

JUN 14 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

Michael N. Milby, Clerk of Court

<hr/>)	Civ. No. H05-1905
FEDERAL TRADE COMMISSION,)	
)	
	Plaintiff,)	
)	(PROPOSED)
vs.)	STIPULATED PRELIMINARY
)	INJUNCTION ORDER
TRUSTSOFT, INC. d/b/a)	
SWANKSOFT and SPYKILLER,)	
)	
DANILO LADENDORF, individually and)	
as an officer of Trustsoft, Inc.,)	
)	
	Defendants)	
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On May 31, 2005, Plaintiff, the Federal Trade Commission ("FTC" or the "Commission"), pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b, and the Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM Act"), 15 U.S.C. §§ 7701 *et seq.*, filed against Trustsoft, Inc. and Danilo Ladendorf a Complaint for Injunctive and Other Equitable Relief, including consumer redress, and applied *ex parte* for a Temporary Restraining Order ("TRO") and for an order to show cause why a preliminary injunction should not be granted pursuant to Rule 65(b) of the Federal Rules of Civil Procedure. On June 1, 2005, this Court, having considered the Complaint, memorandum of law, declarations, and other exhibits filed in support of plaintiff's motion, issued a TRO with an asset freeze and granted other equitable ancillary relief.

The Commission and the defendants, by and through counsel, hereby stipulate to the entry of and request the Court to enter this Stipulated Preliminary Injunction Order.

IT IS THEREFORE STIPULATED, AGREED, AND ORDERED as follows:

1. This Court has jurisdiction over the subject matter of this case, and there is good cause to believe that it will have jurisdiction over all parties hereto;
2. The FTC contends that there is good cause to believe that defendants have engaged in deceptive acts or practices in violation of Section 5 of the FTC Act by making numerous materially deceptive representations in their marketing, selling, and distribution via the Internet of their spyware removal product, "SpyKiller." These misrepresentations include false reports of scans of consumers' computers for spyware, false reports of spyware found on consumers' computers, and false statements about the removal capabilities of SpyKiller. Additionally, the FTC contends that defendants have initiated commercial email that fails to comply with the requirements of the CAN-SPAM Act. The FTC contends that there is good cause to believe that defendants will continue with such illegal actions if not restrained from doing so by Order of this Court;
3. The FTC contends that there is good cause to believe that immediate and irreparable damage will result from the defendants' ongoing violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the CAN-SPAM Act, 15 U.S.C. §§ 7701 *et seq.*, unless the defendants are restrained and enjoined by Order of this Court;
4. The FTC contends that there also is good cause to believe that immediate and irreparable damage to the Court's ability to grant effective final relief for consumers in the form of monetary restitution will result from the sale, transfer, or other disposition or concealment by defendants of their assets or business records, unless defendants are immediately restrained and enjoined by Order of this Court;

5. Defendants dispute and deny the contentions of the FTC, but agree to this Stipulated Preliminary Injunction to expedite a resolution of this matter;
6. Weighing the equities and considering the Commission's substantial likelihood of success on the merits, issuance of a preliminary injunction requiring an immediate freeze and accounting of assets, preserving business records, and providing other equitable relief is in the public interest;
7. As an agency of the United States, no security is required of the Commission for issuance of a preliminary injunction. Fed. R. Civ. P. 65(c).

DEFINITIONS

For the purpose of this Stipulated Preliminary Injunction Order ("PI" or "Order"), the following definitions shall apply:

- A. **"Affiliate marketer"** or **"sub-affiliate marketer"** means any person who provides or has provided defendants with, or who refers or has referred to defendants, actual or potential spyware removal product customers, whether pursuant to defendants' "Affiliate Program" or otherwise.
- B. **"Assets"** means any legal or equitable interest in, right to, or claim to any real or personal property of any defendant, or held for the benefit of any defendant, wherever located, including, but not limited to, "goods," "instruments," "equipment," "fixtures," "general intangibles," "inventory," "checks," "notes" (as these terms are defined in the Uniform Commercial Code), chattels, leaseholds, contracts, mails, other deliveries, shares of stock, lists of participants, intellectual property, accounts, credits, receivables, cash,

and trusts, including, but not limited to, any other trust held for the benefit of any defendant, any defendant's minor children, or any defendant's spouse.

- C. **"Commercial electronic mail message"** (or **"commercial email message"**) means any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service and has the same meaning as defined in the CAN-SPAM Act, 15 U.S.C. § 7702(2)(A).
- D. **"Defendants"** means Trustsoft, Inc., also doing business as "Swanksoft," "SpyKiller," and "spykiller.com," and Danilo Ladendorf. Furthermore, any person insofar as he or she is acting in the capacity of an officer, agent, servant, employee or attorney of any defendant, and any person or entity in active concert or participation with any of the foregoing who receives actual notice of this Order by personal service or otherwise, is bound to comply with this Order, *see* Fed. R. Civ. P. 65(d), whether these persons or entities are acting directly or through a trust, corporation, subsidiary, division, or other device.
- E. **"Document"** is synonymous in meaning and equal in scope to the usage of the term in Federal Rule of Civil Procedure 34(a), and includes, but is not limited to, writings, drawings, graphs, charts, Internet sites, Web pages, Web sites, electronic correspondence, including email and instant messages, photographs, audio and video recordings, computer records, whether active or inactive, and any other data compilations from which information can be obtained and translated, if necessary, through detection devices into reasonably usable form. A draft or non-identical copy is a separate document within the meaning of the term.

- F. **"Plaintiff"** means the Federal Trade Commission.
- G. **"SpyKiller"** means SpyKiller 2003, Spykiller 2004, and SpyKiller 2005.
- H. **"Spyware,"** which includes "adware," means (as defined by defendants in their marketing media) programs that "hide on your computer and do a number of harmful and annoying things without your knowledge," including "steal[ing] information from your computer such as credit card numbers, email addresses, addresses, [and] surfing habits" and which also may effectuate "PopUp web browser ads" as well as banner advertisements, hijack search engine results, and deliver advertisements to consumers' computers. The term includes, but is not limited to, the entries listed in defendants' "spyware encyclopedia" on defendants' web site.
- I. **"Spyware removal product"** means any product marketed, sold, or distributed by defendants, however denominated, including but not limited to SpyKiller, that does or purports to identify, monitor, remove, block, or otherwise prevent spyware from residing on a computer.

PROHIBITED BUSINESS ACTIVITIES

I.

IT IS THEREFORE ORDERED that in connection with the advertising, promotion, offering for sale, or sale of goods or services, defendants, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby restrained and enjoined from making, directly or indirectly, expressly or by implication, any false or misleading representation, including but not limited to:

A. Misrepresenting, before a consumer has downloaded any of defendants' computer software, that: (1) a computer has been scanned or otherwise examined for the presence of spyware; or (2) spyware has been detected on a computer;

B. Misrepresenting that processes on a computer that are not spyware are "Live Spyware Processes";

C. Misrepresenting any material feature of a spyware removal product including, but not limited to, the number of definitions incorporated in a spyware removal product;

D. Misrepresenting the type of spyware detection mechanism used by a spyware removal product;

E. Misrepresenting that a file or application on a consumer's computer is spyware, after receiving notice from a consumer, potential consumer, or other entity not affiliated with the spyware at issue that the file or application is not spyware;

F. Misrepresenting that a spyware removal product detects, removes, blocks, or otherwise prevents all, or substantially all, spyware on a computer; and

G. Misrepresenting that a spyware removal product detects, removes, blocks, or otherwise prevents "all traces" or substantially all traces of particular spyware on a computer.

II.

IT IS FURTHER ORDERED that defendants, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby restrained and enjoined from initiating commercial email messages that fail to comply with the CAN-SPAM Act, including, but not limited to, initiating commercial email messages

that:

- A. Contain, or are accompanied by, materially false or materially misleading header information;
- B. Do not include a clear and conspicuous notice of the recipient's opportunity to decline to receive further commercial email messages from the sender at the recipient's electronic mail address;
- C. Do not include a functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that a recipient can use to submit a reply electronic mail message or other form of Internet-based communication requesting not to receive future commercial email messages from the sender at the electronic mail address where the message was received;
- D. Do not include the sender's valid physical postal address; and
- E. Do not provide clear and conspicuous identification that the message is an advertisement or solicitation.

ASSET FREEZE

III.

IT IS FURTHER ORDERED that defendants are hereby restrained and enjoined from:

- A. Transferring, liquidating, converting, encumbering, pledging, loaning, selling, concealing, dissipating, disbursing, assigning, spending, withdrawing, granting a lien or security interest or other interest in, or otherwise disposing of any funds, real or personal property, accounts, contracts, consumer lists, shares of stock, or other assets, or any interest therein,

wherever located, that are: (1) owned or controlled by defendants, in whole or in part; (2) held for the benefit of defendants; (3) in the actual or constructive possession of defendants; or (4) 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 any defendant, including, but not limited to, any assets held by or for, or subject to access by, any of defendants, at any bank or savings and loan institution, or with any broker-dealer, escrow agent, title company, commodity trading company, precious metals 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, alias, or fictitious "doing business as" name, of any defendant, or subject to access by any of them;

C. Incurring charges or cash advances on any credit card issued in the name, alias, or fictitious "doing business as" name, singly or jointly, of any defendant;

D. Obtaining a personal or secured loan; and

E. Incurring liens or other encumbrances on real property, personal property or other assets titled in the name, singly or jointly, of any defendant.

Provided further, that the assets affected by this Section shall include: (1) all assets of defendants as of June 1, 2005; (2) any present or future proprietary interest held or acquired in [REDACTED]

[REDACTED] and (3) for all assets otherwise obtained after June 1, 2005, only those assets of defendants that are derived in any way from defendants' sales of SpyKiller.

Provided further, defendants shall be permitted to withdraw \$115,000 from [REDACTED] [REDACTED] for the sole purpose of paying defendants' federal tax obligation due on June 15, 2005. The defendants reserve the right to move the Court to release

additional funds to apply toward the tax payment for this quarter, if necessary. The FTC does not object to additional funds being released, if determined to be required to meet the defendants' quarterly tax obligation for the quarter ending June 15, 2005 by the Court or the FTC, so long as the amount does not exceed the "safe harbor" amount of \$175,000 proffered by defendants based on their 2004 revenue.

Notwithstanding the above, the defendants may, with the express written permission of the Commission and at the sole discretion of the Commission, make expenditures from assets frozen pursuant to this paragraph without further leave of the Court.

FINANCIAL REPORTS AND ACCOUNTING

IV.

IT IS FURTHER ORDERED that, to the extent that defendants have not complied with Section VI of the TRO, each defendant shall immediately:

A. Prepare and deliver to the Court and counsel for plaintiff Commission completed financial statements, verified under oath and accurate as of June 1, 2005, on the forms attached to the TRO as Attachment A (for individual defendant Danilo Ladendorf) and Attachment B (for corporate defendant Trustsoft, Inc.);

B. Provide plaintiff Commission with a full accounting of all assets and documents that are located inside or outside of the territory of the United States of America and are held by or for defendants or are under their direct or indirect control, jointly, severally, or individually;

C. Provide the Commission with a statement, verified under oath and accurate as of the date of entry of this Order, detailing the name, address, and telephone number for each

accountant, financial planner, investment advisor, stock broker, or other person who provided any defendant with financial, business, or tax advice or services since January 1, 2003; and

D. Provide the Commission access to all records of accounts or assets of defendants held by financial institutions located outside the territorial United States by signing the Consent to Release of Financial Records attached to the TRO as Attachment C.

Provided further, plaintiff is immediately authorized to issue subpoenas to demand the production of documents from any person or entity relating to the nature, status, extent, location or other relevant information relating to defendants' assets, income, and financial records.

**RETENTION OF ASSETS AND RECORDS BY ASSET HOLDERS, INCLUDING
FINANCIAL INSTITUTIONS**

V.

IT IS FURTHER ORDERED that any financial or brokerage institution, business entity, or person served with a copy of this Order that holds, controls, or maintains custody of any account or asset of any defendant, including but not limited to any account or asset held by, for, or under the name, alias, or fictitious "doing business as" name of any defendant, or has held, controlled or maintained custody of any such account or asset at any time since June 1, 2005, shall:

A. Hold and retain within its control and prohibit the withdrawal, removal, assignment, transfer, pledge, encumbrance, disbursement, dissipation, conversion, sale, or other disposal of any such asset except by further order of the Court.

Provided, however, that each defendant shall be permitted to open new accounts for funds

excepted from the asset freeze as described in Paragraph III of this Order, including for funds derived from sales of HistoryKill after June 1, 2005. *Provided further*, that defendants shall provide to the plaintiff the name and location of each such new account within forty-eight (48) hours of opening it.

B. Deny the defendants access to any safe deposit box that is:

1. titled in any defendants' name, alias, or fictitious "doing business as" name, individually or jointly; or
2. otherwise subject to access by any defendant;

C. To the extent not already done pursuant to Section VII of the TRO, within five (5) business days of receiving a copy of this Order, provide to the Commission's counsel a sworn statement setting forth:

1. the identification number of each such account or asset titled in the name, alias, or fictitious "doing business as" name, individually or jointly, of a defendant, or held on behalf of, or for the benefit of a defendant;
2. the balance of each such account, or a description of the nature and value of each 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; and
3. the identification of any safe deposit box that is titled in the name, alias, or fictitious "doing business as" name, individually or jointly, of a defendant,

or is otherwise subject to access by a defendant; and

D. Upon request by the Commission, promptly provide the Commission with copies of all records or other documentation pertaining to each 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. Any such financial institution, account custodian, or other aforementioned entity may arrange for the Commission to obtain copies of any such records which the Commission seeks.

PRODUCTION OF RECORDS

VI.

IT IS FURTHER ORDERED that, to the extent that defendants have not complied with Section VIII of the TRO with respect to producing: (1) documents owned by or in the custody or control of the defendants concerning defendants' business practices or assets, or (2) computers owned by or in the custody or control of the defendants that are being used or have been used in connection with defendants' business practices or assets, which documents or computers were not located at the defendants' business premises at 1330 Post Oak Blvd., Suite 2300, Houston, Texas during the Immediate Access that took place on June 2, 2005, each defendant shall immediately identify and produce such documents and computers for copying and inspection to the Regional Office of the Attorney General at 808 Travis, Suite 300, Houston, Texas 77002, or at another location mutually agreed upon by plaintiff and defendants. In order to prevent the destruction of computer data, upon service of this order upon defendants, any such computers shall be powered

down (turned off) in the normal course for the operating systems used on such computers and shall not be used until produced for copying and inspection, along with any codes needed for access.

Provided further, that plaintiff shall return to defendants any documents or computers produced within five (5) business days, or at such time as is mutually agreed upon by plaintiff and defendants.

Furthermore, defendants make no waiver of any attorney-client privilege by producing such documents and computers.

PRESERVATION OF RECORDS

VII.

IT IS FURTHER ORDERED that defendants, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby 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 defendants, including but not limited to, computerized files and storage media on which information has been saved (including, but not limited to, floppy disks, hard drives, CD-ROMS, zip disks, punch cards, magnetic tape, backup tapes, and computer chips), contracts, accounting data, correspondence, advertisements (including, but not limited to, advertisements placed on the World Wide Web or the Internet), handwritten notes, telephone logs, telephone scripts, 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 or personal finances of defendants.

IDENTIFICATION OF AFFILIATES AND CUSTOMERS

VIII.

IT IS FURTHER ORDERED that, to the extent that defendants have not complied with Section X of the TRO, defendants shall:

A. Immediately prepare and deliver to the plaintiff a completed statement, verified under oath and accurate as of June 1, 2005, identifying by name, address, phone number, and any affiliate or other identification code used in connection with the sale of spyware removal products, all affiliate marketers, sub-affiliate marketers, agents, vendors, employees, and contractors, that have worked with defendants in connection with the sale of spyware removal products; and

B. Immediately prepare and deliver to counsel for plaintiff a completed statement, verified under oath and accurate as of June 1, 2005, detailing the number and identity of members of the public who purchased from defendants, whether directly, or through affiliate marketers or sub-affiliate marketers, any spyware removal product, including each such purchaser's name, address, phone number, and email address, date of purchase, associated affiliate marketer or other identification code (if any), and the total funds received from each such purchaser.

RECORD KEEPING/BUSINESS OPERATIONS

IX.

IT IS FURTHER ORDERED that defendants are hereby restrained and enjoined from:

- A. Failing to create and maintain documents that, in reasonable detail, accurately, fairly, and completely reflect their incomes, disbursements, transactions, and use of money; and
- B. Creating, operating, or exercising any control over any business entity, including any partnership, limited partnership, joint venture, sole proprietorship, or corporation, without first providing plaintiff Commission with a written statement disclosing: (1) the name of the business entity; (2) the address and telephone number of the business entity; (3) the names of the business entity's officers, directors, principals, managers and employees; and (4) a detailed description of the business entity's intended activities.

DISTRIBUTION OF ORDER BY DEFENDANTS

X.

IT IS FURTHER ORDERED that defendants shall immediately provide a copy of this Order to each affiliate marketer, sub-affiliate marketer, affiliate, subsidiary, division, sales entity, successor, assign, officer, director, employee, independent contractor, client company, agent, attorney, spouse and representative of defendants, and shall, within ten (10) days from the date of entry of this Order, provide the Commission with a sworn statement that defendants have complied with this provision of the Order, which statement shall include the names, physical addresses, and email addresses of each such person or entity who received a copy of the Order.

SERVICE OF ORDER

XI.

IT IS FURTHER ORDERED that copies of this Order may be served by any means, including facsimile transmission, upon any financial institution or other entity or person that may have possession, custody, or control of any documents of any defendant, or that may otherwise be subject to any provision of this Order. Service upon any branch or office of any financial institution shall effect service upon the entire financial institution.

CONSUMER CREDIT REPORTS

XII.

IT IS FURTHER ORDERED that, pursuant to Section 604(1) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(1), any consumer reporting agency may furnish a consumer report concerning defendants Trustsoft, Inc. and Danilo Ladendorf to plaintiff Commission.

DURATION OF PRELIMINARY INJUNCTION

XIII.

IT IS FURTHER ORDERED that the Stipulated Preliminary Injunction granted herein shall remain in effect until further order of the Court.

SERVICE UPON PLAINTIFF AND NOTIFICATION

XIV.

IT IS FURTHER ORDERED that, with regard to any correspondence, pleadings,

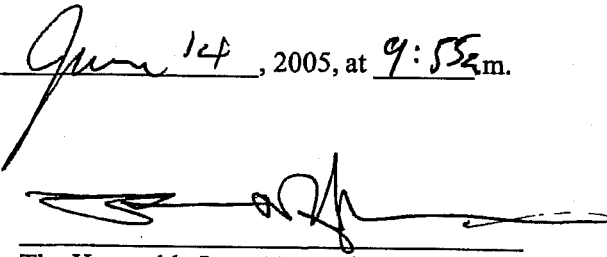
notifications or reporting related to this case or under this Order, service on the Commission shall be performed either by overnight mail delivery or facsimile to the attention of Robert Kaye at the Federal Trade Commission, 600 Pennsylvania Avenue, NW, Room H-238, Washington, DC 20580, telephone number (202) 326-2215, facsimile number (202) 326-3395.

RETENTION OF JURISDICTION

XV.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes.

~~SO ORDERED~~, this _____ day of June¹⁴, 2005, at 9:55 a.m.



The Honorable Lynn N. Hughes
UNITED STATES DISTRICT JUDGE

SO STIPULATED:

/s/Robert S. Kaye

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