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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Federal Trade Commission;

Plaintiff,

v.

**William Dugger, aka Billy
Johnson, dba Net Everyone;**

**Angelina Johnson, dba Net
Everyone; and**

John Vitale, dba Net Everyone;

Defendants.

Civil No.

**COMPLAINT FOR
PERMANENT INJUNCTION
AND OTHER EQUITABLE
RELIEF**

[FILED UNDER SEAL]

Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), for its complaint alleges as follows:

1. The Commission brings this action under Sections 13(b) and 19 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 53(b) and 57b, and under Section 7(a) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of

2003 (“CAN-SPAM” or the CAN-SPAM Act), 15 U.S.C. § 7706(a), to obtain temporary, preliminary, and permanent injunctive relief, disgorgement, other equitable relief, and the payment of damages for Defendants’ violations of Sections 5(a), (b), and (d) of CAN-SPAM, 15 U.S.C. §§ 7704(a), (b) and (d), and the FTC’s Rule Setting Forth the Requirement to Place Warning Labels on Commercial Electronic Mail That Contains Sexually Oriented Material (the “Adult Labeling Rule” or the “Rule”), 16 C.F.R. Part 316.4.

JURISDICTION AND VENUE

2. Subject matter jurisdiction is conferred upon this Court by 15 U.S.C. §§ 45(a), 53(b), 57b, and 7706(a), and 28 U.S.C. §§ 1331, 1337(a), and 1345.

3. Venue in the United States District Court for the District of Arizona is proper under 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b), (c), and (d).

PLAINTIFF

4. Plaintiff, the FTC, is an independent agency of the United States Government created by statute. See 15 U.S.C. §§ 41-58. The FTC is charged with enforcing various provisions of CAN-SPAM as if the violation of CAN-SPAM “were an unfair or deceptive act or practice proscribed under Section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).” 15 U.S.C. § 7706(a). The Commission is accordingly authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the CAN-SPAM Act as if they were violations of the FTC Act, and therefore to secure such other equitable relief as may be appropriate in each case, including redress and disgorgement. 15 U.S.C. § 53(b).

DEFENDANTS

5. Defendant William Dugger (“Dugger”) is an individual residing in Hawaii who has used the name “Billy Johnson,” the business name “Net Everyone” and an address in Phoenix, Arizona, to transact business in Arizona. Since at least April 2005, he has formulated, directed, controlled, or participated in the acts or practices set forth

in this complaint. He transacts business within the District of Arizona and throughout the United States.

6. Defendant Angelina Johnson (“Johnson”) is an individual residing in Hawaii and/or Arizona who has used the business name “Net Everyone” and an address in Phoenix, Arizona, to transact business in Arizona. Since at least April 2005, she has formulated, directed, controlled, or participated in the acts or practices set forth in this complaint. She transacts business within the District of Arizona and throughout the United States.

7. Defendant John Vitale (“Vitale”) is an individual residing in Phoenix, Arizona, who has used the business name “Net Everyone” and his residential address in Phoenix, Arizona, to transact business in Arizona. Since at least April 2005, he has formulated, directed, controlled, or participated in the acts or practices set forth in this complaint. He resides and transacts business within the District of Arizona and throughout the United States.

COMMERCE

8. At all times relevant to this complaint, Defendants have maintained a substantial course of trade in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFINITIONS

9. “Electronic mail message” (or “email”) means a message sent to a unique electronic mail address. 15 U.S.C. § 7702(6).

10. “Electronic mail address” means a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox (commonly referred to as the “local part”) and a reference to an Internet domain (commonly referred to as the “domain part”), whether or not displayed, to which an electronic mail message can be sent or delivered. 15 U.S.C. § 7702(5).

11. “Commercial electronic mail message” means any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a

commercial product or service (including the content on an Internet website operated for commercial purposes). 15 U.S.C. § 7702(2).

12. “Affirmative consent” to receipt of a commercial email message means that:
- (A) the recipient expressly consented to receive the message, either in response to a clear and conspicuous request for such consent or at the recipient’s own initiative, and
 - (B) if the message is from a party other than the party to which the recipient communicated such consent, the recipient was given clear and conspicuous notice at the time the consent was communicated that the recipient’s electronic mail address could be transferred to such other party for the purpose of initiating commercial electronic mail messages. 15 U.S.C. § 7702(1).

13. “Header information” means the source, destination, and routing information attached to an electronic mail message, including the originating domain name and originating electronic mail address, and any other information that appears in the line identifying, or purporting to identify, a person initiating the message. 15 U.S.C. § 7702(8).

14. “Initiate,” when used with respect to a commercial email message, means to originate or transmit such message or to procure the origination or transmission of such message, but shall not include actions that constitute routine conveyance of such message. For purposes of this paragraph, more than one person may be considered to have initiated a message. 15 U.S.C. § 7702(9).

15. “Procure,” when used with respect to the initiation of a commercial email message, means intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one’s behalf. 15 U.S.C. § 7702(12).

16. “Protected computer” means a computer which is used in interstate or foreign commerce or communication, including a computer located outside the United

States that is used in a manner that affects interstate or foreign commerce or communication of the United States. 15 U.S.C. § 7702(13); 18 U.S.C. § 1030(e)(2)(B).

17. “Sexually oriented material” means any material that depicts sexually explicit conduct as that term is defined in 18 U.S.C. § 2256, unless the depiction constitutes a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters. 15 U.S.C. § 7704(d)(4).

DEFENDANTS’ BUSINESS PRACTICES

18. Since at least April 2005 and continuing to the present, Defendants have initiated the transmission of commercial email messages to protected computers. The primary purpose of these commercial email messages has been the commercial advertisement or promotion of Internet websites operated for a commercial purpose.

19. The header information that accompanies commercial email messages initiated by Defendants does not accurately identify Defendants or the computers that Defendants use to initiate email messages because Defendants relay the email messages through other computers in a manner that conceals the identity of the computer that actually initiated the message.

20. Defendants do not have authorization to access the computers they use to relay commercial email messages. Instead, Defendants use computers without the authorization, or sometimes even the knowledge, of their owners. In many cases, defendants relay email messages through computers that have been infected with computer viruses, trojans, and other types of malware that allow persons other than the computers’ owners to control the hijacked computer.

21. Defendants purchase access to current lists of hijacked computers (sometimes referred to as “peas” in defendants’ underground communications with sellers) for routing their sexually explicit email messages. Many of these hijacked computers use Internet Service Provider’s (“ISP”) broadband residential service that prohibits mailing or relaying bulk email directly from the hijacked computer. The ability of the hijacked computer to mail or relay bulk email, without the use of the ISP’s

or other provider's mail server, is a capability activated by the malware that has been added to the computer prior to its inclusion on the lists of hijacked computers purchased by Defendants.

22. Among the Internet websites promoted by the commercial email messages initiated by Defendants are the sexually explicit websites: teanygushers.com, 14inch.com, and farmhoz.com. The email messages initiated by Defendants incorporate sexually explicit images similar to the sexually explicit content of the website being promoted. The subject line of these email messages fails to include the mark "SEXUALLY-EXPLICIT:" In addition, the initially viewable content of these email messages includes sexually oriented material, and fails to include a second instance of the phrase "SEXUALLY-EXPLICIT:".

23. In numerous instances, recipients of the commercial email messages initiated by Defendants have not given prior affirmative consent to receive such messages.

VIOLATIONS OF THE CAN-SPAM ACT

24. The CAN-SPAM Act, 15 U.S.C. §§ 7701 *et seq.*, became effective on January 1, 2004, and has since remained in full force and effect.

25. Section 5(a)(1) of CAN-SPAM, 15 U.S.C. § 7704(a)(1), states:

It is unlawful for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message, or a transactional or relationship message, that contains, or is accompanied by, header information that is materially false or materially misleading. For purposes of this paragraph –

. . . .

(C) header information shall be considered materially misleading if it fails to identify accurately a protected computer used to initiate the message because the person initiating the message knowingly uses another protected computer to relay or retransmit the message for purposes of disguising its origin.

26. Section 5(b)(3) of CAN-SPAM, 15 U.S.C. § 7704(b)(3), states:

It is unlawful for any person knowingly to relay or retransmit a commercial electronic mail message that is unlawful under subsection (a) from a protected computer or computer network that such person has accessed without authorization.

27. Section 7(e) of CAN-SPAM, 15 U.S.C. § 7706(e), states that in any action to enforce compliance through an injunction with Section 5(a)(1)(c), 5(b)(3), and other specified sections of CAN-SPAM, the FTC need not allege or prove the state of mind required by such sections.

28. Section 7(a) of the CAN-SPAM Act states:

[T]his Act shall be enforced by the [FTC] as if the violation of this Act were an unfair or deceptive act or practice proscribed under section 18(a)(1)(B) of the [FTC Act] (15 U.S.C. § 57a(a)(1)(B)).

COUNT I

29. In numerous instances, Defendants have initiated the transmission, to protected computers, of commercial email messages that contained, or were accompanied by, materially misleading header information, including but not limited to, messages that failed to identify accurately the protected computer used to initiate the message because Defendants used another protected computer to relay or retransmit the message.

30. Therefore, Defendants' acts or practices violate Section 5(a)(1) of CAN-SPAM, 15 U.S.C. § 7704(a)(1).

COUNT II

31. In numerous instances, Defendants have relayed or retransmitted a commercial email message that is unlawful under Section 5(a)(1) of CAN-SPAM, 15 U.S.C. § 7704(a)(1), from a protected computer or computer network that Defendants accessed without authorization.

32. Therefore, Defendants' acts or practices violate Section 5(b)(3) of CAN-SPAM, 15 U.S.C. § 7704(b)(3).

**VIOLATIONS OF THE ADULT LABELING RULE AND CAN-SPAM
IN THE TRANSMISSION OF EMAIL THAT CONTAINS
SEXUALLY ORIENTED MATERIAL**

33. The Commission promulgated the Adult Labeling Rule pursuant to Sections 5(d)(3) and 13(a) of the CAN-SPAM Act, 15 U.S.C. §§ 7704(d)(3) and 7711(a). The Rule became effective on May 19, 2004, and sets forth marks and notices to be included in commercial email messages that contain sexually oriented material.

34. The CAN-SPAM Act and the Adult Labeling Rule both prohibit any person from initiating the transmission, to a protected computer, of any commercial email message that includes sexually oriented material and fails to include the phrase "SEXUALLY-EXPLICIT:" as the first nineteen (19) characters at the beginning of the subject line. 15 U.S.C. § 7704(d)(1)(A); 16 C.F.R. § 316.4(a)(1).

35. The CAN-SPAM Act and the Adult Labeling Rule also require that any message that includes sexually oriented material place only specified information, which does not include any sexually oriented material but does require a second clear and conspicuous disclosure of the phrase "SEXUALLY-EXPLICIT:", within the content of the message that is initially viewable by the recipient, when the message is opened by the recipient and absent any further action by the recipient ("initially viewable content"). 15 U.S.C. § 7704(d)(1)(B); 16 C.F.R. § 316.4(a)(2).

36. The labeling and placement requirements of the CAN-SPAM Act and the Adult Labeling Rule do not apply if the recipient has given prior affirmative consent to receipt of the message. 15 U.S.C. § 7704(d)(2); 16 C.F.R. § 316.4(b).

37. Pursuant to Section 13(a) of the CAN-SPAM Act, 15 U.S.C. § 7711(a), which allows the Commission to issue regulations to "implement the provisions of [CAN-SPAM]," and Section 7(a), 15 U.S.C. § 7706(a), which provides that "[CAN-SPAM] shall be enforced by the [FTC] as if the violation of this Act were an unfair or deceptive act or practice proscribed under section 18(a)(1)(B) of the [FTC Act] (15

U.S.C. 57a(a)(1)(B)),” violations of the Adult Labeling Rule and Section 5(d) of CAN-SPAM are subject to enforcement as if those violations were unfair or deceptive acts or practices proscribed under Section 18(a)(1)(B) of the FTC Act.

COUNT III

38. In numerous instances, Defendants have initiated the transmission, to protected computers, of commercial email messages that include sexually oriented material and that:

- A. fail to include the phrase “SEXUALLY-EXPLICIT: ” as the first nineteen (19) characters at the beginning of the subject line;
- B. fail to include, within the initially viewable content of the message, a second instance of the phrase “SEXUALLY-EXPLICIT: ”; or
- C. include sexually oriented material within the the subject line and/or the initially viewable content of the message.

39. In numerous instances, recipients of commercial email messages initiated by Defendants that include sexually oriented material have not given prior affirmative consent to receipt of such messages from Defendants or from a party who gave clear and conspicuous notice that the recipients’ email addresses could be transferred to Defendants.

40. Therefore, the Defendants’ acts or practices violate Section 5(d) of the CAN-SPAM Act, 15 U.S.C. § 7704(d), and the Adult Labeling Rule, 16 C.F.R. § 316.4.

INDIVIDUAL AND BUSINESS INJURY

41. Individuals and businesses throughout the United States have suffered, and continue to suffer, substantial injury as a result of Defendants’ unlawful acts or

practices. In addition, Defendants have been unjustly enriched as a result of their unlawful practices. Absent injunctive relief by this Court, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

42. Sections 13(b) and 19(b) of the FTC Act, 15 U.S.C. §§ 53(b) and 57b(b), empower this Court to grant injunctive and other relief to prevent and remedy Defendants' violations of the FTC Act, to require the Defendants to pay damages, and in the exercise of its equitable jurisdiction, to award redress to remedy the injury to individuals and businesses, to order the disgorgement of monies resulting from Defendants' unlawful acts or practices, and to order other ancillary equitable relief. A violation of CAN-SPAM and the Adult Labeling Rule may be remedied in the same manner as a violation of the FTC Act. 15 U.S.C. § 7706.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff FTC, pursuant to Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, Section 7(a) of CAN-SPAM, 15 U.S.C. § 7706(a), and the Court's own equitable powers, requests that the Court:

1. Enter an order enjoining Defendants preliminarily and permanently from violating the CAN-SPAM Act, and the Adult Labeling Rule, and freezing Defendants' assets;
2. Award Plaintiff such relief as the Court finds necessary to redress injury to any person and deprive the Defendants of any benefits resulting from Defendants' violations of the CAN-SPAM Act and the Adult Labeling Rule, including, but not limited to, disgorgement of ill-gotten gains and the payment of damages; and

3. Award Plaintiff the costs of bringing this action, as well as such other and additional relief as the Court may deem just and proper.

Dated: January 9, 2006

Respectfully submitted,

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