

RECEIVED

DEC 08 2005

MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

\_\_\_\_\_  
FEDERAL TRADE COMMISSION,

Plaintiff,

v.

BRIAN McMULLEN, also doing business  
as BM ENTERTAINMENT and B PIMP,

Defendant.  
\_\_\_\_\_

Case No.

05C 6911

JUDGE COAR

MAGISTRATE JUDGE NOLAN

**COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF**

Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), for its Complaint alleges as follows:

1. The FTC 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"), 15 U.S.C. § 7706(a), to obtain preliminary and permanent injunctive relief, rescission of contracts, restitution, redress, disgorgement and other equitable relief for Defendant's deceptive and unfair acts or practices for violation of CAN-SPAM, 15 U.S.C. § 7701 *et seq.*

**JURISDICTION AND VENUE**

2. This Court has jurisdiction over this matter pursuant to 15 U.S.C. §§ 45(a), 53(b), 57b, 7706(a) and 28 U.S.C. §§ 1331, 1337(a) and 1345.

3. Venue in the United States District Court for the Northern District of Illinois is proper under 15 U.S.C. § 53(b).

**PLAINTIFF**

4. Plaintiff FTC is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-58. The Commission enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The FTC also is charged with enforcing CAN-SPAM as if statutory violations of CAN-SPAM “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)).” 15 U.S.C. § 7706(a).
5. Sections 13(b) and 19 of the FTC Act authorize the FTC to initiate federal district court proceedings, in its own name by its designated attorneys, to enjoin violations of any provision of law enforced by the FTC, and to secure such equitable relief as may be appropriate in each case. 15 U.S.C. §§ 53(b), 57b.

**DEFENDANT**

6. Defendant Brian McMullen, also doing business as BM Entertainment and B Pimp (“McMullen”), has formulated, directed, controlled, or participated in the acts or practices set forth in this Complaint. McMullen has transacted business in the Northern District of Illinois and throughout the United States.

**COMMERCE**

7. At all times material to this Complaint, Defendant has 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

8. **“Electronic mail message”** (or “email”) means a message sent to a unique electronic mail address. 15 U.S.C. § 7702(6).
9. **“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).
10. **“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 Web site operated for commercial purposes). 15 U.S.C. § 7702(2).
11. **“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).
12. **“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. 15 U.S.C. § 7702(9).
13. **“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).

14. **“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).
15. **“Sender”** means a person who initiates a commercial email message and whose product, service, or Internet Web site is advertised or promoted by the message. 15 U.S.C. § 7702(16).

#### **DEFENDANT’S BUSINESS ACTIVITIES**

16. Since at least July 2004, and continuing to the present, Defendant has 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 Web sites. The commercial email messages market multiple goods or services, including adult entertainment, pharmaceuticals, and mortgage opportunities.
17. In numerous instances, Defendant has initiated commercial email messages containing materially false or misleading header information. In many instances, the email contains an originating email address that was not assigned by the email service provider or was used without the authorization of the subscriber who obtained the email address from the email service operator. In other instances, the email message fails to identify accurately the protected computer used to initiate the message because the email message was relayed or retransmitted through another protected computer for purposes of disguising its origin.

18. In numerous instances, in order to induce consumers to open and read their commercial emails, Defendant has initiated commercial email messages that contain subject headers that misrepresent the content or subject matter of the message.
19. In numerous instances, Defendant has initiated commercial email messages that fail to include any notification to recipients of their ability to decline receiving future email messages from Defendant, and that fail to include a reply email address or other mechanism that recipients can use to decline receiving future email messages from Defendant.
20. In numerous instances, Defendant has initiated commercial email messages that fail to include a valid physical postal address of the sender.

#### **VIOLATIONS OF THE CAN-SPAM ACT**

21. The Controlling The Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM”), 15 U.S.C. § 7701 *et seq.*, became effective on January 1, 2004, and has since remained in full force and effect.
22. 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 . . . that contains, or is accompanied by, header information that is materially false or materially misleading.
23. Section 5(a)(6) of CAN-SPAM, 15 U.S.C. § 7704(a)(6), states:

For purposes of [section 5(a)(1)], the term “materially”, when used with respect to false or misleading header information, includes the alteration or concealment of header information in a manner that would impair the ability of an Internet access service processing the message on behalf of a recipient, a person alleging a violation of this section, or a law enforcement agency to identify, locate, or

respond to a person who initiated the electronic mail message or to investigate the alleged violation, or the ability of a recipient of the message to respond to a person who initiated the electronic message.

24. Section 5(a)(2) of CAN-SPAM, 15 U.S.C. § 7704(a)(2), states:

It is unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message if such person has actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that a subject heading of the message would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the content or subject matter of the message (consistent with the criteria used in enforcement of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45)).

25. 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)(2) and other specified sections of CAN-SPAM, the FTC need not allege or prove the state of mind required by such sections.

26. Section 5(a)(3) of CAN-SPAM, § 7704(a)(3) states:

It is unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message that does not contain a functioning return electronic mail 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 electronic mail message or other form of Internet-based communication requesting not to receive future commercial electronic mail messages from that sender at the electronic mail address where the message was received; and
- (ii) remains capable of receiving such messages or communications for no less than 30 days after the transmission of the original message.

27. Section 5(a)(5)(A) of CAN-SPAM, § 7704(a)(5)(A) states:

It is unlawful for any person to initiate the transmission of any commercial electronic mail message to a protected computer unless the message provides:

- (i) clear and conspicuous identification that the message is an advertisement or solicitation;
- (ii) clear and conspicuous notice of the opportunity under [section 5(a)(3)] to decline to receive further commercial electronic mail messages from the sender; and
- (iii) a valid physical postal address of the sender.

28. Section 7(a) of CAN-SPAM, 15 U.S.C. § 7706(a), 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. 57(a)(1)(B)).

### COUNT I

29. In numerous instances, Defendant has initiated the transmission, to protected computers, of commercial email messages that contained, or were accompanied by, header information that is materially false or materially misleading.
30. Defendant's acts or practices, as described in paragraph 29 above, violate 15 U.S.C. § 7704(a)(1).

### COUNT II

31. In numerous instances, Defendant has initiated the transmission, to protected computers, of commercial email messages that contained subject headings that would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.
32. Defendant's acts or practices, as described in paragraph 31 above, violate 15 U.S.C. § 7704(a)(2).

### COUNT III

33. In numerous instances, Defendant has initiated the transmission, to protected computers, of commercial email messages that do not include:
- a. a clear and conspicuous notice of the recipient's opportunity to decline to receive further commercial electronic mail messages from Defendant at the recipient's electronic mail address; and/or
  - b. a functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that a recipient could use to submit a reply electronic mail message or other form of Internet-based communication requesting not to receive future commercial electronic mail messages from Defendant at the electronic mail address where the message was received, and that remains capable of receiving such messages or communications for no less than 30 days after the transmission of the original message.
34. Defendant's acts or practices, as described in paragraph 33 above, violate 15 U.S.C. § 7704(a)(5)(A)(ii) and/or § 7704(a)(3).

### COUNT IV

35. In numerous instances, Defendant has initiated the transmission, to protected computers, of commercial email messages that do not include the sender's valid physical postal address.
36. Defendant's acts or practices, as described in paragraph 35 above, violate 15 U.S.C. § 7704(a)(5)(A)(iii).



### **INDIVIDUAL AND BUSINESS INJURY**

37. Individuals and businesses throughout the United States and beyond have suffered, and continue to suffer, substantial monetary loss and other injury as a result of Defendant's unlawful acts or practices. In addition, Defendant has been unjustly enriched as a result of his unlawful practices. Absent injunctive and other equitable relief by this Court, Defendant is likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

### **THIS COURT'S POWER TO GRANT RELIEF**

38. Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, empower this Court to grant injunctive and other ancillary equitable relief to prevent and remedy Defendant's violations of the FTC Act, 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 Defendant's unlawful acts or practices, and to order other ancillary equitable relief. A violation of CAN-SPAM 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:

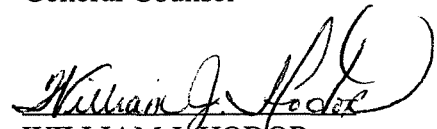
1. Enter an order enjoining Defendant preliminarily and permanently from violating Section 5 of the FTC Act, CAN-SPAM, and preserving Defendant's assets;

2. Award such relief as the Court finds necessary to address injury resulting from Defendant's violations of the FTC Act and CAN-SPAM, including, but not limited to, rescission of contracts, restitution, redress, disgorgement of ill-gotten gains, and the refund of monies paid; and
3. Award Plaintiff the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

Respectfully submitted,

WILLIAM BLUMENTHAL  
General Counsel

Dated: Dec. 8, 2005



WILLIAM J. HODOR  
STEVEN M. WERNIKOFF  
Attorneys for Plaintiff  
Federal Trade Commission  
55 East Monroe Street, Suite 1860  
Chicago, Illinois 60603  
(312) 960-5634 [Telephone]  
(312) 960-5600 [Facsimile]