

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

FEDERAL TRADE COMMISSION,	)	
	)	
Plaintiff,	)	Case No. 05C 6737
	)	
v.	)	Judge William J. Hibbler
	)	
ZACHARY A. KINION,	)	Magistrate Judge Nan R. Nolan
	)	
Defendant.	)	
	)	

**PRELIMINARY INJUNCTION ORDER**

WHEREAS, on November 29, 2005, Plaintiff Federal Trade Commission ("Commission" or "FTC") filed a Complaint for Injunctive and Other Equitable Relief in this matter pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b, and 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);

WHEREAS, on December 1, 2005, Defendant Zachary A. Kinion was properly served with the Complaint and Summons, as well as the FTC's Motion For a Temporary Restraining Order, Other Equitable Relief and Order to Show Cause Why a Preliminary Injunction Should Not Issue and the memorandum and exhibits supporting that motion;

WHEREAS, on December 7, 2005, this Court granted the FTC's Motion For a Temporary Restraining Order, Other Equitable Relief and Order To Show Cause Why a Preliminary Injunction Should Not Issue;

WHEREAS, the Court having considered the pleadings, memoranda, declarations and other exhibits filed herein, and being fully advised in the premises, it is now **ORDERED, ADJUDGED, AND DECREED** as follows:

**FINDINGS**

1. This Court has jurisdiction over the subject matter of this case and over the Defendant.
2. Venue, process and service of process are proper.
3. There is good cause to believe that Defendant has engaged in acts and practices that violate the CAN-SPAM Act. Particularly, the evidence demonstrates that Defendant has initiated commercial email messages that: (1) utilize false or misleading header information; (2) mislead recipients as to the nature of the email through deceptive subject headings; (3) fail to include the opportunity to decline future email messages; and/or fail to include the sender's postal address.
4. There is good cause to believe that immediate and irreparable harm will result from Defendant's ongoing violations of the CAN-SPAM Act absent entry of this Order. Particularly, there is good cause to believe that Defendant will dissipate assets or destroy records if equitable relief preserving the *status quo* is not ordered. As such, there is good cause for issuing this Order pursuant to Rule 65(d) of the Federal Rules of Civil Procedure.
5. Weighing the equities and considering the FTC's likelihood of ultimate success, this preliminary injunction and other relief are in the public interest.
6. No security is required by the FTC for issuance of this injunction. *See Fed. R. Civ. P. 65(c).*

## DEFINITIONS

1. **"Affirmative Consent,"** with respect to a commercial email message, means that "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 "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 purposes of initiating commercial electronic mail messages." 15 U.S.C. § 7702(1).

2. **"Asset" or "Assets"** means any legal or equitable interest in, right to, or claim to, any real and personal property, including but not limited to chattel, goods, instruments, equipment, fixtures, general intangibles, effects, leaseholds, premises, contracts, mail or other deliveries, shares of stock, lists of consumer names, inventory, checks, notes, accounts, credits, receivables, funds, and all cash, wherever located.

3. **"Clear and conspicuous" or "clearly and conspicuously,"** with regard to the display of a notice, means that the information shall be presented in writing, in a type size, color, and location sufficient for an ordinary consumer to read and comprehend it, and shall be disclosed in a manner that would be easily recognizable and understandable in language and syntax to an ordinary consumer. If the information is contained in a multi-page print document, the disclosure shall appear on the first page.

4. **"Commercial electronic mail message" (or "commercial email")** "means any electronic mail message the primary purpose of which is the commercial advertisement or

promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).” 15 U.S.C. § 7702(2) (A).

5. “**Defendant**” means Zachary A. Kinion, by whatever name he might be known.

6. “**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, Internet sites, Web pages, Web sites, electronic correspondence, photographs, audio and video recordings, computer records, and 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.

7. “**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).

8. “**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).

9. “**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).

10. **"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).

11. **"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).

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

I.

**PROHIBITIONS AGAINST MISREPRESENTATIONS**

**IT IS THEREFORE ORDERED** that Defendant, and his officers, agents, servants, employees and attorneys, and those persons in active concert or participation with him who receive actual notice of this Order by personal service or otherwise, are restrained and enjoined from initiating the transmission of commercial email that:

A. Contains, or is accompanied by, materially false or materially misleading header information, including, but not limited to:

1. an originating electronic mail address, domain name, or Internet Protocol address when the access to such originating electronic mail address, domain name, or Internet Protocol address was obtained by means of false or fraudulent pretenses or representations;

2. a "from" line (the line identifying or purporting to identify the person initiating the messages) that does not accurately identify any person who initiated the message;

3. header information that fails to identify accurately the computer used to initiate the message because the person initiating the message used another computer to relay or retransmit the message for purposes of disguising its origin; and/or

B. Contains a subject heading likely to mislead recipients, acting reasonably under the circumstances, about material facts regarding the contents or subject matter of the message.

## II.

### **PROHIBITIONS AGAINST OPT-OUT AND POSTAL ADDRESS VIOLATIONS**

**IT IS FURTHER ORDERED** that Defendant, and his officers, agents, servants, employees and attorneys, and those persons in active concert or participation with him who receive actual notice of this Order by personal service or otherwise, are restrained and enjoined from initiating the transmission of commercial email that:

A. Does not include a clear and conspicuous notice of the recipient's opportunity to decline to receive further commercial electronic mail messages from the sender at the recipient's electronic mail address and describes the means by which the recipient can decline to receive future commercial email messages from the sender;

B. Does 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 electronic mail messages from the sender 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; and/or

- C. Does not include the sender's valid physical postal address.

### III.

#### **PROHIBITIONS AGAINST FAILING TO IDENTIFY AN EMAIL MESSAGE AS AN ADVERTISEMENT OR SOLICITATION**

**IT IS FURTHER ORDERED** that Defendant, and his officers, agents, servants, employees and attorneys, and those persons in active concert or participation with him who receive actual notice of this Order by personal service or otherwise, are restrained and enjoined from initiating the transmission of commercial email that fails to provide clear and conspicuous identification that the message is an advertisement or solicitation.

**PROVIDED, HOWEVER,** that the requirements of this Section do not apply to commercial email messages transmitted only to recipients for whom Defendant has Affirmative Consent from such recipients.

### IV.

#### **INJUNCTION AGAINST NEW ACCOUNT REGISTRATIONS WITHOUT REPORTING**

**IT IS FURTHER ORDERED** that in connection with the promotion, advertising, marketing, sale, or offering for sale of any product or service, Defendant and his officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with him who receive actual notice of this Order by personal service or otherwise, are restrained and enjoined from registering or creating any new domain names, Web sites, Web pages, or email

accounts, Internet service accounts, or online payment service accounts, without notifying counsel for the Commission within 72 hours of such registrations. The notice shall include:

- A. The true identity of the registrant, account holder, or user, including the complete and accurate physical mailing address, email address, and telephone number;
- B. The means and source of payment for the registration, including the credit card number or bank account number used;
- C. The name and address of the person or entity to whom such registration was submitted;
- D. The date and time the registration was created; and
- E. The purpose of the domain names, Web sites, Web pages, or email accounts, Internet service accounts, or online payment service accounts registered.

V.

**INJUNCTION AGAINST USING ANY PERSONS OR ENTITIES  
TO SEND COMMERCIAL EMAIL WITHOUT REPORTING**

**IT IS FURTHER ORDERED** that in connection with the promotion, advertising, marketing, sale, or offering for sale of any product or service, Defendant is restrained and enjoined from using any affiliates, sub-affiliates, agents, mailers, vendors, employees, contractors, or other persons or entities to send commercial email on his behalf without notifying counsel for the Commission prior to the initiation of any commercial email message by such persons or entities. The notice shall include:

- A. The identity of the affiliate, sub-affiliate, agent, mailer, vendor, employee, contractor, or other person or entity including the name of an individual, the complete and

accurate physical mailing address, a working email address, a working telephone number, and any identification codes associated with or used by such person or entity;

B. The amount of payment and information necessary to process such payment for the affiliate, sub-affiliate, agent, mailer, vendor, employee, contractor, or other person or entity, including the account name and number used;

C. A copy of the body and subject line of each unique commercial email being sent by the affiliate, sub-affiliate, agent, mailer, vendor, employee, contractor, or other person or entity;

D. A list of each of the email addresses from which the affiliate, sub-affiliate, agent, mailer, vendor, employee, contractor, or other person or entity will send the commercial email message;

E. A list of the Web site addresses and/or domain names promoted in the commercial email message;

F. A description of the procedures Defendant has to ensure that:

1. Such person or entity does not send commercial email messages to recipients who have previously requested not to receive commercial email messages from Defendant; and

2. Defendant will receive all requests received by such persons or entities from email recipients who request not to receive commercial email messages from Defendant; and

G. A certification that such person or entity has agreed, in writing, to comply with this Order and the provisions of the CAN-SPAM Act.

VI.

**ASSET PRESERVATION**

**IT IS FURTHER ORDERED** that:

A. Defendant, whether acting directly or through a trust, corporation, subsidiary, division, or other device, or any of them, is hereby restrained and enjoined from selling, transferring, converting, encumbering, selling, concealing, dissipating, disbursing, assigning, spending, withdrawing, perfecting a security interest in, or otherwise disposing of any assets or any interest therein, wherever located, including any assets outside the territorial United States, other than those that are actual, ordinary, and necessary living expenses that Defendant reasonably incurs.

B. The assets affected by this Section shall include both existing assets and assets acquired after the effective date of this Order.

C. Notwithstanding Section VI.A above, Defendant may withdraw, transfer, encumber, or otherwise dissipate assets in excess of three thousand dollars (\$3,000) per calendar month only with prior written agreement by counsel for the Commission, or prior approval by the Court.

D. To the extent that Defendant withdraws, transfers, encumbers, or otherwise dissipates assets pursuant to Section VI.A of this Order, he shall provide an accounting of his expenses to counsel for the FTC for each calendar month.

**VII.**

**FINANCIAL REPORTS AND ACCOUNTING**

**IT IS FURTHER ORDERED** that Defendant, if he has not done so already as required by the Court's TRO entered on December 7, 2005, immediately shall prepare and deliver to counsel for the Commission:

- A. A completed financial statement on the forms attached to the Court's TRO Order as **Attachment A**. The financial statement shall be accurate as of the date of its completion; and
- B. A complete accounting of all gross and net profits obtained from, derived from, or related in any way to products, services, Web page memberships, or any other commercial venture promoted in any way through commercial electronic mail messages from January 1, 2004 through the submission of the accounting.

**VIII.**

**IDENTIFICATION OF MARKETERS**

**IT IS FURTHER ORDERED** that, to the extent that he has not already done so as required by the Court's TRO entered on December 7, 2005, Defendant immediately shall prepare and deliver to counsel for the Commission a completed statement identifying all affiliates, sub-affiliates, agents, mailers, vendors, employees, contractors, or other persons or entities that have sent commercial email on Defendants' behalf since January 1, 2004, on the form attached to the Court's TRO as **Attachment B**. The statement shall be accurate as of the date of its completion.

**IX.**

**PRESERVATION AND MAINTENANCE OF RECORDS  
AND NOTICE OF NEW VENTURES**

**IT IS FURTHER ORDERED** that Defendant and his officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with him who receive actual notice of this Order by personal service or otherwise, are hereby restrained and enjoined from:

A. Destroying, erasing, mutilating, falsifying, concealing, writing over, altering, transferring, or otherwise disposing of, in any manner, directly or indirectly, any documents or records, including but not limited to, any and all computerized files, storage media (including but not limited to floppy disks, hard drives, CD-Roms, Zip disks, punch cards, magnetic tape, backup tapes, and computer chips) on which information has been saved (including any and all equipment needed to read any such material), contracts, accounting data, registrations, correspondence, advertisements (including, but not limited to, advertisements placed on the World Wide Web or the Internet or sent via email), FTP logs, Service Access Logs, USENET Newsgroups postings, World Wide Web pages, email messages, books, written or printed records, 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 Defendant;

B. Failing to create and maintain documents that, in reasonable detail, accurately, fairly, and completely reflect incomes, disbursements, transactions, and use of money; and

C. Creating, operating, or exercising any control over any business entity, including any partnership, limited partnership, joint venture, sole proprietorship or corporation, without first providing the Commission with a written statement disclosing:

1. the name of the business entity;
2. the address, telephone number, email address, and Web site address of the business entity;
3. the names of the business entity's officers, directors, principals, managers, and employees;
4. the names and addresses of any persons or entities providing online marketing, advertising, or mailing services for the business entity; and
5. a detailed description of the business entity's intended activities.

**X.**

**DISTRIBUTION OF ORDER BY DEFENDANT**

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

**XI.**

**SERVICE OF ORDER**

**IT IS FURTHER ORDERED** that copies of this Order may be served by any means, including facsimile transmission or electronic mail, upon any financial institution or other entity or person that may have possession, custody, or control of any documents or assets of 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.

**XII.**

**CONSUMER CREDIT REPORTS**

**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 Defendant to the Commission.

**XIII.**

**EXPEDITED DISCOVERY**

**IT IS FURTHER ORDERED** that the parties are granted leave at any time after service of this Order and pursuant to Federal Rules of Civil Procedure 30(a), 34 and 45 to: (1) take the deposition of any person or entity for the purpose of discovering the nature, status, extent, location or other relevant information relating to Defendant's assets and the nature and location of documents reflecting the business transactions of Defendant; and (2) demand the production of documents from any person or entity relating to the nature, status, extent, and location or other relevant information relating to Defendant's assets and the location of documents reflecting the business transactions of Defendant. Seventy-two (72) hours notice shall be deemed sufficient for any such deposition and production of documents from Defendant and any other person or entity,

including but not limited to financial institutions, accountants, stock brokers, and financial planners.

The limitations and conditions set forth in Fed. R. Civ. P. 30(a)(2)(B) and 31(a)(2)(B) regarding subsequent depositions of an individual shall not apply to depositions taken pursuant to this Section. Any such depositions taken pursuant to this Section shall not be counted toward any limit on the number of depositions under the Federal Rules of Civil Procedure, including those set forth in Fed. R. Civ. P. 30(a)(2)(A) and 31(a)(2)(A) or the Local Rules. Additionally, the production of documents submitted pursuant to this provision shall not in any way waive the Commission's rights to seek the production of additional documents.

**XIV.**

**RETENTION OF JURISDICTION**

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

**IT IS SO ORDERED**, this 4<sup>th</sup> day of JANUARY 2006.

  
\_\_\_\_\_  
Honorable William J. Hibbler  
United States District Judge