information from students.

Provided that the disclosures required by this Part II are in addition to, and not in lieu of, any other disclosures that respondents may be required to make, including but not limited to any disclosure required by state or federal law.

III.

IT IS FURTHER ORDERED that respondents shall not use or disclose for any noneducational-related marketing purpose any personally identifiable information collected through surveys distributed to students in this State prior to the date of service of this Consent Order and Judgment, from any student who was thirteen years or older at the time of collection. For purposes of this Part only, “noneducational-related marketing purpose” shall exclude use or disclosure for the purpose of (a) job recruitment, (b) the provision of student loans, or (c) the provision of standardized test preparation products or services.

IV.

IT IS FURTHER ORDERED that respondents shall delete from their records and data bank all personally identifiable information collected through surveys distributed in this State prior to the date of service of this Consent Order and Judgment from any student who was under the age of thirteen at the time of collection.

IT IS FURTHER ORDERED that respondents and their successors and assigns shall, for a period of five (5) years after the date of service of this Consent Order and Judgment, maintain and upon request make available to the New York Attorney General for inspection and copying a print or electronic copy of all documents demonstrating their compliance with the terms and provisions of this Consent Order and Judgment, including, but not limited to:

- A. a sample copy of each different survey form, privacy statement, or communication relating to the collection of personally identifiable information to students, parents, educators, or educational institutions, residing or located in this State, containing representations about how personally identifiable information will be used or disclosed. Each Web page copy shall be dated and contain the full URL of the Web page where the material was posted online. Electronic copies shall include all text and graphics files, audio scripts, and other computer files used in presenting the information on the Web;
- B. a sample copy of each different document containing the disclosure required by Part II of this Consent Order and Judgment; and
- C. all invoices, communications, and records relating to the use or disclosure of personally identifiable information obtained from students residing in this State for any noneducational-related marketing purpose.

VI.

IT IS FURTHER ORDERED that respondents shall deliver a copy of this Consent Order and Judgment to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this Consent Order and Judgment. Respondents shall deliver this Consent Order

and Judgment to such current personnel within thirty (30) days after the date of service of this Consent Order and Judgment, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

IT IS FURTHER ORDERED that respondents shall notify the Attorney General's Office at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this Consent Order and Judgment, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Consent Order and Judgment; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which a respondent learns less than thirty (30) days prior to the date such action is to take place, the respondent shall notify the Attorney General's Office as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the New York Attorney General's Office, Bureau of Consumer Frauds & Protection, 120 Broadway, New York, NY 10271.

VIII.

IT IS FURTHER ORDERED that, within one hundred fifty (150) days after the date of service of this Consent Order and Judgment, or within five (5) days of filing with the Federal Trade Commission a report detailing compliance with any consent order relating to the matters resolved herein (whichever date comes first), and at such other times as the Attorney General may require, Respondents shall file with the Attorney General's Office a report, in writing, setting forth in detail the manner and form in which it has complied with this Consent Order and Judgment.

IT IS FURTHER ORDERED that, within 30 days from the date respondents are served with a notice of entry of this Consent Order and Judgment, respondents will pay the sum of \$75,000 to the State of New York as and for costs of investigation.

X.

IT IS FURTHER ORDERED that nothing contained herein shall be construed so as to deprive any individual of any private right of action under the law

XI.

IT IS FURTHER ORDERED that jurisdiction is reserved in this court for the purpose of carrying out the terms of this Consent Order and Judgment and for granting such further relief as the Court deems just and proper.

ENTER



J.S.C.

HON. EILEEN BRANSTEN

J.S.C.

J.S.C.

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

-----X
**THE PEOPLE OF THE STATE OF NEW YORK, by
ELIOT SPITZER, Attorney General of the State
of New York,**

Petitioners

CONSENT & STIPULATION

-against-

Index # 403543102

**STUDENT MARKETING GROUP, INC. and
EDUCATIONAL RESEARCH CENTER OF
AMERICA, INC.,**

Respondents

..... X

IT IS HEREBY ACKNOWLEDGED, STIPULATED, CONSENTED TO AND AGREED, by and between STUDENT MARKETING GROUP, INC. (“SMG”) and EDUCATIONAL RESEARCH CENTER OF AMERICA, INC. (“ERCA”) by their attorneys, Kirkpatrick & Lockhart LLP (Patrick J. McElhinny, Esq. of counsel) and ELIOT SPITZER, Attorney General of the State of New York (Assistant Attorneys General Stephen Mindell, Herbert Israel and Melissa Saren, of counsel), attorneys for Petitioners herein, that:

1. Respondents have received a copy of the annexed Consent Order and Judgment and know and understand the obligations and duties it imposes.
2. This Stipulation and Consent is entered into by respondents as their own free and voluntary act with full knowledge and understanding of the nature of the action and duties imposed upon them by the Consent Judgment. Respondents consent to the entry of the Consent Order and Judgment without further notice, and agree that no offers, agreements, other than set forth herein, or inducements of any nature whatsoever have been made by the petitioners or by their attorneys or any employees of the Attorney General’s office to procure this Stipulation and Consent.
3. The corporate signatories hereto, Jan Stumacher and Marian Sanjana, are the President and Executive Director of respondents SMG and ERCA, respectively. They are authorized to enter into this Stipulation and Consent on behalf of respondents and have read the

annexed Consent Order and Judgment and agree to its entry without further notice.

4. Respondents enter into this Stipulation and Consent without any admission of wrongdoing or violation of law or adjudication of any issue of fact or law and consent to the entry of the annexed Consent Order and Judgment solely for the purpose of avoiding the expense of protracted litigation.

5. Either party may apply to the Court, on five days written notice to the opposing party, for such other and further relief as it deems necessary for the purpose of carrying out the terms of the Consent Order and Judgment.

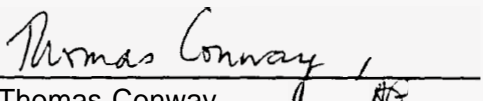
6. Respondents agree to pay to the Attorney General of New York the sum of \$75,000 as costs.

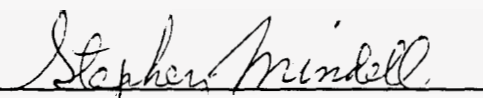
7. No prior application for the relief sought herein has been made.

WHEREFORE, the following signatures are affixed hereto this 2nd day of January, 2003

ELIOT SPITZER
Attorney General of the
State of New York

Bureau of Consumer Frauds
and Protection


Thomas Conway
Assistant Attorney General in Charge


Stephen Mindell
Assistant Attorney General



Herbert Israel
Assistant Attorney General
120 Broadway, 3rd Floor
New York, New York 10271
Tel: (212) 416-8321
Fax: (212) 416-6003

STUDENT MARKETING GROUP, INC.
By:

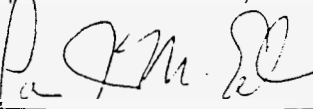

Jan Stumacher, President

EDUCATIONAL RESEARCH CENTER OF
AMERICA, INC.

By:


Marian Sanjana, Executive Director

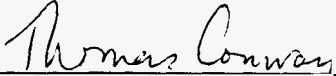
Approved:
Kirkpatrick & Lockhart, LLP


By: 
Patrick J. McElhinny, Esq.
Attorneys for Respondents
535 Smithfield Street
Pittsburgh, PA 15222-2312
Tel: (412) 355-6334
Fax: (412) 355-6501

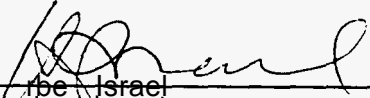
WHEREFORE, the following signatures are affixed hereto this 2nd day of January, 2003

ELIOT SPITZER
Attorney General of the
State of New York

Bureau of Consumer Frauds
and Protection


Thomas Conway
Assistant Attorney General in Charge

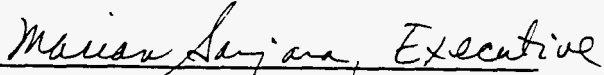

Stephen Mindell
Assistant Attorney General


Herbert Israel
Assistant Attorney General
120 Broadway, 3rd Floor
New York, New York 10271
Tel: (212) 416-8321
Fax: (212)416-6003

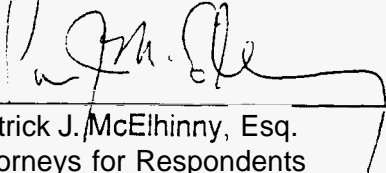
STUDENT MARKETING GROUP, INC.
By:

Jan Stumacher, President

EDUCATIONAL RESEARCH CENTER OF
AMERICA, INC.

By:

Marian Sanjana, Executive Director

Approved:
Kirkpatrick & Lockhart, LLP

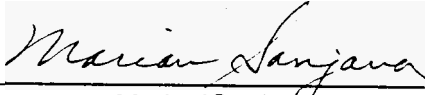
By: 
Patrick J. McElhinny, Esq.
Attorneys for Respondents
535 Smithfield Street
Pittsburgh, PA 15222-2312
Tel: (412) 355-6334
Fax: (412) 355-6501

CORPORATE ACKNOWLEDGMENT

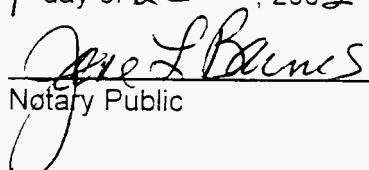
STATE OF PA)
)
 : ss
COUNTY OF ALLEGHENY)

MARIAN SANJANA, being duly sworn, deposes and says:

I am the Executive Director of EDUCATIONAL RESEARCH CENTER OF AMERICA, INC. ("ERCA"), respondent described in and which executed the foregoing Consent and Stipulation. I have executed the aforesaid instrument with the consent and authority of ERCA and those responsible for the acts of said entity and duly acknowledge same:



Marian Sanjana

Sworn to before me this
27 day of Dec, 2002


Notary Public

Notary Public
Jane L. Barnes, Notary Public
Bethel Park, Pa. Allegheny County
My Commission Expires Feb. 9, 2004