

BBB NATIONAL PROGRAMS

THE DIRECT SELLING SELF-REGULATORY COUNCIL

SURGE365

Case No. 58-2021

Filed 12/20/21

MONITORING INQUIRY

I. Company Description

Surge365 (or the “Company”) is a multi-level direct selling company headquartered in Wood River, Illinois that offers customers discounts on hotels, rentals, cruises, flights, and other travel services.

II. Basis of Inquiry

The Direct Selling Self-Regulatory Council (“DSSRC”) is a national advertising self-regulation program administered by BBB National Programs. This inquiry was commenced by DSSRC pursuant to its ongoing independent monitoring of advertising and marketing claims in the direct selling industry.

This inquiry concerns earnings claims disseminated by the Company and its salesforce members. The representative claims that formed the basis of this inquiry were located on social media and on the Company’s website. Those claims are set forth below:

- “The founders have a **Proven Track Record of Success** - \$3 Billion in sales, 60,000 - \$1,000 Bonuses, 600 - \$10,000 Bonuses, Hundreds of \$1,000,000 Earners”
- “Earn referral compensation, residual income &+ unlimited 1,000\$ & 10,000\$ bonus checks!”
- “SURGE 365 IS A BUSINESS...WE UNDERSTAND RESIDUAL INCOME IS NEEDED FOR OUR RESIDUAL BILLS! What would \$50,000 do for you by January 2019?”
 - Image with copy stating “Learn How To: Earn \$1000 Bonuses, Earn \$50K in 100 Days, Travel Wholesale, Gain Tax Benefits, And Much More”



Krystal McDowell

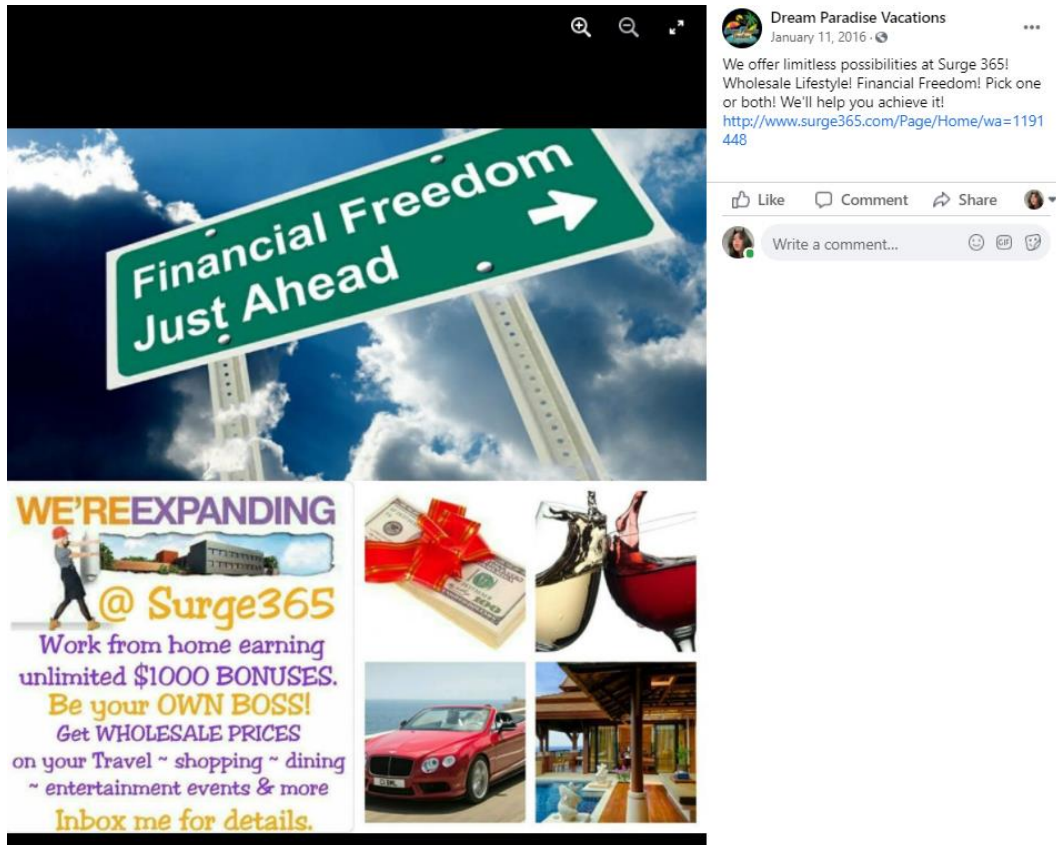
September 19, 2018 · 🌐

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SURGE 365 IS A BUSINESS...WE UNDERSTAND RESIDUAL INCOME IS NEEDED FOR OUR RESIDUAL BILLS! What would \$50,000 do for you by January 2019? Meet me on the line tonight at 9pm eastern. Let's talk! (712)451-1074 Code 452848#



- “Surge 365 is a Company you can plant your flag and WIN. Changing lives daily. Through Travel, creating financial freedom. Join us.”
- “We offer limitless possibilities at Surge 365! Wholesale Lifestyle! Financial Freedom! Pick one or both! We’ll help you achieve it!”
 - Image with copy stating “Work from home earning unlimited \$1000 BONUSSES”



- “What are your plans for the future. Let us help you secure your financial freedom.
While you are waiting for this pandemic to pass. Let us show you how you can position your self to never have to worry again.
 - Image with copy stating “\$1,000 & \$10,000 Bonuses, \$25,000 Fast Start Bonus, Overrides & Residuals”
- “Want to earn \$10,000???”
- “One Surge \$1k check at a time...I’m building a legacy of financial freedom. We are Surge 365. Home of the unlimited \$1k bonuses. \$10k bonuses, and THE 100 day \$50K bonus. We’re changing more than bank accounts. We’re changing lives. We even guarantee your investment”
- “For most of my adult career I’d been searching for a home based business where I could go full time and earn the executive income I was accustomed to earning. Over the years I’d been in several marketing and direct sales companies where I excelled rank wise, but those companies did not offer the executive income opportunity I sought. When I found Surge365 it was like I finally found my home. Surge has brought me that executive income with executive perks and so much more! Not only have I been able to create priceless relationships by building an amazing network of business partners, I have been able to travel the world at insider prices! Now with our company’s new focus shift to healing nations with vacations, our active

business partners are presented with a 7 day reward vacation at the end of 12 months!”

- “The opportunity to create unlimited income, leverage and financial freedom is amazing.”



Level 2 Marketing Director | Surge365 Founders Circle Member

After working for 30 years in corporate America I didn't want to grow old on a fixed income. I was introduced to the travel industry and have had the opportunity to travel the world to locations like China, Amsterdam, Holland, Paris, Germany, Belize, Costa Rica, Hawaii, Mexico, Caribbean and many other places I never dreamed of traveling. Being a part of the largest industry on the planet offers the ability to change lives by introducing the opportunity of travel. You don't have to educate or demo to someone how to have fun and when they have the ability to recapture their own money and put it back in their pockets it just makes sense! The opportunity to create unlimited income, leverage and financial freedom is amazing.

- “Within a few months I became the company’s 1st \$10,000 Bonus earner and in less than 12 months was able to leave my 9-5. Since then I have been promoted to Marketing Directed, helped hundred internationally and explored several countries!”
- “Before the COVID-19 pandemic and the shelter in place directive, we had a healthy bank account and three income sources – my financial services business, my wife Janice’s job at the clinic, and Surge365. We are down to one income – Surge365! That means we don’t have to take any steps backwards financially, we have some sense of normalcy, and we aren’t forced to look at uncomfortable options. Thank you Surge365!”

DSSRC informed the Company of its concern that such earnings claims may convey a message that the typical Surge365 salesforce member can earn significant, career level, and/or replacement income through the Company's business opportunity.

III. Company's Position

Surge365 informed DSSRC that it prides itself on the truthfulness and accuracy of its Income Disclosure Statement (IDS). The Company explained that during the initial enrollment process, each of its Independent Marketing Representatives (IMR) are required to agree to the Surge365 SBA Policies and Procedures which state that anytime an income or lifestyle claim is made or implied, it will be followed with a link to the IDS. A copy of this agreement is also available to all IMRs in their Surge365 Back Office.

Surge365 noted that it regularly reminds its IMRs of these policies via electronic email Compliance Memos and telephone conversations. Additionally, during the annual Surge365 Convention, whether hosted live (in-person) or via virtual connection, the Company also provides a Compliance course for IMRs and Members to participate in. This course covers the basic "What to do and What not to do" as well as more in-depth training on current hot topics. The 2021 Surge365 Convention was available virtually to all SBAs and Members who registered for the event. Each training was recorded and made available in the Back Office to all registrants for more than 30 days following the event.

Surge365 stated that it monitors social media for non-compliant posts, topics, comments, and conversations daily. When a non-compliant post is found by Surge365 staff or reported by another IMR or Member, it is reported to the Company's Compliance Department. The Compliance Department then reaches out to the IMR and outlines the non-compliant issue and reminds them of the policy they agreed to upon enrollment.

Regarding posting an income or lifestyle claim without also providing a link to the Surge365 IDS, the Company stated that its Compliance Department requires the IMR to modify the post within 48 hours to include a copy of the IDS, or to delete the post entirely. If an IMR continues to post income or lifestyle claims without the proper IDS link, they will receive disciplinary action up to and including suspension of their Surge365 account.

With respect to the Facebook posts at issue, Surge365 advised DSSRC that all but one of the posts have been discontinued. The remaining post was disseminated by a salesforce member that is no longer affiliated with Surge365. The Company informed DSSRC that, in addition to attempting to contact the inactive salesforce member, it has notified Facebook that the post includes unauthorized claims and requested that the platform take down the post.

Regarding the claims that were made by salesforce members on the Success Stories page of the Surge365 website, the Company stated that an IDS link is included on any page of the corporate website which includes an income or lifestyle claim.

IV. Analysis and Recommendation

1. Facebook Posts

DSSRC acknowledged the good faith efforts taken by Surge365 to address DSSRC's concerns in this inquiry. Regarding the Facebook posts, the Company acknowledged that the claims in the context presented were not authorized and was able to effectuate the discontinuance of all but one of the posts. DSSRC determined that these actions were necessary and appropriate.

As to the one remaining Facebook post, DSSRC determined that Surge365 made a genuine, bona fide attempt to contact the inactive salesforce member to have the post taken down. Moreover, after its attempts to contact the salesforce member proved unsuccessful, it reached out to Facebook in writing to request that the unauthorized post be removed.

As DSSRC has noted in previous inquiries, when a direct selling company is made aware of an improper claim that was made by an individual and the company recognizes the claim to be untrue and unsupported, DSSRC acknowledges that the direct selling company may not be able to require the individual to remove such claim. In that instance, DSSRC nonetheless recommends that the direct selling company make a bona fide good faith effort to have the improper claim removed, including by attempting to contact the individual in writing. If the social media platform where the subject post was made provides a mechanism for reporting trademark or copyright violations, DSSRC recommends that the direct selling company promptly utilize such mechanism and seek removal of the subject claims and posts.¹ If efforts to utilize a mechanism for reporting trademark or copyright violations are unsuccessful or if the subject claim occurred on a website or platform without a reporting mechanism, DSSRC recommends that in addition to making a bona fide good faith effort to contact the individual as described above, the Company contact the website or platform in writing and request removal of the subject claim or post.

With respect to the remaining Facebook post at issue, DSSRC determined that Surge365 exercised the appropriate due diligence in having the post removed by attempting to contact both the inactive salesforce member and the platform where the post remains available. Although Facebook has not been responsive to the Company's request, DSSRC recommends that the Company resubmit its request to Facebook to have the post taken down.

¹ See: DSSRC Case #52-2921 Daxen, Inc., and Case #30-2020. Gano Excel USA, Inc.

2. *YouTube Video*

Surge365 acknowledged DSSRC's concerns that the YouTube video at issue included several earnings representations regarding earnings that would not be generally expected by the typical Company salesforce member. Although Surge365 informed DSSRC that it would consider the addition of a hyperlink to its IDS during certain portions of the video, DSSRC determined that based upon the extravagant earnings claims and depictions featured in the video, the addition of a hyperlink to the video would not appropriately qualify (and would contradict) the main message of the video – i.e., that the typical Surge365 salesforce member can generally expect to earn significant, life-changing income. Moreover, in the context of this video, it was concluded that the use of a hyperlink, by itself, to qualify the earnings message would be insufficient.

Specifically, the YouTube video featured references including, but not limited to, Company salesforce members earning career level income, building financial freedom, earning money while you sleep, earning “as much as you’d like,” earning money with little or no experience, receiving an extra paycheck every week, earning \$10,000 in next 100 days, and unlimited \$1,000 bonuses. The video also included several success stories including, among others, a woman who was sleeping in her car who earned millions through the business opportunity and a businessman who worked the Surge365 business opportunity part-time and replaced his income. In addition, the video included lavish lifestyle depictions of luxury automobiles and boats as well as stacks of \$20 and \$100 bills.

The Federal Trade Commission (FTC) Guide Concerning the Use of Endorsements and Testimonials in Advertising provides that “[A]n advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser’s experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. If the advertiser does not have substantiation that the endorser’s experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation.”²

The video at issue did not include a disclosure of generally expected results and, to modify the video, Surge365 suggested that an inclusion of a hyperlink to its IDS would serve to properly qualify the earnings claims communicated in the video. DSSRC disagreed.

² Section 255 (2) (b) of the FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising.

As noted by the FTC in its Dot.com Disclosure Guide, “Disclosures that are an integral part of a claim or inseparable from it should not be communicated through a hyperlink. Instead, they should be placed on the same page and immediately next to the claim and be sufficiently prominent so that the claim and the disclosure are read at the same time, without referring the consumer somewhere else to obtain this important information.”³

Similarly, as DSSRC notes in section 14(B) of its Guidance on Earnings Claims for the Direct Selling Industry, (the “Earnings Claim Guidance”) hyperlink disclosures may be acceptable in some circumstances, but disclosures necessary to prevent deception should not be hidden behind a hyperlink. Accordingly, an advertisement, including a social media post, that includes an earnings claim disclosure should clearly and conspicuously disclose any material information related to the claim to ensure that the net impression is truthful and not misleading. An advertisement or social media post may use a hyperlink to complement generally expected results stated in an atypical earnings disclosure.”⁴

For the reasons above, DSSRC determined that the significant earnings claims communicated in the YouTube video at issue were so extraordinary and atypical that they could not be properly qualified by a disclosure of generally accepted results or a hyperlink to an IDS (or a combination of both).

3. *Website Testimonials*

The Surge365 website includes two pages that feature Surge365 Success Stories. Neither page includes a disclosure of generally expected results. The pages do include a link to the Company’s IDS at the bottom of each webpage. DSSRC determined that the IDS link was insufficient to qualify the testimonial claims regarding the income that can be generally expected by the typical Surge365 salesforce member.

DSSRC again referred to guidance from the FTC indicating that disclosures that are an integral part of a claim should not be communicated through a hyperlink and should be placed clearly and conspicuously and in close proximity to the triggering claim so that the claim and the disclosure are read at the same time, without referring the consumer somewhere else to obtain this qualifying information.⁵

The testimonials, as presented on the Surge365 website, do not provide any indication (for example, an asterisk) that would put consumers on notice of any additional, material information that is intended to qualify the claim. In addition, the IDS link is provided at the bottom of the page and not in close proximity to the

³ <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>, page 10.

⁴ See https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/dssrc_guidanceonearningsclaimsforthedirectsellingindustry_2020.pdf?sfvrsn=4ecfd36_8.

⁵ Supra at 3.

triggering statement (which is presented on a pop-up page). Thus, an unsuspecting consumer must scroll down to the bottom of the page to access the IDS link.⁶ DSSRC concluded that the IDS link by itself as does not properly qualify the atypical income representations communicated by the testimonials.

With respect to the testimonials themselves, one testimonial was from a couple who maintained that because of the income that they earned from Surge365 during the COVID 19 pandemic, they “don’t have to take any steps backwards financially” and “aren’t forced to look at any uncomfortable options.”

DSSRC has cautioned direct selling companies and their independent salesforces from making claims referencing COVID-19 in the context of business opportunity claims and particularly any claims pertaining to career-level income.

DSSRC was further concerned that this testimonial communicated the implied claim that the typical Company salesforce members can generally expect to receive career-level income.

As DSSRC states in its Earnings Claim Guidance, with respect to any earnings claim, if the direct selling company does not have substantiation that the experience of the individual making the claim or who is the subject of the claim is representative of what the audience will generally expect to achieve, the advertisement (e.g., social media post) should clearly and conspicuously disclose the generally expected results in the depicted circumstance.⁷ Moreover, claims regarding career-level income are generally so unrepresentative of the income earned by almost all business opportunity participants that that even a disclosure of the income that could be expected by the typical salesforce member would serve to contradict the message being communicated to consumers that can earn significant i.e., career-level, income.

Accordingly, in the absence of such evidence, DSSRC recommended that Surge365 remove this success story in the context in which it is presented on the website.

Similarly, the Surge365 website includes a page of success stories from sales leaders of various levels (several of whom were featured in the YouTube video discussed in the preceding section). Several testimonials on the Surge365 website feature unqualified references to the career-level income that the salesforce members earned from the Company’s business opportunity. Examples of these claims include:

⁶ DSSRC noted that viewers cannot access the Surge365 IDS link while the pop-up page appears.

⁷ *Id* at section 12.

- “We both have a passion for creating multiple streams of income and, before Surge365, we did so in traditional businesses. That passion led us to find Surge365, allowing us to earn more while working from home and spending more time with our family.”
- “I knew my 9-5 was only a temporary solution. I needed a way to bring in extra income while still taking care of my family...that’s where Surge365 came in. Within a few months I became the company’s 1st \$10,000 Bonus earner and in less than 12 months was able to leave my 9-5.”
- “I was working in the real estate industry earning a 6-figure income and one day a friend of mine called me up and told me about a travel opportunity. I didn’t hesitate and signed right up. I hit the #1 spot in that travel company but when I saw Surge365 I knew it was time to move on... ”.
- “For most of my adult career I’d been searching for a home-based business where I could go full time and earn the executive income I was accustomed to earning. Over the years I’d been in several marketing and direct sales companies where I excelled rank wise, but those companies did not offer the executive income opportunity I sought. When I found Surge365 it was like I finally found my home. Surge has brought me that executive income with executive perks and so much more!”

As the FTC states in its Business Guidance Concerning Multi-Level Marketing, some business opportunities may present themselves as a way for participants to get rich or lead a wealthy lifestyle. If participants generally do not achieve such results, these representations likely would be false or misleading to current or prospective participants. Moreover, business opportunities may also claim that participants, while not necessarily becoming wealthy, can achieve career-level income. They may represent through words or images that participants can earn thousands of dollars a month, quit their jobs, “fire their bosses,” or become stay-at-home parents. If participants generally do not achieve such results, these representations likely would be false or misleading to current or prospective participants.⁸

The FTC Business Guidance further notes that even truthful testimonials from the very small minority of participants who do earn career-level income or more will likely be misleading unless the advertising or presentation also makes clear the amount earned or lost by most participants.⁹

DSSRC determined that the unqualified context in which these testimonial claims were presented on the Surge365 website could be reasonably interpreted by

⁸ <https://www.ftc.gov/tips-advice/business-center/guidance/business-guidance-concerning-multi-level-marketing>, section13.

⁹ *Id.*

consumers as conveying the message that the typical Surge365 salesforce member will earn significant income from the Company's business opportunity. However, such a message cannot be supported by Surge365. DSSRC also concluded that the IDS link was neither clear and conspicuous, nor in close proximity, to the earnings representation in the testimonial and, thus, did not properly qualify the claims.

As such DSSRC recommended that the Company remove any testimonials from the Surge365 website that could be interpreted as communicating that the typical Surge365 salesforce member will earn significant, career-level income.

V. Conclusion

DSSRC appreciated the good faith efforts taken by Surge365 to address DSSRC's concerns regarding the Facebook posts at issue by removing six Facebook posts and making a bona fide good faith effort to remove the remaining social media post. DSSRC also determined that the significant earnings claims communicated in the YouTube video at issue were so extraordinary and atypical that they could not be properly qualified by a disclosure of generally accepted results or a hyperlink to an income disclosure statement. Finally, DSSRC recommended that the Company remove any testimonials from its website that could be interpreted as communicating that the typical Surge365 salesforce member will earn significant, career-level income.

VI. Company Statement

"Surge365 will continue the good faith efforts mentioned at the beginning of this report. We also are redesigning our marketing videos and website to ensure the IDS link and average income statement appear within close approximately to the income claims. Additionally, we will be modifying the testimony that mentioned Covid 19 on our corporate website. We are in the process of doing so now and anticipate having all updates made during the first quarter of 2022."

(Case No. 58-2022 PCM, closed on 1/07/22)

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