

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

STATE OF MISSOURI, ex rel.)
JEREMIAH W. (JAY) NIXON,)
Attorney General,)

Plaintiff,)

v.)

Case No. _____

ACCESS RESOURCE SERVICES,)
INC., a Delaware corporation,)
2455 East Sunrise Blvd., 10th Floor)
Ft. Lauderdale, Florida, 33304)

Division _____

SERVE SECRETARY OF STATE)
PURSUANT TO §351.380 RSMo)
The Honorable Matt Blunt)
Secretary of State, State of Missouri)
State Information Center)
600 West Main)
Jefferson City, Missouri)

Defendant.)

**PETITION FOR INJUNCTIVE RELIEF,
APPLICATION FOR TEMPORARY RESTRAINING
ORDER, CIVIL PENALTIES AND OTHER RELIEF**

COMES NOW the Plaintiff, the State of Missouri, pursuant to § 407.020 *et seq.*, RSMo 2000, by and through its Attorney General and Assistant Attorneys General, states in support of its petition:

PARTIES AND JURISDICTION

1. Jeremiah W. (Jay) Nixon is the duly elected and acting Attorney General of the State of Missouri and brings this action in his official capacity pursuant to §§407.020 and 407.100 RSMo 2000.

2. Defendant Access Resource Services, Inc., is a Delaware corporation, with its principal place of business in Fort Lauderdale, Florida. Defendant is not registered as a foreign corporation in Missouri, and has no agent for service of process in Missouri, as required by §351.576 RSMo (2000). Its Florida registered agent is American Information Services, Inc., located at One S.E. 3rd Avenue, 27th Floor, Miami, Florida, 33131.

3. This Court has subject matter jurisdiction over this action pursuant to §407.100 RSMo 2000, which allows the Attorney General to seek injunctive relief, restitution, and penalties in circuit court for violations of §407.020.

4. Venue is proper in this Court pursuant to §407.100.7 RSMo 2000, because acts which are alleged to violate the Missouri Merchandising Practices Act described below occurred, among other places, in Jackson County, Missouri, and accordingly venue is proper in this circuit.

5. This Court has personal jurisdiction over Defendant pursuant to §§ 407.100 and 506.500.1 RSMo (2000).

THE MISSOURI MERCHANDISING PRACTICES ACT

6. Section 407.020, RSMo 2000 provides, in pertinent part:

“The act, use, or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in Section 407.453, in or from the State of Missouri, is declared to be an unlawful practice.”

7. Section 407.100 RSMo 2000, provides:

"1. Whenever it appears to the Attorney General that a person has engaged in, is engaging in, or is about to engage in any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter, he may seek and obtain, in an action in a circuit court, an injunction prohibiting such person from continuing such methods, acts, uses, practices, or solicitations, or any combination thereof, or engaging therein, or doing anything in furtherance thereof.

"2. In any action under subsection 1 of this section, and pursuant to the provisions of the Missouri Rules of Civil Procedure, the attorney general may seek and obtain temporary restraining orders, preliminary injunctions, temporary receivers, and the sequestering of any funds or accounts if the court finds that funds or property may be hidden or removed from the state or that such orders or injunctions are otherwise necessary.

"3. If the court finds that the person has engaged in, is engaging in, or is about to engage in any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter, it may make such orders or judgments as may be necessary to prevent such person from employing or continuing to employ, or to prevent the recurrence of, any prohibited methods, acts, uses, practices or solicitations, or any combination thereof, declared to be unlawful by this chapter.

"4. The court in its discretion, may enter an order of restitution, payable to the state, as may be necessary to restore to any person who has suffered any ascertainable loss, including but not limited to, any moneys or property, real or personal, which may have been acquired by means of any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter. It shall be the duty of the attorney general to distribute such funds to those persons injured.

"5. The court, in its discretion, may appoint a receiver to insure the conformance to any orders issued under

subsection 3 of this section or to insure the payment of any damages ordered under subsection 4 of this section.

“6. The court may award to the state a civil penalty of not more than one thousand dollars per violation; except that, if the person who would be liable for such penalty shows, by a preponderance of the evidence, that a violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error, no civil penalties shall be imposed.

“7. Any action under this section may be brought in the county in which the defendant resides, where the violation alleged to have been committed occurred, or where the defendant has his principal place of business.”

8. "Advertisement" is defined by §407.010(1) as "the attempt by publication, dissemination, solicitation, circulation, or any other means to induce, directly or indirectly, any person to enter into any obligation or acquire any title or interest in any merchandise."

9. "Merchandise" is defined by §407.010(4) as "any objects, wares, goods, commodities, intangibles, real estate or services."

10. "Sale" is defined by §407.010(6) as "any sale, lease, offer for sale or lease, or attempt to sell or lease merchandise for cash or credit."

11. "Trade or Commerce" is defined by §407.010(7) as "the advertising, offering for sale, sale, or distribution, or any combination thereof, of any services and any property, tangible or intangible, real personal, or mixed and any other article, commodity, or thing of value wherever situated. The terms 'trade' and 'commerce' include any trade or commerce directly or indirectly affecting the people of this state."

12. 15 CSR §60-8.020 defines "unfair practice" as follows:

“(1) An unfair practice is any practice which -

“(A) Either -

“1. Offends any public policy as it has been established by the Constitution, statutes or common law of this state, or by the Federal Trade Commission, or its interpretive decisions; or

“2. Is unethical, oppressive or unscrupulous; and

“(B) Presents a risk of, or causes, substantial injury to consumers.

“(2) Proof of deception, fraud or misrepresentation is not required to prove unfair practices as used in section 407.020.1 RSMo.”

13. 15 CSR §60-8.090 “illegal conduct” provides:

“(1) It is an unfair practice for any person in connection with the advertisement or sale of merchandise to engage in any method, use or practice which –

“(A) Violates state or federal law intended to protect the public; and

“(B) Presents a risk of, or causes substantial injury to consumers.”

14. 15 CSR §60-9.020 “deception in general” provides:

“(1) Deception is any method, act, use, practice, advertisement or solicitation that has the tendency or capacity to mislead, deceive or cheat, or that tends to create a false impression.

“(2) Reliance, actual deception, knowledge of deception, intent to mislead or deceive, or any other culpable mental state such as recklessness or negligence, are not elements of deception as used in section 407.020.1, RSMo. . . . Deception may occur in securing the first contact with a consumer and is not cured even though the true facts or nature of the advertisement or offer for sale are subsequently disclosed. . . .”

15. 15 CSR §60-9.030 “deceptive format” provides:

“(1) It is deception for any person in an advertisement or sales presentation to use any format which because of its overall appearance has the tendency or capacity to mislead consumers.”

16. 15 CSR §60-9.110 “concealment, suppression or omission of any material fact in general” provides:

“(1) Concealment of a material fact is any method, act, use or practice which operates to hide or keep material facts from consumers.

“(2) Suppression of a material fact is any method, act, use or practice which is likely to curtail or reduce the ability of consumers to take notice of material facts which are stated.

“(3) Omission of a material fact is any failure by a person to disclose material facts known to him/her, or upon reasonable inquiry would be known to him/her.

“(4) Reliance and intent that others rely upon such concealment, suppression or omission are not elements of concealment, suppression or omission as used in section 407.020.1, RSMo.”

17. 15 CSR §60-9.070 “misrepresentation” provides:

“(1) A misrepresentation is an assertion that is not in accord with the facts.

“(2) Reliance, knowledge that the assertion is false or misleading, intent to defraud, intent that the consumer rely upon the assertion, or any other capable mental state such as recklessness or negligence, are not elements of misrepresentation as used in section 407.010.1.”

FACTS

18. At all times herein mentioned, Defendant purports to provide “psychic” readings and other information and entertainment services for a fee via pay per call telephone numbers.

19. Defendant solicits business from Missouri residents and subscribers by television, telephone calls and direct mail advertisements. True and accurate copies of direct mail solicitations are attached hereto, marked as Exhibits 1, 2, 3 and 4, and by this reference, are made parts hereof.

20. Defendant’s advertisements indicate that customers can speak to a “real psychic” and gain “psychic” advice on life, and offer to “predict” a customer’s future by use of tarot card readings and other “psychic” skills.

21. Defendant’s advertisements also offer certain free services, such as free tarot readings, free psychic readings, reduced rates and waivers of fees for the first three minutes of each phone call.

22. Customers are directed to call a 1-800 phone number, where Defendant’s agents or employees re-direct callers to a 1-900 number to actually receive “psychic” services.

23. Once a customer calls the 1-900 number, such customer then converses with Defendant’s agent or employee “psychic” who purports to provide advice and prognostication by use of tarot cards and other paranormal phenomena and skills.

24. Defendant advertises that its services are for persons over 18 years of age.

25. Defendant fails to provide advertised free services to customers who are residents of Missouri, in that Defendant uses the “free time” to compile administrative

information, such as name, address and phone number, from customers during the “free period” without conveying services, or takes up so much time in gathering administrative information that less than one minute of time remains for Defendant’s employees or agents to provide the “free psychic services” advertised, or fails to deliver any free services whatsoever. The Affidavit of Delores Davis is attached hereto as Exhibit 5 and by this reference is made a part hereof.

26. Defendant provides services to persons under 18 years of age.

27. Defendant charges customers for time spent on hold waiting to speak with its “psychic” without advising the customer of the charges, or by misleading the customer into believing that there is no charge for waiting to speak with a “psychic”.

28. Missouri residents who have never received or requested services from Defendant have received bills from Defendant. The Affidavit of Peggy L. Cook is attached hereto as Exhibit 6, and by this reference is made a part hereof.

29. Defendant has tendered bills for services rendered to dead persons, for services provided after such person’s date of death.

30. Before, during, after and in connection with the marketing, offering, advertising, and/or selling its “psychic” and entertainment services or pay per call services, Defendant, through its agents, employees and representatives has engaged in deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of material facts, all declared to be unlawful under §407.020 RSMo 2000, in the following respects, among others:

- a. Billing dead consumers for calls allegedly made from the subscriber’s telephone line well after the date of the consumer’s death, in violation of

15 CSR §60-8.020, 15 CSR §60-9.020(1), 15 CSR §60-9.070(1), §§407.145 and 407.020.1 RSMo;

- b. Falsely representing that certain services are free of charge in violation of 15 CSR §60-8.020, 15 CSR §60-9.020(1), 15 CSR §60-9.070(1), 15 CSR §60-8.020, §§407.145 and 407.020.1 RSMo ;
- c. Billing consumers for services that were represented as being free of charge in violation of 15 CSR §60-8.020, 15 CSR §60-9.020(1), 15 CSR §60-9.070(1), §§407.145 and 407.020.1 RSMo ;
- d. Falsely representing that consumers will not be charged for holding or waiting to speak with a “psychic”, violating 15 CSR §60-8.020, 15 CSR §60-9.020, 15 CSR §60-9.070(1), 15 CSR §60-8.020, §§407.145 and 407.020.1 RSMo ;
- e. Billing consumers for calls that were never made from the consumer’s phone line 15 CSR §60-8.020, 15 CSR §60-9.020(1), 15 CSR §60-9.070(1), §§407.145 and 407.020.1 RSMo ;
- f. Falsely representing that certain calls had been made from a consumer’s phone line, when in fact, such was not the case, violating 15 CSR §60-8.020, 15 CSR §60-9.020(1), 15 CSR §60-9.070(1), §§407.145 and 407.020.1 RSMo ;
- g. Billing consumers for calls that were instigated by minors without first obtaining parental consent for such calls, violating 15 CSR §60-8.020(1), 15 CSR §60-8.020, §§407.145 and 407.020.1 RSMo .

31. These unfair and unlawful practices engaged in by Defendant have presented a risk of, and/or have caused, significant injury to consumers.

**APPLICATION FOR TEMPORARY RESTRAINING
ORDER AND FOR PRELIMINARY INJUNCTION**

32. Section 407.100 and Rule 92.02(a) provide this Court with the authority to issue a temporary restraining order and to fashion appropriate remedies necessary to grant relief in actions brought under the Merchandising Practices Act.

33. The Attorney General has investigated and is continuing to investigate the above described violations of §407.100 and now seeks an immediate temporary restraining order to protect the public and to carry out the mandate of Chapter 407.

34. Once the Court finds that a defendant has engaged in, is engaging in, or is about to engage in a practice unlawful pursuant to Chapter 407, potential harm to the public is presumed for purposes of injunctive relief under Chapter 407 and Rule 92.02(a).

35. Upon information and belief, Defendant presently retains the ability to commit further violations of the Merchandising Practices Act.

36. Plaintiff seeks a Temporary Restraining Order and a Preliminary Injunction during the pendency of this action to protect the public from the following ongoing unlawful and fraudulent practices:

- (A) Restraining Defendant from misleading Missouri consumers into believing that psychic, informational or entertainment services are free when they are not in fact free;
- (B) Restraining Defendant from billing Missouri residents for

services that were never requested by such residents;

(C) Restraining Defendant from billing Missouri residents for services requested by persons under 18 years of age without affirmative proof of parental or guardian's consent thereof;

37. Notice of this Petition for Temporary Restraining Order and Permanent Injunction was given to Defendant by letter faxed the 20th day of July, 2001, to Sean Moynihan, Esq., attorney for Defendant, at (212)753-8101. A copy of the cover page for such notice is attached hereto as Exhibit 7 and by this

38. Suits instituted by the state are exempt from bond requirements pursuant to Rule 92.02(d) of the Missouri Rules of Civil Procedure. Plaintiff, therefore, is not required to post a bond.

PRAYER FOR RELIEF

WHEREFORE, the Attorney General prays this Court for the following relief:

A. A judgment finding that Defendant has violated §407.020 RSMo (2000), as aforesaid;

B. A Temporary Restraining Order, pursuant to §407.100.1 RSMo (2000) and Rule 92.02(a), Missouri Rules of Civil Procedure, enjoining Defendant, its agents, employees, representatives, attorneys, assigns, and all those acting for it in whatever capacity from violating §407.020 RSMo (2000) by the act, use or employment of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression or omission of any material fact in connection with the sale or advertisement of any "psychic" or entertainment services or pay per call services, including but not limited to:

- (1) Restraining Defendant from misleading Missouri consumers into believing that psychic, informational or entertainment services are free when they are not in fact free;
- (2) Restraining Defendant from billing Missouri residents for services that were never requested by such residents; and
- (3) Restraining Defendant from billing Missouri residents for services requested by persons under 18 years of age without affirmative proof of parental or guardian's consent thereof;

C. Preliminary and permanent injunctions, pursuant to §407.100.1 RSMo (2000), enjoining Defendant, its agents, employees, representatives, attorneys, assigns, and all those acting for them in whatever capacity from violating §407.020, RSMo (2000) by the act, use or employment of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression or omission of any material fact in connection with the sale or advertisement of any "psychic" or entertainment services or pay per call services, including but not limited to:

- (1) Defendant, itself or acting in concert with others, from engaging in the business of advertising, offering for sale, and selling its own services, or the services of others, as a seller or reseller of "psychic" or entertainment services or pay per call services of any stripe, to residents of the State of Missouri.
- (2) An Order declaring all purported agreements entered into and between Defendant and Missouri consumers by the one of methods and practices declared unlawful are void;

- (3) Defendant will no longer mislead Missouri consumers into believing that psychic, informational or entertainment services are free when they are not in fact free;
- (4) Defendant will not bill Missouri residents for services that were never requested by such residents;
- (5) Defendant will not bill Missouri residents for services requested by persons under 18 years of age without affirmative proof of parental or guardian's consent thereof;
- (6) Defendant will issue corrective information to each credit reporting agency it utilized, amending and removing any adverse credit information placed thereto by Defendant regarding Missouri residents;

C. An Order directing Defendant to pay to the State an award of restitution, pursuant to § 407.100.4 RSMo (2000) on behalf of all Missouri consumers who have been injured by the above alleged violations with an additional amount to be paid into the state treasury for the benefit of the Merchandising Practices Revolving Fund as provided in §407.140.1 RSMo (2000).

D. An Order requiring Defendant to pay all court costs incurred in this action and all costs of investigation and prosecution of this action, including a reasonable attorney's fee incurred by the Attorney General's Office, as provided for by §407.130 RSMo (2000).

E. Civil penalties in the amount of \$1,000.00 for each violation of §407.020 RSMo, as provided in §407.100.6 RSMo;

F. Such further relief as the Court deems just and proper.

Respectfully submitted,

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