



**STATE OF FLORIDA,
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LEGAL AFFAIRS**

In the Investigation of:

Case # L09-3-1027

SMART SAVINGS CENTER LLC;
HOTMOVIESALE.COM, LLC; HOTBOOKSALE.COM, LLC,
DISCOUNT BOOK SALE, LLC; and XACTI, LLC

Respondents.

ASSURANCE OF VOLUNTARY COMPLIANCE

PURSUANT to the provisions of FLA. STAT. Ch. 501, Part II, Florida's Deceptive and Unfair Trade Practices Act, and FLA. STAT. Ch. 501, **STATE OF FLORIDA, OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF LEGAL AFFAIRS** (hereinafter "Department"), has investigated the business practices of SMART SAVINGS CENTER LLC, HOTMOVIESALE.COM, LLC, HOTBOOKSALE.COM, LLC, DISCOUNT BOOK SALE, LLC and XACTI, LLC **and their related companies** (hereinafter, "**Respondents**"), with its principal place of business located at 999 West Yamato Rd., Suite 100, Boca Raton, FL 33431.

IT APPEARS THAT Respondents are prepared to enter into this Assurance of Voluntary Compliance (hereinafter "AVC"), for the purpose of resolution of this matter only, and without any admission that Respondents have violated the law, and the Attorney General, by and through its undersigned Assistant Attorney General, and Director of Economic Crimes, being in

agreement, does accept this AVC in termination of this investigation, pursuant to FLA. STAT. § 501.207(6), and by virtue of the authority vested in the Attorney General by said statute.

I. DEFINITIONS

For purposes of this AVC, the following terms have the meanings set forth below:

1.1 “Negative Option Marketing” shall mean transactions in which a seller interprets a customer’s failure to take an affirmative action, either to reject an offer or cancel an agreement, as assent to be charged for goods or services.

1.2 “Trial Offer” as used herein means a type of negative option in which there is an offer to provide a trial period of products or services to consumers where, as a result of accepting the trial period, consumers are required to contact Respondents before the expiration of the trial period to avoid receiving additional products or services or to avoid incurring a future financial obligation.

1.3 “Clear and conspicuous” (including “Clearly and Conspicuously”) means that a statement, representation, claim, disclosure or term being conveyed is presented in a way that a consumer will notice and understand it. The following, without limitation, shall be considered in determining whether a statement, claim, term, or representation is clear and conspicuous:

a. whether it is of sufficient prominence in terms of font, size, placement, color, contrast, duration of appearance, sound and speed, as compared with accompanying statements, claims, terms, or representations so that it is readily noticeable and understandable, and likely to be read by the person to whom it is directed; and if written or conveyed electronically, that is not buried on the back or bottom, or in unrelated information or placed on the page where a person would not think it important to read;

b. whether it is presented to the person(s) to whom it is directed in a coherent and meaningful sequence with respect to other terms, representations claims or statements being conveyed;

c. whether it is near to or in close proximity to the statement, representation, claim, or term it clarifies, modifies, explains, or to which it otherwise relates;

d. whether it contradicts, or renders ambiguous or confusing, any other information with which it is presented;

e. whether, if in association with a Negative Option Plan as defined herein, the terms and conditions of the Negative Option Plan are segregated from other terms and conditions of the offer;

f. whether, if it is oral, it is at an understandable pace and in the same tone and volume as the sales offer;

g. whether it appears for a duration sufficient to allow listeners or viewers to have a reasonable opportunity to notice, read, or otherwise understand;

h. whether the language and terms used are commonly understood by the consumer in the context in which they are used;

i. whether it is presented in such a way as to be free of distractions, including but not limited to sound, graphics, text or other offers that compete for the attention of the consumer;

j. whether, in advertising on the Internet, it is made on the same page as any other term, statement, claim or representation that it modifies, and above the fold;

k. whether the disclosure, term, condition or representation appears on the Internet on a co-registration order path in which numerous offers for various goods and services are represented to be free, and the consumer is required to accept a certain number of offers.

II. STIPULATIONS

IT IS AGREED that this AVC does not constitute an admission of any kind and, specifically, Respondents deny any and all allegations of wrongdoing. This AVC does not constitute a finding of law or fact by any court or agency that Respondents have engaged in any act or practice declared unlawful by any laws, rules or regulations of the State of Florida, and neither party shall make any statement to the contrary. Respondents are prepared to enter into this AVC solely for the purpose of resolution and cooperation, and the parties, being in agreement, do accept this AVC by virtue of the authority vested in the Department by said statute.

The Department and Respondents hereby agree and stipulate to the following:

2.1 Respondents and/or their related companies engage in the sale of books, movies, posters and other items over the Internet via various websites and provide a membership service to give consumers discounts for a variety of products and services.

2.2 Beginning in February 2009, the Department received several complaints from consumers who alleged, among other complaints, that they were unable to contact Respondents by telephone, email, or via Respondents' websites to cancel their membership under the terms of the Trial Offer. Respondents were and are offering a 7-day free trial offer, also known as a negative option, where consumers must cancel during the trial offer period to ensure they will not be charged in the future. Some consumers complained that they were continuously being

charged on a monthly basis for services that they neither wanted nor ordered, but could not cancel.

2.3 The Department's investigation focused primarily, inter alia, on whether Respondents engaged in negative option marketing to sell memberships in SmartSavingsCenter.com and their related websites, but failed to provide adequate means for consumers to cancel during the free trial period, thus resulting in future membership charges and/or whether consumers were properly made aware that when they purchased a book, movie, poster, etc that they were signing up for a Trial Offer.

2.4 Respondents make no admission that they or their related companies engaged in any wrongdoing or committed any violation of Florida Statute 501, Part II. This AVC contains neither findings of fact nor conclusions of law.

III. COMPLIANCE

3.1 The Department has not approved any of Respondents' past, current or proposed business practices, other than those specifically mentioned in this AVC, and therefore no portion of this AVC shall be construed as such an approval.

3.2 The parties agree that Respondents are on notice and shall comply with FLA. STAT. Ch. 501, Part II, Florida's Deceptive and Unfair Trade Practices Act.

3.3 Respondents and their representatives, agents, employees, or any other person who acts under, by, through, or on behalf of Respondents, directly or indirectly, or through any corporate or other device, shall comply with and have actual knowledge of Chapter 501, Part II, Florida Statutes, the Florida Deceptive and Unfair Trade Practices Act.

3.4 **IT IS HEREBY AGREED** by the parties that Respondents shall:

a) Web Sites: Describe all billing terms of any negative option marketing offer located on Respondents' website in a clear and conspicuous manner and in a prominent location where it is likely that the customer will see the terms and conditions before the consumer incurs a financial obligation. Furthermore, Respondents shall:

i) refrain from using terms "free," "complimentary," "risk free," "without charge," or any other term that reasonably leads a consumer to believe that he or she may receive something of value, entirely or in part without a requirement of compensation in any form, or that tends to convey the impression to the consuming public that an article of merchandise or service is "free;"

ii) aid in the verification of each consumer's affirmative consent to the offer by placing the negative option billing terms in close proximity to and directly above the Submit button where the consumer completes his or her order, without the use of pre-checked boxes;

iii) send an order confirmation communication, within 24 hours of the consumer's order placement, to customers disclosing the billing terms and conditions of any negative option offer, including when and how the consumer can cancel without being charged, exactly how much they will be charged monthly after the trial period and what product they will be receiving on a monthly basis after the trial period is over;

iv) clearly and conspicuously disclose to customers the billing terms and conditions of the Trial Offer, including the following:

a) specifically when the trial period begins and ends;

- b) that to cancel the trial membership and avoid further membership charges, the consumer must contact customer service before the end of the trial period;
- c) the specific methods by which the consumer may cancel their trial membership;
- d) that if the consumer does not cancel, the consumer's credit card will be charged the full price of the membership (stated in specific dollars i.e. \$xx.xx);

b) Cancellations/Refunds: Clearly and conspicuously disclose to customers how and when products may be returned, and maintain adequate customer service capacity to facilitate cancellation requests that comply with the cancellation procedures. This provision specifically requires Respondents to:

i) disclose to customers whether the consumer will incur any financial expense, such as postage, shipping, or restocking if the customer returns the product;

ii) terminate the enrollment of any and all consumers who are enrolled in Respondents' negative option membership program if and when they desire to terminate their membership and Respondents will not knowingly, purposely or intentionally impede the methods of cancellation and will fully honor the requests that comply with the terms and conditions;

iii) continue to process requests for refunds from customers who, in accordance with the terms and conditions of Respondents' website, attempted to cancel or terminate their orders from Respondents in a timely fashion but were unable to do so in the past for any reason;

iv) adjust its consumer service policies and practices designed to ensure that properly addressed phone, email, live chat, and written inquiries are responded to within twenty-four (24) business day hours from the receipt of such inquiries; and

v) provide the Department with information regarding its resolution of complaints previously forwarded to Respondents. Respondents have represented that they have resolved all previous consumer complaints received from the Department dealing with the allegations in this AVC. As part of this AVC, Robert Oesterlund shall provide a notarized affidavit and spreadsheet along with this AVC on behalf of Respondents, containing proof that Respondents have resolved all the complaints received from the Department since January 27, 2010, which will be attached to this AVC as Exhibits A. Respondents have refunded a total of \$7,418.32 to the consumers listed on Exhibit A

IV. MONETARY TERMS

4.1 Respondents agree to pay a total of THIRTY THOUSAND DOLLARS (\$30,000) in attorneys' fees, investigative fees and costs of future investigation ("Funds").

4.2 The Funds shall be payable in their entirety and sent along with the partially executed AVC signed and notarized by Respondents and Respondents' attorney, delivered to Assistant Attorney General Samantha Schosberg Feuer, Office of the Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida 33401. The above payment will be made by certified funds payable to the **DEPARTMENT OF LEGAL AFFAIRS REVOLVING TRUST FUND.**

4.3 Upon signing this AVC, Respondents will keep a minimum of FIVE-THOUSAND DOLLARS (\$5,000.00) ("the Escrow Funds") in Respondents' attorney's escrow account for the purpose of making refunds to eligible consumers (i.e. those consumers who

submit complaints to the Department , during the Escrow period, related to the reasons investigated by the Department who have not yet made contact with the Department, but who make complaints to the Department subsequent to the execution of the AVC seeking a refund for the business practices of Respondents prior to the execution of the AVC). Respondents will establish and maintain exclusive access to and control of this account. Respondents' obligation to maintain the Escrow Funds for the purposes stated herein terminates sixty (60) from the date this AVC is executed ("the Escrow Period"). In the event actual restitution for eligible complainants exceeds the amount of the Escrow Funds, then the Escrow Funds will be distributed pro-rata to the complainants who come forward within the sixty (60) day Escrow Period. However, no individual consumer will receive more than the amount they are actually owed. Respondents will maintain a spreadsheet, entitled Escrow Complaints Spreadsheet, containing all the complaints forwarded to Respondents from the Department during the Escrow Period that contains the complainant's name, contact information, and how the complaint was resolved. At the end of the sixty (60) day Escrow Period, Respondents will provide a notarized affidavit with the complete aforementioned spreadsheet attached, attesting to the fact that those complaints forwarded to the Respondents by the Department during the Escrow Period were resolved. If there are any excess Escrow funds remaining after the distribution, these funds will be returned to the Respondents. During the Escrow Period, should the Respondents receive complaints from consumers, independent of those received by the Department, those consumer complaints will continue to be addressed by Respondents. Complaints that the Department receives regarding Respondents after the above sixty (60) day Escrow Period and after the Escrow Funds are distributed will be sent directly to "Refund Department" which will maintain a specific individual, known as the Refund Manager, who shall be responsible for resolving

complaints and refund requests. Complaints, either within the 60 day Escrow Period or after, will include any complaints that the Department receives that reference Respondents, reference any addresses connected to Respondents, or reference any shipping or fulfillment by or from Respondents. The Department will forward copies of any such complaints to Respondents and these complaints sent by the Department will be answered by Respondents within six (6) business days. All complaints the Department receives will be faxed or mailed or emailed to Respondents to the following locations: FAX: 561/989-7401, attn: Legal Department, 999 West Yamato Rd., Suite 100, Boca Raton, FL 33431, with a copy to bbennington@shutts.com. Complainants may call Respondents 24 hours a day, 7 days a week at 866/529-3413 to lodge any and all complaints, to speak to a customer service representative or to cancel their membership and/or order. Respondents will make contact with the complainant via electronic mail or phone within six (6) business days from the time the complaint is received by the Respondents. Respondents will keep a spreadsheet of complaints that are forwarded by the Department to Respondents and will send the Department an updated spreadsheet on or before the tenth day of the month, for six months from the date this AVC is executed, describing the resolution of each complaint received during the prior month. Respondents will maintain adequate customer service personnel to examine, address and resolve all complaints expeditiously related to Respondents' business, membership and trial offers.

4.4 Respondents' interest in funds paid in conjunction with this AVC shall fully and completely divest when the AVC is fully executed by all parties. Notwithstanding any other provision of this AVC, no portion of the Funds, other than any remaining Escrow Funds, shall in any event be returned to Respondents provided that the AVC has been fully executed.

4.5 Upon receipt of the partially executed AVC and accompanying Funds check, Samantha Schosberg Feuer will sign the AVC and then forward the AVC to the Director of Economic Crimes, together with the aforementioned funds. The Director of Economic Crimes has the final authority to approve or disapprove the entry of the AVC. Should the Director of Economic Crimes or her authorized designee decline to authorize and execute this AVC, then the Funds would be promptly returned to Respondents.

V. EFFECTIVE DATE

The Effective Date of this AVC is the date on which the AVC is fully executed by the parties. This will be the date that the AVC is signed by the Deputy Attorney General or Division Director. The receipt of or deposit by the Department of any monies pursuant to this AVC does not constitute acceptance by said Department, and monies received will be returned if this AVC is not accepted. Upon entry and full execution of this AVC and upon full payment of the Funds, the Attorney General agrees to close this investigation into the activities of Respondents and Respondents shall be released from liability regarding the allegations referenced in this AVC dating prior to the effective date of this AVC.

VI. AVAILABILITY OF RECORDS

Respondents shall retain for a minimum of two (2) years and maintain and make available to the Department, upon its written request, all books, records website archives and other documents which reflect the implementation of the terms of this AVC and compliance with its terms. Any such records requested by the State shall be made available for inspection within twenty (20) business days after receipt of such request. Respondents shall honor any request from the State to make such records available without further legal process.

VII. FUTURE VIOLATIONS

7.1 Notwithstanding any other provision of this AVC, the parties further recognize that future violations of this AVC or of FLA. STAT. Ch. 501, Part II, may subject Respondents or its officers, directors and employees to any and all civil penalties and sanctions provided by law.

7.2 The Department shall provide written notice to Respondents if the Department becomes aware of circumstances which could result in a determination by the Department that Respondents are in violation of their obligations under this AVC.

IT IS FURTHER AGREED by the parties that any future violations of this AVC which occur are by statute *prima facie* evidence of a violation of FLA. STAT. Ch. 501, Part II, and will subject Respondents to any and all civil penalties and sanctions provided by law, attorneys' fees and costs. Notwithstanding anything to the contrary, Respondents will have the right to challenge the facts underlying any such alleged violation of the AVC and to present evidence in rebuttal of the Department's *prima facie* case in a court of law.

7.3 **IT IS HEREBY AGREED** by the parties that Respondents shall be responsible for making the substantive terms and conditions of this AVC known to the officers, directors, partners, employees, agents, representatives, licensees, franchisees, independent contractors, successors and assigns, engaged in Respondents' business, projects, and activities that are related to the terms and conditions of this AVC.

VIII. MISCELLANEOUS PROVISIONS

8.1 Nothing herein shall be construed as a waiver of any private rights, causes of action, or remedies of any private person, business, corporation, government or legal entity against the Respondents' directors or employees. Similarly, nothing contained herein shall waive the right of the Respondents to assert any lawful defenses in response to a claim of a consumer.

8.2 In consideration for the fulfillment and acceptance of the various obligations set forth herein, no penalties are imposed under this AVC. However, the Attorney General reserves the right to seek Chapter 501 penalties for any future violation(s) of Chapter 501 Part II Florida Statutes. The Attorney General also reserves the right to seek attorneys' fees and costs upon any future noncompliance.

8.3 The parties jointly participated in the negotiation of the terms articulated in this AVC. No provision of this AVC shall be construed for or against either party on the ground that one party or another was more heavily involved in the preparation.

IN WITNESS WHEREOF, Respondents have caused this AVC to be executed by an authorized representative, as a true act and deed, in the County and State listed below, as of the date affixed thereon.

Agreed to and Signed this 27 day of May, 2010.

MY SIGNATURE I hereby affirm that I am acting in my capacity and within my authority as Manager and in my individual capacity, and that by my signature I am binding myself and the Respondents to the terms and conditions of this AVC.

For: Respondents

By: Robert Oesterlund

State of Florida

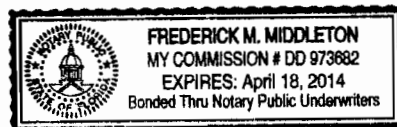
STATE OF FLORIDA

COUNTY OF BROWARD

BEFORE ME, a notary public of the State of Florida appeared Robert Oesterlund who swore under oath that he has the authority to bind Respondents to this AVC and who is either (Check One) known to me or who _____ produced the following identification:

[Signature]

NOTARY PUBLIC
AFFIX NOTARY SEAL



INITIALS RO

SHUTTS & BOWEN, L.L.P.

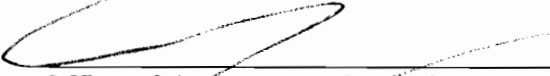
By: _____

Alfred J. Bennington, Jr.

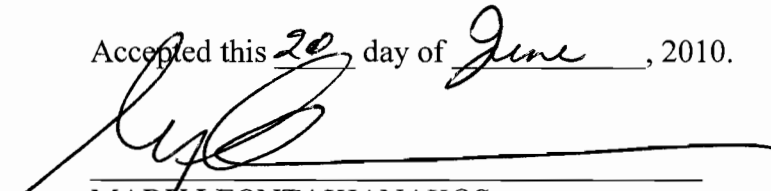
Florida Bar No. 0404985
Attorneys for Respondents

ACCEPTANCE BY ATTORNEY GENERAL'S OFFICE

Signed this 10th day of June, 2010.


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Accepted this 20 day of June, 2010.


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