

1 WILLIAM BLUMENTHAL
General Counsel

2 Kerry O'Brien (Cal. Bar No. 149264)
3 Linda K. Badger (Cal. Bar No. 122209)
4 Matthew D. Gold (NY Bar)
5 Federal Trade Commission
901 Market Street, Suite 570
6 San Francisco, CA 94103
Telephone: (415) 848-5189
7 Fax: (415) 848-5184
E-mail address: kobrien@ftc.gov

8 Attorneys for Plaintiff
Federal Trade Commission

9
10 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
11 San Francisco Division

CHAMBER COPY -
DO NOT FILE

RECEIVED

JAN 12 2009
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

E-filing

EMC

12 CV 09 0124

13 FEDERAL TRADE COMMISSION,

14 Plaintiff,

15 v.

16 MARKET DEVELOPMENT SPECIALISTS,
17 INC., a corporation, also d/b/a
Wintergreen Systems, and

18 JOHN LEVY, individually and as an officer of
19 Market Development Specialists, Inc.,

20 Defendants.

Case No. _____

**[PROPOSED] STIPULATED FINAL
JUDGMENT AND ORDER FOR
PERMANENT INJUNCTION AND
OTHER EQUITABLE RELIEF AS
TO DEFENDANTS MARKET
DEVELOPMENT SPECIALISTS,
INC., and JOHN LEVY**

21
22 Plaintiff, the Federal Trade Commission ("FTC" or "Commission") filed a Complaint for
23 Permanent Injunction and Other Equitable Relief ("Complaint") against Defendants Market
24 Development Specialists, Inc., and John Levy (collectively, "Defendants") pursuant to Section
25 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), to secure
26 permanent injunctive relief, restitution, disgorgement, and other equitable relief against
27 Defendants for their alleged deceptive acts or practices in connection with the offering of mail-in
28 rebates, in violation of Sections 5(a) of the FTC Act, 15 U.S.C. §§ 45(a).

1 Other than the allegations pertaining to jurisdictional facts and except as otherwise stated
2 herein, Defendants deny the allegations in the Complaint. Defendants agree to the terms of the
3 Order to avoid the uncertainties and costs of litigation.

4 The Commission and Defendants have stipulated to the entry of the following Order in
5 settlement of the Commission's Complaint against Defendants. The Court, being advised in the
6 premises, finds:

7 **FINDINGS**

8 1. This Court has jurisdiction over the subject matter of this case and jurisdiction
9 over all parties pursuant to 15 U.S.C. §§ 45(a) and 53(b) and 28 U.S.C. §§ 1331, 1337(a) and
10 1345.

11 2. Venue in the Northern District of California is proper under 15 U.S.C. § 53(b)
12 and 28 U.S.C. § 1391(b) and (c).

13 3. The acts and practices of Defendants were and are in or affecting commerce, as
14 defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

15 4. The Complaint states a claim upon which relief can be granted under Section 5(a)
16 of the FTC Act, 15 U.S.C. § 45(a), and the Commission has the authority to seek the relief it has
17 requested.

18 5. Defendants waive service of a summons and all rights to seek judicial review or
19 otherwise challenge or contest the validity of this Order. Defendants also waive any claims that
20 they may have held under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the
21 prosecution of this action to the date of this Order.

22 6. Pursuant to Federal Rule of Civil Procedure 65(d), the provisions of this Order are
23 binding upon Defendants, and their officers, agents, servants, employees, and all other persons
24 or entities in active concert or participation with them, who receive actual notice of this Order by
25 personal service or otherwise.

26 7. Nothing in this Order obviates Defendants' obligation to comply with Section 5
27 of the FTC Act, 15 U.S.C. § 45.

1 the Commission shall mean that the Defendant shall send the necessary information via
2 overnight courier, costs prepaid, to:

3 Associate Director for Enforcement
4 Federal Trade Commission
5 600 Pennsylvania Avenue, N.W.
6 Washington, DC 20580
7 Attn: *FTC v. Market Development Specialists, Inc., et al.* (N.D. Ind.)
8 Civ. No. _____ ().

9 7. The terms “and” and “or” in this Order shall be construed conjunctively or
10 disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than
11 exclusive.

12 8. The term “including” in this Order shall mean “without limitation.”

13 **IT IS STIPULATED, AGREED, AND ORDERED THAT:**

14 **I.**

15 **PROHIBITED BUSINESS ACTIVITIES**

16 A. Defendants, directly or through any corporation, partnership, subsidiary, division,
17 trade name, device, or other entity, and their officers, agents, servants, employees,
18 and all persons and entities in active concert or participation with them who
19 receive actual notice of this Order, by personal service or otherwise, are hereby
20 permanently restrained and enjoined from any involvement in the development,
21 marketing, fulfillment, or funding of any rebate program.

22 B. Defendants, directly or through any corporation, partnership, subsidiary, division,
23 trade name, device, or other entity, and their officers, agents, servants, employees,
24 and all persons and entities in active concert or participation with them who
25 receive actual notice of this Order, by personal service or otherwise, in connection
26 with the manufacturing, labeling, advertising, promotion, offering for sale, sale,
27 or distribution of any product or service, in or affecting commerce, are hereby
28 permanently restrained and enjoined from making, or assisting others in making,
directly or by implication, any misrepresentation regarding any bonus.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

II.

MONETARY JUDGMENT

A. Judgment is hereby entered in favor of the Commission and against Defendants Market Development Specialists, Inc., and John Levy, jointly and severally, in the amount of \$330,240.00 for redress to consumers. Provided, however, that this judgment shall be suspended subject to the provisions of Part III.

B. All funds paid pursuant to this Order shall be deposited into a fund administered by the Commission or its agents to be used for equitable relief, including but not limited to consumer redress, and any attendant expenses for the administration of such equitable relief. If requested, Defendants will cooperate fully to assist Plaintiffs in identifying which consumers are eligible to receive redress funds. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after the redress is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Defendants' practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited to the United States Treasury as disgorgement. Defendants shall have no right to challenge the Commission's choice of remedies under this Part. Defendants shall have no right to contest the manner of distribution chosen by the Commission. No portion of any payment under the judgment herein shall be deemed a payment of any fine, penalty, or punitive assessment.

C. Defendants relinquish all dominion, control, and title to the funds paid, and all legal and equitable title to the funds shall vest in the Treasurer of the United States and in the designated consumers. Defendants shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of any Defendant, Defendants acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

- 1 D. Defendants agree that, if they fail to timely and completely fulfill the payment
2 and other obligations set forth in this Order, the facts as alleged in the Complaint
3 filed in this matter shall be taken as true in any subsequent litigation filed by the
4 Commission to enforce its rights pursuant to this Order, including but not limited
5 to a non-dischargeability complaint in any bankruptcy case.
- 6 E. Proceedings instituted under this Part are in addition to, and not in lieu of, any
7 other civil or criminal remedies that may be provided by law, including any other
8 proceedings the Commission may initiate to enforce this Order.
- 9 F. In accordance with 31 U.S.C. § 7701, Defendants are hereby required to furnish
10 to the Commission their respective taxpayer identifying numbers (social security
11 numbers or employer identification numbers) which shall be used for purposes of
12 collecting and reporting on any delinquent amount arising out of the Defendants'
13 relationship with the government.

14 III.

15 RIGHT TO REOPEN

- 16 A. The Commission's agreement to this Order is expressly premised upon the
17 financial condition of Defendants as represented in:
- 18 1. Financial Statement of Market Development Specialists, Inc., dated June
19 6, 2008; and
 - 20 2. Financial Statement of John Levy, dated June 10, 2008,
- 21 all of which include material information upon which the Commission relied in
22 negotiating and consenting to this Order.
- 23 B. If, upon motion by the Commission, this Court finds that Defendants made a
24 material misrepresentation or omitted material information concerning their
25 financial condition, then the Court shall reinstate the judgment against Defendants
26 and in favor of the Commission for the full amount of \$330,240.00 immediately
27 due and payable, together with interest computed at the rate prescribed under 28
28 U.S.C. § 1961, as amended, less the sum of any payments previously made

1 compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to
2 obtain any documentary material, tangible things, testimony, or information relevant to unfair or
3 deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C. §
4 45(a)(1)).

5 **V.**

6 **COMPLIANCE REPORTING BY DEFENDANTS**

7 In order that compliance with the provisions of this Order may be monitored:

8 A. For a period of five (5) years from the date of entry of this Order,

9 1. Individual Defendant John Levy shall notify the Commission of the
10 following:

11 a. Any changes in residence, mailing addresses, and telephone
12 numbers of Individual Defendant, within ten (10) days of the date
13 of such change;

14 b. Any changes in employment status (including self-employment) of
15 Individual Defendant, and any change in the ownership of the
16 Individual Defendant in any business entity, within ten (10) days
17 of the date of such change. Such notice shall include the name and
18 address of each business that the Individual Defendant is affiliated
19 with, employed by, creates or forms, or performs services for; a
20 statement of the nature of the business; and a statement of the
21 Individual Defendant's duties and responsibilities in connection
22 with the business or employment; and

23 c. Any changes in the Individual Defendant's name or use of any
24 aliases or fictitious names; and

25 2. Market Development Specialists, Inc., and John Levy shall notify the
26 Commission of any changes in the corporate structure of Market
27 Development Specialists, Inc., or any business entity that the Individual
28 Defendant directly or indirectly controls, or has an ownership interest in,

1 that may affect compliance obligations arising under this Order, including
2 but not limited to a dissolution, assignment, sale, merger, or other action
3 that would result in the emergence of a successor entity; the creation or
4 dissolution of a subsidiary, parent, or affiliate that engages in any acts or
5 practices subject to this Order; the filing of a bankruptcy petition; or a
6 change in the corporate name or address, at least thirty (30) days prior to
7 such change, provided that, with respect to any proposed change in the
8 corporation about which the Defendant(s) learns less than thirty (30) days
9 prior to the date such action is to take place, Defendant(s) shall notify the
10 Commission as soon as is practicable after obtaining such knowledge.

11 B. One hundred eighty (180) days after the date of entry of this Order, Market
12 Development Specialists, Inc., and John Levy each shall provide a written report
13 to the FTC, sworn to under penalty of perjury, setting forth in detail the manner
14 and form in which they have complied and are complying with this Order. This
15 report shall include, but not be limited to:

16 1. For the Individual Defendant:

- 17 a. The then-current residence address, mailing addresses, and
18 telephone numbers of the Individual Defendant;
- 19 b. The then-current employment and business addresses and
20 telephone numbers of the Individual Defendant, a description of
21 the business activities of each such employer or business, and the
22 title and responsibilities of the Individual Defendant, for each such
23 employer or business; and
- 24 c. Any other changes required to be reported under Subpart A of this
25 Part.

26 2. For all Defendants:

- 27 a. A copy of each acknowledgment of receipt of this Order, obtained
28 pursuant to Part VII; and

1 Order.

2 VII.

3 DISTRIBUTION OF ORDER BY DEFENDANT(S)

4 For a period of five (5) years from the date of entry of this Order, Defendants shall
5 deliver copies of the Order as directed below:

- 6 A. Corporate Defendant: Market Development Specialists, Inc., must deliver a copy
7 of this Order to all of its principals, officers, directors, and managers. Market
8 Development Specialists, Inc., also must deliver copies of this Order to all of its
9 employees, agents, and representatives who engage in conduct related to the
10 subject matter of the Order. For current personnel, delivery shall be within (5)
11 days of service of this Order upon Defendant. For new personnel, delivery shall
12 occur prior to them assuming their responsibilities.
- 13 B. Individual Defendant John Levy as Control Person: For any business that John
14 Levy controls, directly or indirectly, or in which John Levy has a majority
15 ownership interest, John Levy must deliver a copy of this Order to all principals,
16 officers, directors, and managers of that business. John Levy must also deliver
17 copies of this Order to all employees, agents, and representatives of that business
18 who engage in conduct related to the subject matter of the Order. For current
19 personnel, delivery shall be within (5) days of service of this Order upon
20 Defendant. For new personnel, delivery shall occur prior to them assuming their
21 responsibilities.
- 22 C. Individual Defendant John Levy as employee or non-control person: For any
23 business where John Levy is not a controlling person of a business but otherwise
24 engages in conduct related to the subject matter of this Order, John Levy must
25 deliver a copy of this Order to all principals and managers of such business before
26 engaging in such conduct.
- 27 D. Defendants Market Development Specialists, Inc., and John Levy must deliver a
28 copy of this Order to all current and future retailers who have entered or will enter

1 into a business relationship with the Defendant(s) before engaging in any conduct
2 related to the subject matter of this Order. For current retailers, delivery shall be
3 within (30) days of service of this Order upon Defendant. For new retailers,
4 delivery shall occur within thirty (30) days after the retailer enters into a business
5 relationship with the defendant.

6 E. Defendants Market Development Specialists, Inc., and John Levy must secure a
7 signed and dated statement acknowledging receipt of the Order, within thirty days
8 of delivery, from all persons receiving a copy of the Order pursuant to this Part.

9 **VIII.**

10 **ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANT(S)**

11 Each Defendant, within five (5) business days of receipt of this Order as entered by the
12 Court, must submit to the Commission a truthful sworn statement acknowledging receipt of this
13 Order.

14 **IX.**

15 **RETENTION OF JURISDICTION**

16 This Court shall retain jurisdiction of this matter for purposes of construction,
17 modification and enforcement of this Order.

18 **IT IS SO ORDERED**, this 2nd day of February, 09.

19
20
21 ~~UNITED STATES DISTRICT JUDGE~~

22 EDWARD M. CHEN
UNITED STATES MAGISTRATE JUDGE

23 **SO STIPULATED:**

24 WILLIAM BLUMENTHAL
General Counsel

25 JEFFREY A. KLURFELD
Regional Director

26 John Levy
MARKET DEVELOPMENT
SPECIALISTS, INC.

By: John Levy, President

Dated: 12/17/08

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

KO'Brien

KERRY O'BRIEN
LINDA K. BADGER
MATTHEW D. GOLD
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103
(415)848-5100
(415)848-5184 (Fax)
Dated: 1/9/09

ATTORNEYS FOR PLAINTIFF

John Levy

JOHN LEVY
Individually, and as an officer of Market
Development Specialists, Inc.
Dated: 12/17/08

Allan B. Cooper

ALLAN B. COOPER, ESQ
Ervin, Cohen & Jessup LLP
9401 Wilshire Boulevard, Ninth Floor
Beverly Hills, CA 90212-2974
(310) 273-6333
(310) 859-2325 (Fax)
Dated: 12/18/08

ATTORNEY FOR DEFENDANTS