

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	Case No. 1:13-CV-0647
)	
v.)	
)	
HENRY KELLY, individually)	
)	
Defendant.)	
)	

**STIPULATED FINAL JUDGMENT AND ORDER FOR
PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF**

Plaintiff, the Federal Trade Commission (“Commission” or “FTC”), filed its Complaint for Permanent Injunction and Other Equitable Relief (“Complaint”) for a permanent injunction, and other equitable relief in this matter, pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b).

The Commission and Defendant stipulate to entry of this Final Judgment and Order for Permanent Injunction and Other Equitable Relief (“Order”) to resolve all matters in dispute in this action between them.

THEREFORE, IT IS ORDERED as follows:

FINDINGS

1. The Court has jurisdiction over this matter.
2. The Complaint charges that Defendant participated in deceptive and unfair acts or practices in violation of Section 5, of the FTC Act, 15 U.S.C. § 45, in the course of: (1) offering to consumers purportedly free merchandise, such as Apple iPads and iPhones; and (2) the transmission of unauthorized or unsolicited commercial electronic text messages to mobile telephones and other wireless devices.
3. Defendant neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Order. Only for purposes of this action, Defendant admits the facts necessary to establish jurisdiction.
4. Defendant waives any claim that he may have under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action through the date of this Order, and agrees to bear his own costs and attorney fees.
5. Defendant and the Commission waive all rights to appeal or otherwise challenge or contest the validity of this Order.

DEFINITIONS

For purposes of this Order, the following definitions shall apply:

1. **“Defendant”** means Henry Nolan Kelly, Henry Kelly d/b/a Brand Marketing Guruz and by whatever other names he may be known.
2. **“Document” or “Documents”** means any materials listed in Federal Rule of Civil Procedure 34(a) and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from which information can be obtained and translated, if necessary, into reasonably usable form through detection devices. A draft or non-identical copy is a separate Document within the meaning of the term.
3. **“Person”** means a natural person, an organization or other legal entity, including a corporation, partnership, sole proprietorship, limited liability company, association, cooperative, or any other group or combination acting as an entity.
4. **“Plaintiff”** means the Federal Trade Commission (“Commission” or “FTC”).
5. **“Unauthorized or Unsolicited Commercial Electronic Text Message”** means an unauthorized or unsolicited text message the primary purpose of which is a commercial advertisement or promotion of a commercial product or service (including the content on an Internet website operated for commercial purposes).

I.

**BAN ON UNAUTHORIZED OR
UNSOLICITED COMMERCIAL ELECTRONIC TEXT MESSAGES**

IT IS ORDERED that Defendant, whether acting directly or indirectly, is permanently enjoined from making or initiating, or procuring the transmission of, or assisting others in making or initiating, or procuring the transmission of, unauthorized or unsolicited commercial electronic text messages to mobile telephones and other wireless devices.

II.

PROHIBITED BUSINESS ACTIVITIES

IT IS FURTHER ORDERED that Defendant, Defendant's officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promoting, offering for sale, or sale of any product or service, are permanently restrained and enjoined from:

- A. Misrepresenting, or assisting others in misrepresenting, any material fact, expressly or by implication, including, but not limited to:
1. that a product or service is "free;"

2. that a product or service is without cost or obligation;
3. that consumers have won a contest or have been selected to receive a gift or prize;
4. that Defendant is collecting consumers' personal information to send consumers merchandise;
5. the purpose for which consumers are providing personal information;
6. that personal information submitted by consumers will be sold or shared with third parties;
7. the extent to which Defendant maintains and protects the privacy and confidentiality of consumers' personal information, including, but not limited to:
 - a. the purposes for which it collects and discloses that information; and
 - b. the extent to which it makes or has made consumers' personal information accessible to third parties;
8. the total cost to purchase, receive, or use the good or service;
9. any material restrictions, limitations, or conditions to purchase,

receive, or use the good or service;

10. any material aspect of the performance, efficacy, nature, or central characteristic of the good or service; and

11. any material aspect of the nature of a refund, cancellation, exchange, or repurchase policy for the good or service.

B. Failing to disclose, or assisting others in failing to disclose, clearly and prominently, the material terms and conditions of any offer, including, but not limited to:

1. in any text message, email, or online advertisement, and on any landing page associated with such text message, email, or online advertisement, that contains any direct or implied representation that a good or service is free or is a gift or award, failing to disclose, in the same color, font, and size, and within close proximity to such representation, that a purchase is required, or that purchases are required, to obtain such gift or award, when such is the case; and

2. on any landing page associated with any direct or implied representation that a good or service is free or is a gift or award, failing to disclose, in a clear and conspicuous manner:

a. a list of the monetary obligations a consumer is likely to

incur to obtain the advertised gift or prize; and

- b. a list of any non-monetary obligations a consumer is likely to incur to obtain the advertised gift or award, such as having to apply and qualify for credit cards or an automobile loan.

III.

MONETARY JUDGMENT AND SUSPENSION

IT IS FURTHER ORDERED that:

- A. Judgment in the amount of Sixty Thousand Nine Hundred Fifty Dollars (\$60,950.00) is entered in favor of the Commission against Defendant as equitable monetary relief.
- B. The judgment is suspended subject to the Subsections below.
- C. The Commission's agreement to the suspension of the judgment is expressly premised upon the truthfulness, accuracy, and completeness of Defendant's sworn financial statement and related document (collectively, "financial representations") submitted to the Commission namely:

1. The Financial Statement (pp.1-10) of Defendant Henry Kelly signed on March 20, 2013 (pp.1-6) and April 1, 2013 (pp.7-10), including attachments.

2. The additional documentation and information provided in a response entitled "Section IV. Financial Reports and Accounting," which was signed on March 19, 2013 and submitted by Defendant to Commission counsel.

3. The additional documentation and information identified in a spreadsheet entitled "Gross Revenue" that was sent to Commission counsel by Defendant in an email dated March 22, 2013.

4. The information and bank statements for JP Morgan Chase account ending in 3005 in the name of Henry N. Kelly for January 1, 2011- April 16, 2013, submitted by Defendant to Commission counsel in emails dated April 18 and 24, 2013.

D. The suspension of the judgment will be lifted as to Defendant if, upon motion by the Commission, the Court finds that Defendant failed to disclose any material asset, materially misstated the value of any asset, or made any other material misstatement or omission in the financial representations identified above.

E. If the suspension is lifted, the judgment becomes immediately due as to the Defendant in the amount specified in Subsection A above (which the parties stipulate only for purposes of this Section represents the unjust enrichment received by Defendant), plus interest computed from the date of entry of this Order.

F. Defendant relinquishes dominion and all legal equitable right, title interest in all assets transferred pursuant to this Order and may not seek the return of any assets.

G. The facts alleged in the Complaint will be taken as true, without further proof, in any subsequent civil litigation pursued by or on behalf of the Commission, including a proceeding to enforce its rights to any payment or monetary judgment pursuant to this Order, such as a nondischargeability complaint in any bankruptcy case.

H. The facts alleged in the Complaint establish all elements necessary to sustain an action by the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and that this Order will have collateral estoppel effect for such purposes.

I. Defendant acknowledges that his Social Security Number, which Defendant previously submitted to the Commission, may be used for collecting and reporting on any delinquent amount arising out of this Order, in accordance with 31 U.S.C. § 7701.

J. All money paid to the Commission pursuant to this Order may be deposited into a fund administered by the Commission or its designee to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, the Commission may apply any remaining money for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Defendant's practices alleged in the Complaint. Any money not used for such equitable relief is to be deposited to the U.S. Treasury as disgorgement. Defendant has no right to challenge any actions the Commission or its representatives may take pursuant to this Subsection.

IV.

CUSTOMER INFORMATION

IT IS FURTHER ORDERED that Defendant, Defendant's officers, agents,

servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order are permanently restrained and enjoined from directly or indirectly:

A. Failing to provide sufficient customer information to enable the Commission to efficiently administer consumer redress. If a representative of the Commission requests in writing any information related to redress, Defendant must provide it, in the form preserved by the Commission, within 14 days.

B. Disclosing, using, or benefitting from customer information, including the name, address, telephone number, email address, social security number, other identifying information or any data that enables access to a customer's account (including a credit card, bank account, or other financial account) that Defendant obtained prior to entry of this Order in connection with (1) the marketing or advertising of a product, service or program offering free gifts or prizes and (2) the transmission of unauthorized or unsolicited text messages; and

C. Failing to destroy such customer information in all forms in his possession, custody, or control within thirty (30) days after written direction to do so from a representative of the Commission.

Provided, however, that customer information need not be disposed of, and

may be disclosed, to the extent requested by a government agency or required by a law, regulation, or court order.

V.

COOPERATION WITH FTC COUNSEL

IT IS FURTHER ORDERED that Defendant must fully cooperate with representatives of the Commission in this case and in any investigation related to or associated with the transactions or occurrences that are the subject of the Complaint. Defendant must provide truthful and complete information, evidence, and testimony. Defendant must appear for interviews, discovery, hearings, trials, and any other proceedings that a Commission representative may reasonably request upon five (5) days written notice, or other reasonable notice, at such places and times as a Commission representative may designate, without the service of a subpoena.

VI.

ORDER ACKNOWLEDGMENTS

IT IS FURTHER ORDERED that Defendant obtains acknowledgment of receipt of this Order:

A. Defendant, within 7 days of entry of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For five (5) years after entry of this Order, for any business that Defendant is the majority owner or controls directly or indirectly, Defendant must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Section titled "Compliance Reporting." Delivery must occur within 7 days of entry of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Defendant delivered a copy of this Order, Defendant must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

VII.

COMPLIANCE REPORTING

IT IS FURTHER ORDERED that Defendant makes timely submissions to the Commission:

A. One year after entry of this Order, Defendant must submit a compliance report, sworn under penalty of perjury. Defendant must:

1. identify all telephone numbers and all physical, postal, email and Internet addresses, including all residences;
2. identify all business activities, including any business for which Defendant performs services whether as an employee or otherwise and any entity in which Defendant has any ownership interest;
3. describe in detail Defendant's involvement in each such business, including title, role, responsibilities, participation, authority, control, and any ownership.
4. identify the primary physical, postal, and email addresses and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Defendant;
5. identify all of Defendant's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses;

6. describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and the involvement of Defendant;

7. describe in detail whether and how Defendant is in compliance with each Section of this Order;

8. provide a copy of each Order Acknowledgment obtained pursuant to this Order, unless previously submitted to the Commission.

B. For 15 years following entry of this Order, Defendant must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

1. Name, including alias or fictitious name, or residence address;
or

2. Title or role in any business activity, including any business for which Defendant performs services whether as an employee or otherwise and any entity in which Defendant has any ownership interest, and identify the name, physical address, and any Internet address of the business or entity;

3. Any designated point of contact; or

4. The structure of any entity that Defendant has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Defendant must submit to the Commission notice of the filing of any bankruptcy petition, insolvency proceeding, or any similar proceeding by or against Defendant within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: “I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____” and supplying the date, signatory’s full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal

Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: *FTC v. Henry Nolan Kelly*, Matter No. X 130041.

VIII.

RECORDKEEPING

IT IS FURTHER ORDERED that Defendant must create certain records for 15 years after entry of the Order, and to retain each such record for 5 years. Specifically, for any business in which Defendant is a majority owner or controls directly or indirectly, Defendant must maintain the following records:

- A. Accounting records showing the revenues from all goods or services sold;
- B. Personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name, addresses, and telephone numbers; job title or position; dates of service; and, if applicable, the reason for termination;
- C. Records relating to affiliates or affiliate networks including all names, addresses, and telephone numbers, dollar amounts paid or received; and information used in calculating such payments.
- D. Records of all consumer complaints and refund requests, whether

received directly or indirectly, such as through a third party, any response;

E. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission;

F. Copies of all marketing materials, documents, and information related to affiliate marketing campaigns and all written approvals or denials of such marketing.

G. For any goods or services that Defendant sells or assists others to sell, a copy of each advertisement or other marketing material regarding such goods or services.

IX.

COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring Defendant's compliance with this Order, including the financial representations upon which the judgment was suspended:

A. Within 14 days of receipt of a written request from a representative of the Commission, Defendant must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury; appear for depositions; and produce documents for inspection and copying. The Commission

is also authorized to obtain discovery, without further leave of court, using any of the procedures prescribed by Federal Rules of Civil Procedure 29, 30 (including telephonic depositions), 31, 33, 34, 36, 45, and 69.

B. For matters concerning this Order, the Commission is authorized to communicate directly with Defendant. Defendant must permit representatives of the Commission to interview any employee or other person affiliated with Defendant who has agreed to such an interview. The person interviewed may have counsel present.

C. The Commission may use all other lawful means, including posing, through its representatives, as consumers, suppliers, or other individuals or entities, to Defendant or any individual or entity affiliated with Defendant, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

X.

RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court retains jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.

SO STIPULATED AND AGREED:

FOR THE PLAINTIFF:



Date: 7/16/2013

ROBIN L. ROCK, GA Bar No. 632529
Federal Trade Commission
225 Peachtree St., NE, Suite 1500
Atlanta, GA 30303
Tel. (404) 656-1368
Fax (404) 656-1379
rrock@ftc.gov

Attorney for Plaintiff
Federal Trade Commission

FOR THE DEFENDANT:



Date: 5/22/13

HENRY NOLAN KELLY
Pro se Defendant

SO ORDERED this 17th day of July, 2013.

/s/Thomas W. Thrash
Thomas W. Thrash
United States District Court Judge