

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

JOHN ZUCCARINI, individually and
d/b/a Cupcake Party *et al.*,

Defendant.

Civil Action No. 2:01-cv-04854-BMS

FILED JAN - 5 2007

ENTERED

JAN 5 2007

CLERK OF COURT

(Proposed)

STIPULATED PRELIMINARY INJUNCTION

On December 21, 2006, after an *ex parte* hearing and consideration of Plaintiff's *Ex Parte* Motion for Temporary Restraining Order with Ancillary Equitable Relief, and a Preliminary Injunction Pending Decision on Plaintiff's Motion for a Civil Contempt Order, Plaintiff's *Ex Parte* Motion for an Order to Show Cause Why Defendant Zuccarini Should Not Be Held In Civil Contempt, and the declarations, exhibits, and memorandum of law submitted in support thereof, this Court entered its *ex parte* Temporary Restraining Order with Ancillary Equitable Relief and an Order to Show Cause why Defendant John Zuccarini should not be held in civil contempt for violating that Permanent Injunction. The Court also scheduled a Preliminary Injunction hearing to take place on January 8, 2007. As the parties have agreed upon the terms of a Stipulated Preliminary Injunction,

This Court **ORDERS** and **FINDS** as follows:

1. This Court has jurisdiction over the subject matter of this case, and there is good believe that it will have jurisdiction over all parties hereto.

2. There is good cause to believe that Defendant Zuccarini has actual notice of the Permanent Injunction.

3. There is good cause to believe Defendant Zuccarini continues to be bound by the Court's Permanent Injunction.

4. There is good cause to believe that Defendant Zuccarini has violated the Permanent Injunction. The evidence submitted in the declarations and exhibits accompanying Plaintiff's Memoranda of Points and Authorities in support of its *ex parte* Motion for Temporary Restraining Order and its Motion for Order to Show Cause, shows that there is good cause to believe that Defendant Zuccarini has engaged in prohibited activity by redirecting consumers on the Internet; representing that his web pages and domain names are endorsed by, affiliated or associated with third parties or entities, when in fact they are not; and participating in affiliate marketing programs, in violation of Section I of the Permanent Injunction. In addition, the evidence shows that there is good cause to believe Defendant Zuccarini has failed to notify the Commission within 30 days of registering or re-registering each domain name with any Domain Name Registrar and failed to notify the Commission of his current residential mailing address and employment status, in violation of Section V of the Permanent Injunction.

5. The Court has considered the FTC's substantial likelihood of success on the merits of the contempt action and weighed the equities, and finds that entry of this preliminary injunction is in the public interest.

6. Defendant Zuccarini received personal service of the FTC's Motions and the Court's Temporary Restraining Order, Order to Show Cause, and Order Temporarily Sealing Filings on December 23, 2006.

7. FED. R. CIV. P. 65(c) does not require security of the United States or an officer or agency thereof.

DEFINITIONS

For the purposes of this Preliminary Injunction Order, the following definitions apply:

A. "Affiliate Marketing Program" means a revenue sharing arrangement between online merchants and "affiliates," – online content providers who market and/or advertise goods or services for merchants through, *inter alia*, the use of banners, ads and text links posted on web sites or web pages. Compensation is paid to the affiliate by the merchant on performance of certain measures, typically in the form of sales, clicks, registrations or a hybrid model. The affiliate is paid a commission by the merchant when a visitor takes a specific action such as filling out a form or making a purchase.

B. "Asset[s]" means any legal or equitable interest in, right to, or claim to, any and all real and personal property of Defendant, or held for the benefit of Defendant, including but not limited to chattel, goods, instruments, equipment, fixtures, general intangibles, effects, leaseholds, inventory, checks, notes, accounts, credits, receivables, shares of stock, contracts, and all cash and currency, or other assets, or any interest therein, wherever located.

C. "Defendant" means John Zuccarini, individually and d/b/a Cupcake Party, Cupcake-Party, Cupcake Parties, Cupcake-Parties, Cupcake City, Cupcake Patrol, Cupcake-Patrol, Cupcake First-Patrol, Cupcake Show, Cupcake-Show, Cupcake Shows, Cupcake-Shows, Cupcake Parade, Cupcake-Parade, Cupcakes, Cupcake Confidential, Cupcake-Movies, Cupcake Real Video, The Cupcake Incident, The Cupcake Secret, Cupcake Message, Cupcake Messenger, The Country Walk, JZ Design, and RaveClub Berlin, whether acting

directly or through any entity, corporation, subsidiary, division, or other device, unless specified otherwise, as well as his successors and assigns.

D. "Financial Institution" means any bank, savings and loan institution, credit union, or any financial depository of any kind, including but not limited to any brokerage house, trustee, broker-dealer, escrow agent, title company, commodity trading company, precious metal dealer, commercial check cashing facility, or any entity or person that holds, controls, or maintains custody of any account or asset of any Defendant.

E. "Plaintiff" means the Federal Trade Commission, FTC, or Commission.

**I.
ASSET FREEZE**

IT IS ORDERED that Defendant Zuccarini is hereby preliminarily restrained and enjoined from directly or indirectly:

A. Transferring, liquidating, converting, encumbering, pledging, loaning, selling, concealing, dissipating, disbursing, assigning, spending, withdrawing, granting a lien or security interest in, or otherwise disposing of any Assets, wherever located, including outside the United States, that are: (1) owned or controlled, directly or indirectly, by Defendant, in whole or in part, or held, in whole or in part for the benefit of Defendant; (2) in the actual or constructive possession of Defendant; or (3) owned, controlled by, or in the actual or constructive possession of any corporation, partnership, or other entity directly or indirectly owned, managed, or controlled by, or under common control with Defendant, including but not limited to, any Assets held by, for, or under the name of Defendant at any bank, savings and loan institution, or Defendant bank, or with any broker-dealer, escrow agent, title company, commodity trading

company, precious metal dealer, or other financial institution or depository of any kind;

- B. Opening or causing to be opened any safe deposit boxes titled in the name of Defendant, or subject to access by Defendant;
- C. Incurring charges or cash advances on any credit card, debit card, or checking card issued in the name, singly or jointly, of Defendant;
- D. Incurring liens or encumbrances on real property, personal property or other Assets in the name, singly or jointly of Defendant; and
- E. Cashing any checks, obtaining any cash advances, or using any funds obtained in connection with participating in any Affiliate Marketing Programs.

The Assets affected by this Paragraph shall include: (a) all Assets of Defendant as of the time the Temporary Restraining Order was entered; and (b) those Assets obtained after entry of the Temporary Restraining Order that are derived from any conduct that violates the Permanent Injunction.

II. RETENTION OF ASSETS BY FINANCIAL INSTITUTIONS AND OTHER THIRD PARTIES

IT IS FURTHER ORDERED that any financial or brokerage institution, escrow agent, title company, commodity trading company, trust, entity, or person that holds, controls or maintains custody of any account or asset owned or controlled by Defendant, or has held, controlled or maintained any account or asset of, or on behalf of, Defendant at any time since the entry of this Court's Temporary Restraining Order shall continue to:

- A. Hold and retain within its control and prohibit Defendant from withdrawing, removing, assigning, transferring, pledging, encumbering, disbursing, dissipating, converting,

selling, gifting, or otherwise disposing of any of the Assets, funds, or other property held by or on behalf of Defendant in any account maintained in the name of or for the benefit of Defendant, in whole or in part, except as directed by further order of the Court; or

B. Deny Defendant access to any safe deposit box titled in the name of Defendant, individually or jointly, or subject to access by Defendant, whether directly or indirectly;

C. Provide counsel for Plaintiff¹ within three (3) business days after being served with a copy of this Order, a certified statement setting forth:

1. the identification number of each such account or asset (1) titled in the name, individually or jointly, of Defendant; (2) held on behalf of, or for the benefit of, Defendant; (3) owned or controlled by Defendant; or (4) otherwise subject to access by Defendant, directly or indirectly;

2. the balance of each such account, or a description of the nature and value of such asset as of the close of business on the day on which this Order is served, and, if the account or other asset has been closed or removed, the date closed or removed, the total funds removed in order to close the account, and the name of the person or entity to whom such account or other asset was remitted;

3. the identification of any safe deposit box that is either titled in the name of Defendant, or is otherwise subject to access by Defendant; and

4. if an account, safe deposit box, or other asset has been closed or removed, the date

¹ Counsel for Plaintiff means FTC attorneys Carolyn L. Hann and Laureen Kapin, and any other FTC attorneys who appear in this action after the entry of this Order. Counsel for Plaintiff's mailing address for all materials mailed pursuant to this Order is 601 New Jersey Avenue, N.W., Room NJ-2122, Washington, DC 20001. Counsel for Plaintiff's fax number is (202) 326-2558.

closed or removed, the balance on such date, and the manner in which such account or asset was closed or removed.

D. Provide counsel for Plaintiff, within three (3) business days after being served with a request, copies of all documents pertaining to such account or asset, including but not limited to originals or copies of account applications, account statements, signature cards, checks, drafts, deposit tickets, transfers to and from the accounts, all other debit and credit instruments or slips, currency transaction reports, 1099 forms, and safe deposit box logs; and

E. Cooperate with all reasonable requests of counsel for Plaintiff relating to this Order's implementation.

III.

FINANCIAL REPORTS AND ACCOUNTING

IT IS FURTHER ORDERED that, to the extent Defendant has not yet fully complied with Section III of the Temporary Restraining Order, Defendant shall immediately prepare and serve on counsel for Plaintiff:

A. Completed financial statements fully disclosing his own finances and those of all corporations, partnerships, trusts or other entities that he now owns, controls, or is associated with in any capacity on the forms attached to this Order as **Attachment A**, accurate as of the date of service of this Order upon Defendant;

B. Copies of signed and completed federal and state income tax forms, including all schedules and attachments for the four (4) most recent filing years; and

C. For all revenues obtained in connection with Defendant's participation in any

Affiliate Marketing Program, provide the FTC with a completed statement, verified under oath reporting:

1. All revenues collected and obtained by Defendant, directly or through any other corporation, partnership, limited liability corporation, or other entity since April 9, 2002, the date of entry of the Permanent Injunction;
2. The full names, addresses, and telephone numbers, of all individuals and entities from whom Defendant receives revenues in connection with his participation in any Affiliate Marketing Program;
3. All costs and expenses incurred by Defendant, directly or indirectly; and
4. All net profits collected and obtained by Defendant, directly or indirectly.

Defendant also shall provide copies of such other financial statements as Plaintiff may, from time to time, request in order to monitor Defendant's compliance with the provisions of this Order.

IV. FOREIGN ASSET REPATRIATION

IT IS FURTHER ORDERED that, to the extent Defendant has not yet fully complied with Section IV of the Temporary Restraining Order, Defendant shall immediately:

- A. Provide counsel for Plaintiff a full accounting of all funds and Assets outside of the territory of the United States which are held either: (1) by Defendant; (2) for Defendant's benefit; or (3) under Defendant's direct or indirect control, individually or jointly, as required by the forms included in **Attachment A**;

B. Transfer to the territory of the United States all such funds and Assets in foreign countries; and

C. Hold and retain all repatriated funds and Assets, and prevent any disposition, transfer, or dissipation whatsoever of any such Assets or funds, except as required by this Order.

Defendant shall provide access to records and documents held by Financial Institutions outside the territorial United States, by signing the Consent to Release of Financial Records attached to this Order as **Attachment B**, immediately upon service of this Order upon them, or within such time as permitted by counsel for Plaintiff in writing.

V.
NON-INTERFERENCE WITH REPATRIATION

IT IS FURTHER ORDERED that Defendant, and those persons in active concert or participation with him who receive actual notice of this Order by personal service or otherwise, are hereby preliminarily restrained and enjoined from taking any action, directly or indirectly, which may result in the encumbrance or dissipation of foreign Assets, or in the hindrance of the repatriation required by the preceding Paragraph IV of this Order, including but not limited to:

A. Sending any statement, letter, fax, e-mail or wire transmission, telephoning or engaging in any other act, directly or indirectly, that results in a determination by a foreign trustee or other entity that a "duress" event has occurred under the terms of a foreign trust agreement, until such time that all Assets have been fully repatriated pursuant to Paragraph IV of this Order; and

B. Notifying any trustee, protector or other agent of any foreign trust or other related

entities of either the existence of this Order, or of the fact that repatriation is required pursuant to a court order, until such time that all Assets have been fully repatriated pursuant to Paragraph IV of this Order.

**VI.
PRESERVATION OF RECORDS**

IT IS FURTHER ORDERED that Defendant, and those persons in active concert or participation with him who receive actual notice of this Order by personal service or otherwise, are hereby preliminarily restrained and enjoined from destroying, erasing, mutilating, concealing, altering, transferring, writing over, or otherwise disposing of, in any manner, directly or indirectly, any documents or records of any kind that relate to the business practices or business or personal finances of Defendant, including but not limited to, computers, computerized files and storage media on which information has been saved (including, but not limited to, thumb drives, floppy disks, hard drives, CD-ROMS, zip disks, punch cards, magnetic tape, backup tapes, and computer chips) and any and all equipment needed to read any such material, contracts, accounting data, correspondence (including, but not limited to, electronic correspondence), advertisements (including, but not limited to, advertisements placed on the World Wide Web or the Internet), FTP logs, Server Access Logs, World Wide Web pages, handwritten notes, written or printed records, telephone logs, receipt books, ledgers, personal and business canceled checks and check registers, bank statements, appointment books, copies of federal, state or local business or personal income or property tax returns, and other documents or records of any kind that relate to the business practices or business finances of Defendant.

