

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN**

UNITED STATES OF AMERICA

Plaintiff,

v.

MD MEDIA, INC.,

Defendant.

No. _____

**STIPULATED JUDGMENT AND
ORDER FOR PERMANENT
INJUNCTION**

Plaintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission (“FTC” or the “Commission”), pursuant to Section 16(a)(1) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 56(a)(1), has filed a complaint pursuant to Sections 5(a)(1), 5(m)(1)(A), 13(b), 16(a), and 19 of the FTC Act, 15 U.S.C. §§ 45(a)(1), 45(m)(1)(A), 53b, 56(a), 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 secure civil penalties, a permanent injunction, and other equitable relief for Defendant’s violations of Sections 5(a) and (d) of CAN-SPAM, 15 U.S.C. §§ 7704(a) and (d), and the FTC’s Adult Labeling Rule (the “Adult Labeling Rule” or the “Rule”), 16 C.F.R. Part 316.4. The parties to this action agree to settlement of this action without adjudication of any issue of fact or law and without Defendant admitting liability for any of the violations alleged in the complaint.

THEREFORE, on the joint motion of the parties, it is hereby **ORDERED**,
ADJUDGED AND DECREED as follows:

FINDINGS

1. This Court has jurisdiction over the subject matter pursuant to 15 U.S.C. §§ 45(m)(1)(A), 53(b), 56(a), 57b, and 7706(a), and 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355.
2. Plaintiff and Defendant consent to Jurisdiction and Venue in this District.
3. The activities of Defendant are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
4. The complaint states a claim upon which relief may be granted against Defendant under Sections 5(a) and (d) of the CAN-SPAM Act, 15 U.S.C. §§ 7704(a) and (d), and the FTC's Adult Labeling Rule, 16 C.F.R. Part 316.4.
5. Defendant has entered into this Stipulated Judgment and Order for Permanent Injunction ("Order") freely and without coercion.
6. Defendant hereby waives all rights to appeal or otherwise challenge or contest the validity of this Order.
7. Defendant has agreed that this Order does not entitle Defendant to seek or to obtain attorneys' fees as a prevailing party under the Equal Access to Justice Act, 28 U.S.C. § 2412, and Defendant further waives any rights to attorneys' fees that may arise under said provision of law.
8. Entry of this Order is in the public interest.

DEFINITIONS

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

1. “Affiliate Program” means any arrangement whereby any person agrees to provide Defendant with, or refers to Defendant, potential or actual customers.
2. “Commercial electronic mail (“email”) message” means any electronic mail message which contains a commercial advertisement or promotion of a commercial product or service (including content on an Internet web site operated for a commercial purpose).
3. Unless otherwise specified, “Defendant” means MD Media, Inc. and its successors, assigns, officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile, or otherwise, whether acting directly or through any corporation, subsidiary, division, or other entity.
4. “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 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.
5. “Electronic mail (“email”) 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.

6. “Electronic mail (“email”) message” means a message sent to a unique electronic mail address.

7. “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. For purposes of this Order, more than one person may be considered to have initiated a message.

8. “Person” means a natural person or a corporation, partnership, proprietorship, limited liability company, or other organization or legal entity, including an association, cooperative, or agency, or other group or combination acting as an entity.

9. “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; ***Provided, however,*** that for the purposes of this Order, Defendants have not procured the initiation of commercial electronic mail messages that violate the CAN-SPAM Act or its implementing regulations: (1) if they have contractually prohibited affiliates from sending commercial electronic mail or, in the case of persons who are not affiliates, have not requested any such persons to send commercial electronic mail; and (2) if they have complied with the requirements set forth in Section III of this Order.

10. “Recipient,” when used with respect to a commercial electronic mail message, means an authorized user of the electronic mail address to which the message was sent or delivered. If a recipient of a commercial electronic mail message has one or more electronic

mail addresses in addition to the address to which the message was sent or delivered, the recipient shall be treated as a separate recipient with respect to each such address. If an electronic mail address is reassigned to a new user, the new user shall not be treated as a recipient of any commercial electronic mail message sent or delivered to that address before it was reassigned.

11. “Sender,” when used with respect to a commercial electronic mail message, means a person who initiates such a message and whose product, service, or Internet web site is advertised or promoted by the message.

12. “Sexually oriented material” means any material that depicts sexually explicit conduct (as that term is defined in section 2256 of title 18, United States Code), unless the depiction constitutes a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters.

13. “Valid physical postal address” means a sender’s current street address, a Post Office box a sender has registered with the United States Postal Service, or a private mailbox a sender has registered with a commercial mail receiving agency that is established pursuant to United States Postal Service regulations.

ORDER

I. PROHIBITION AGAINST VIOLATING THE CAN-SPAM ACT

IT IS THEREFORE ORDERED that Defendant is hereby permanently restrained and enjoined from:

- A. Violating the CAN-SPAM Act, 15 U.S.C. §§ 7701 et seq., including but not limited to initiating the transmission of a commercial email message that:
1. Does not contain a functioning return email address or other Internet-based mechanism, clearly and conspicuously displayed, that (i) a recipient may use to submit, in a manner specified in the message, a reply email message or other form of Internet-based communication requesting not to receive future commercial email messages from that sender at the email address where the message was received; and (ii) that remains capable of receiving such messages or communications for no less than 30 days after the transmission of the original message; and
 2. Does not contain a clear and conspicuous display of an accurate, valid, physical postal address of the Defendant who is the sender of the message; and
- B. Initiating a commercial email message that does not contain a clear and conspicuous notice of a recipient's opportunity to decline to receive further commercial email messages from Defendant.

II. PROHIBITION AGAINST VIOLATING THE ADULT LABELING RULE

IT IS FURTHER ORDERED that Defendant is hereby permanently restrained and enjoined from violating the Adult Labeling Rule, 16 C.F.R. § 316.4, including but not limited to initiating the transmission of a commercial email message that includes sexually oriented material that:

- A. Does not contain the phrase “SEXUALLY-EXPLICIT:” as the first nineteen (19) characters at the beginning of the subject line of the message;
- B. Includes sexually oriented materials within the subject line of the message;
- C. Includes sexually oriented materials 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; and
- D. Does not contain only the following information 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:
 - 1. The phrase “SEXUALLY-EXPLICIT:” in a clear and conspicuous manner; and
 - 2. Clear and conspicuous notice that the message is an advertisement or solicitation.

III. MONITORING BY DEFENDANT FOR COMPLIANCE

IT IS FURTHER ORDERED that the Defendant, and its successors, assigns, officers, agents, servants, and employees are hereby permanently restrained and enjoined from failing to immediately take the following steps to ensure compliance with Sections I and II of this Order within thirty (30) days of the date Defendant signs this Order:

- A. Prior to a person’s participation in Defendant’s affiliate program, Defendant shall require each prospective participant to provide to Defendant their first and last name, physical address, country, telephone number, email address, date of birth, and bank account information

(where used to make payments to that person). In the event that the prospective participant is not a natural person, but is a corporation, partnership, proprietorship, limited liability company, or other organization or legal entity, including an association, cooperative, agency, or other group or combination acting as an entity, Defendant shall also require from that prospective participant the first and last name, physical address, country, telephone number, email address, and date of birth for the natural person(s) who owns, manages, or controls that prospective participant;

B. Prior to a person's acceptance into Defendant's affiliate program, Defendant shall (1) provide each prospective participant in Defendant's affiliate program a copy of this Order; (2) obtain from each prospective participant an express agreement to comply with this Order and the CAN-SPAM Act; and (3) obtain from each prospective participant a signed and dated statement (which signature may be obtained electronically, provided that the signature would comply with the signature requirements of the Electronic Signatures in Global and National Commerce Act, ("E-Sign Act"), 15 U.S.C. § 7001 et seq.), acknowledging receipt of this Order;

C. Defendant shall establish, implement, and maintain an email address or other Internet-based mechanism that is clearly and conspicuously disclosed on the first page a consumer visits upon entering Defendant's web site, (i) that invites visitors to report commercial email messages promoting the Defendant's web site, and that permits the Defendant to associate affirmative responses, if any, to such invitation with the referring affiliate, and (ii) for receiving and responding to consumer complaints, whether received directly by Defendant or through an

intermediary, concerning violations of the CAN-SPAM Act, the Adult Labeling Rule, or any provision of this Order;

D. Defendant shall promptly and fully investigate, in accordance with industry standards, any information received by Defendant regarding a commercial email message that promotes Defendant's web site(s), including, but not limited to, responses received pursuant to Section III.C, and complaints received from consumers, Internet Service Providers, the Commission or other law enforcement agencies, to determine whether such commercial email message violates a contractual provision of the Defendant's affiliate program, the CAN-SPAM Act, the Adult Labeling Rule, or any provision of this Order;

E. Defendant shall require each new subscriber to Defendant's web sites to identify the manner in which they were directed to Defendant's web sites (i.e., email message, banner ad, pop-up window, etc.). If a new subscriber indicates that he or she was referred to Defendant's web sites through a commercial email message, Defendant shall promptly and fully investigate to determine whether a commercial email message was sent in violation of a contractual provision of the Defendant's affiliate program, the CAN-SPAM Act, the Adult Labeling Rule, or any provision of this Order;

F. Defendant shall immediately terminate from all of the Defendant's affiliate programs, and cease payments to, any person who Defendant reasonably concludes has sent a commercial email message on Defendant's behalf that violates a contractual provision of Defendant's affiliate program prohibiting the sending of commercial email, the CAN-SPAM Act, the Adult Labeling Rule, or any provision of this Order.

G. On the web page where a person registers to become a member of Defendant's affiliate program, Defendant shall clearly and conspicuously disclose that a violation of the affiliate program's commercial email policy will result in immediate termination of a person's affiliate account and the forfeiture of all monies earned or owed to that person. Such message shall also include a hyperlink to Defendant's commercial email policy if that policy is not included on that web page;

H. Defendant shall require each person who participates in Defendant's affiliate program to create, maintain, and retain the records and documents necessary to demonstrate each person's full compliance with each provision of this Order.

Provided, however, that this Section does not authorize or require Defendants to take any action that violates any federal, state, or local law.

III. CIVIL PENALTY

IT IS FURTHER ORDERED that defendant and its successors and assigns, shall pay to plaintiff a civil penalty, pursuant to section 5(m)(1)(A) of the Federal Trade Commission Act, 15 U.S.C. § 45(m)(1)(A), in the amount of \$238,743.00 as follows:

A. Defendant shall pay the penalty required by Paragraph IV by paying Sixty Thousand Dollars (\$60,000.00) within five (5) business days of the date of entry of this Order, followed by payment of the remaining One Hundred Seventy Eight Thousand Seven Hundred and Forty Three Dollars (\$178,743.00), in three (3) equal installments of Fifty Nine Thousand Five Hundred Eighty One Dollars (\$59,581.00) plus interest, as calculated pursuant to 28 U.S.C. § 1961, due September 30, 2005, December 31, 2005, and March 31, 2006; *provided, however,*

that at any time, and without penalty, Defendant may pay the balance due, make more frequent payments, make advance payments, or make larger payments than scheduled. Defendant shall make these payments by certified or cashier's check made payable to the Treasurer of the United States and delivered to: The Office of Consumer Litigation, Civil Division, United States Department of Justice, Washington, D.C. 20530, for appropriate disposition.

B. As security for the payments required by this Paragraph IV, Defendant shall deliver to the Commission, within five (5) business days of signing this Order, an irrevocable standby letter of credit in the amount of One Hundred Twenty Eight Thousand Four Hundred Twenty Four Dollars (\$128,424.00) issued by a financial institution and made payable, in the event of any default by Defendant, to the Treasurer of the United States. Both the financial institution that issues the letter of credit and the form of the letter of credit must be acceptable to the Commission, which acceptance will not be unreasonably withheld. The letter of credit shall be drawn upon only in the event that Defendant fails to fully and timely pay the installments required by this Paragraph IV;

C. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the entire unpaid civil penalty amount, together with interest, as computed pursuant to 28 U.S.C. § 1961, from the date of default to the date of payment, shall immediately become due and payable, and Plaintiff shall be entitled to exercise immediately any and all rights and remedies, including, but not limited to, drawing on the letter of credit. Defendant hereby waives any right to contest any allegations in Plaintiff's Complaint, and the facts as alleged in Plaintiff's Complaint filed in this action must be taken as true in any

subsequent litigation filed by the Plaintiff to collect such unpaid amount, including, but not limited to, a nondischargeability complaint filed in any bankruptcy case;

D. The Plaintiff's agreement to this Order is expressly premised upon the truthfulness, accuracy, and completeness of the corporate financial statement provided to the Commission and signed by on behalf of Defendant by its President, David Koonar, dated May 2, 2005, and the separate statement signed by David Koonar on the same date attesting to the truthfulness, accuracy, and completeness of the financial figures showing the gross revenues derived from email marketing by the Defendant. These documents contain material information upon which the Plaintiff and Commission have relied in negotiating and agreeing to this Order. If, upon motion by the Plaintiff, this Court finds that Defendant has materially understated the revenues derived by Defendant as a result of email marketing, the Court shall enter judgment against Defendant for the amounts by which revenues have been understated;

E. Defendant relinquishes all dominion, control and title to the funds paid to the FTC pursuant to this Order. Defendant shall make no claim to or demand for the return of the funds, directly or indirectly, through counsel or otherwise; and

F. Proceedings instituted under this Paragraph are in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law, including any other proceedings the Plaintiff or Commission may initiate to enforce this Order.

IV. COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring and investigating Defendant's compliance with any provision of this Order:

- A. Within ten (10) days of receipt of written notice from a representative of the Plaintiff or Commission, Defendant shall submit additional written reports, sworn to under penalty of perjury; produce documents for inspection and copying; appear for deposition; and/or provide entry during normal business hours to any business location in Defendant's possession, or direct or indirect control, to inspect the business operation;
- B. In addition, the Commission and Plaintiff are authorized to monitor compliance with this Order by all other lawful means, including but not limited to the following:
1. Obtaining discovery from any person, without further leave of court, using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, and 45; and
 2. Posing as consumers and suppliers to: Defendant, any of Defendant's employees, or any other entity managed or controlled in whole or in part by Defendant, without the necessity of identification or prior notice; and
- C. Defendant shall permit representatives of the Commission or Plaintiff to interview any employer, consultant, independent contractor, representative, agent, or employee who has agreed to such an interview, relating in any way to any conduct subject to this Order. The person interviewed may have counsel present; *Provided, however,* that nothing in this Order shall limit the Commission's or Plaintiff's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15

U.S.C. §§ 49 and 57b-1, to obtain any documentary material, tangible things, testimony, or information relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C. § 45(a)(1)).

V. COMPLIANCE REPORTING BY DEFENDANT

IT IS FURTHER ORDERED that, in order that compliance with the provisions of this Order may be monitored:

- A. For a period of three (3) years from the date of entry of this Order, Defendant shall notify the Commission of any changes in corporate structure that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the filing of a bankruptcy petition; or a change in the corporate name or address, at least thirty (30) days prior to such change, *provided* that, with respect to any proposed change in the corporation about which Defendant learns less than thirty (30) days prior to the date such action is to take place, Defendant shall notify the Commission as soon as is practicable after obtaining such knowledge.
- B. One hundred eighty (180) days after the date of entry of this Order, Defendant shall provide a written report to the FTC, sworn to under penalty of perjury, setting forth in detail the manner and form in which it has complied and is complying with this Order. This report shall include, but not be limited to:

1. A copy of each acknowledgment of receipt of this Order, obtained pursuant to Paragraphs III and VIII of this Order;
 2. Any changes required to be reported pursuant to subparagraph A of this Paragraph;
 3. A list that identifies, to the best of the Defendant's knowledge and belief after due inquiry, every person who is initiating, marketing, or promoting, through commercial email messages, any goods or services of Defendant since entry of this Order;
 4. A list of all names under which Defendant did or currently does business since entry of this Order; and
 5. A list of all domain names and web page addresses Defendant has registered or used since entry of the Order.
- C. For the purposes of this Order, Defendant shall, unless otherwise directed by the Commission's authorized representatives, mail all written notifications to the Commission to:
- Associate Director for Marketing Practices
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room 238
Washington, DC 20580
Re: United States v. M.D. Media, Inc.,
Civ. No. _____.
- D. For the purposes of this Order, each Defendant shall, unless otherwise directed by a representative of Plaintiff, identify all written notifications required to be sent to Plaintiff as in reference to DJ# 102-3287, and mail them to:

Director, Office of Consumer Litigation
U.S. Department of Justice - Civil Division
P.O. Box 386
Washington, DC 20044.

- E. For purposes of the compliance reporting and monitoring required by this Order, representatives of Plaintiff and the Commission are authorized to communicate directly with Defendant's officers and managers.

VI. RECORD-KEEPING PROVISIONS

IT IS FURTHER ORDERED that, for a period of six (6) years from the date of entry of this Order, Defendant is hereby restrained and enjoined from failing to create and retain the following records in connection with the marketing, advertising, promotion, offering for sale, or sale of goods or services via commercial email messages or other Internet-based mechanisms:

- A. Standard accounting records generated in the ordinary course of business including, but not limited to, balance sheets, income statements, and annual reports;
- B. Accounting records that reflect revenue generated by sales to individuals referred through Defendants' affiliate program and corresponding disbursements to participants in Defendants' affiliate program on an individual basis, including copies of the most recently deposited check for each such participant paid by check;
- C. Records reflecting: the name, physical address, and telephone number of each person employed in any capacity by such business, including as an independent contractor; that person's job title or position; the date upon which the person

commenced work; and the date and reason for the person's termination, if applicable;

- D. Records that reflect, for every written or oral consumer complaint or refund request received by Defendant, whether directly or indirectly or through any third party, including affiliates: (1) the consumer's name, address, and telephone number; (2) the written complaint or request, if any; (3) the basis of the complaint or request; (4) the nature and result of any investigation conducted concerning the complaint or request; (5) each response and the date of such response to the complaint or request; (6) any final resolution of the complaint or request, and the date of such resolution; and (7) in the event of a denial of any resolution, the reason for the denial;
- E. Copies of all information obtained, pursuant to Paragraph III, from each person who participates in Defendant's affiliate programs;
- F. All other records and documents necessary to demonstrate full compliance with each provision of this Order, including but not limited to, all documents obtained, created, generated or which in any way relate to the requirements, provisions or terms of this Order, copies of signed and dated acknowledgments of receipt of this Order, required by Paragraphs III and VIII of this Order, and all reports submitted to the FTC pursuant to this Order.

VII. DISTRIBUTION OF ORDER BY DEFENDANT

IT IS FURTHER ORDERED that, for a period of three (3) years from the date of entry of this Order, Defendant shall deliver copies of this Order as directed below:

- A. Defendant must deliver a copy of this Order to all of its principals, members, officers, directors, and managers. Defendant must also deliver copies of this Order to all of its employees, agents, independent contractors, and persons who engage in conduct related to the subject matter of this Order. For current personnel, delivery shall be within five (5) days of service of this Order. For new personnel, delivery shall occur prior to them assuming their responsibilities.
- B. Defendant must secure a signed and dated statement acknowledging receipt of this Order, within thirty (30) days of delivery, from all persons receiving a copy of this Order pursuant to this Paragraph.

VIII. ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANT

IT IS FURTHER ORDERED that Defendant, within five (5) business days of receipt of this Order as entered by the Court, must submit to the Commission a truthful sworn statement acknowledging receipt of this Order.

IX. FEES AND COSTS

IT IS FURTHER ORDERED that each party to this Order hereby agrees to bear its own costs and attorneys' fees incurred in connection with this action.

XX. SEVERABILITY

IT IS FURTHER ORDERED that the provisions of this Order are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall remain in full force and effect.

XIXI. RETENTION OF JURISDICTION

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

JUDGMENT IS THEREFORE ENTERED in favor of Plaintiff and against Defendant, pursuant to all the terms and conditions recited above.

Dated this _____ day of _____, 2005.

[Name]
United States District Judge

The parties, by their respective counsel, hereby consent to the terms and conditions of this Stipulated Order as set forth above and consent to the entry thereof.

FOR THE DEFENDANT:

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MD Media, Inc.

Danny E. Adams
Kelley Drye and Warren, LLP
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