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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SBA

UNITED STATES OF AMERICA, Plaintiff, v. KODAK IMAGING NETWORK, INC., formerly Ofoto, Inc., a Delaware corporation, Defendant.	C 06 3117 COMPLAINT FOR CIVIL PENALTIES, PERMANENT INJUNCTION, AND OTHER EQUITABLE RELIEF

Plaintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission ("FTC" or "Commission"), pursuant to Section 16(a)(1) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 56(a)(1), for its complaint alleges:

1. Plaintiff brings this action under Sections 5(a), 5(m)(1)(A), 13(b), and 16(a) of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), and 56(a), 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 Section 5(a) of CAN-SPAM, 15 U.S.C. § 7704(a).

JURISDICTION AND VENUE

2. Subject matter jurisdiction is conferred upon this Court by 15 U.S.C. §§ 45(m)(1)(A), 53(b), 56(a), and 7706(a), and 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355. This action arises under 15 U.S.C. § 45(a).

3. Venue in the United States District Court for the Northern District of California is proper under 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b-c), and 1395(a).

INTRADISTRICT ASSIGNMENT

4. The events giving rise to the United States' claims occurred in substantial part in Alameda County.

DEFENDANT

5. Defendant Kodak Imaging Network, Inc. ("KIN"), formerly Ofoto, Inc., is a Delaware corporation with its registered office located at 5900 Hollis Street, Suite S, Emeryville, CA 94608. Since February 5, 2004, KIN has formulated, directed, controlled, or participated in the acts or practices set forth in this complaint. KIN resides in the Northern District of California and transacts business within the Northern District of California and throughout the United States.

COMMERCE

6. At all times relevant 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.

THE CAN-SPAM ACT

7. The CAN-SPAM Act, 15 U.S.C. §§ 7701-7713, became effective on January 1, 2004, and has since remained in full force and effect.

8. Section 3(2) of the CAN-SPAM Act, 15 U.S.C. § 7702(2), defines "commercial electronic mail message" to mean:

> 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).

9. Section 3(9) of the CAN-SPAM Act, 15 U.S.C. § 7702(9), defines "initiate," when used with respect to a commercial electronic mail ("email") message, to mean:

> to originate or transmit such message or to procure the origination or transmission of such message, but shall not include actions that constitute routine conveyance of such message. For purposes of this paragraph, more than one person may be considered to have initiated a message.

10. Section 3(12) of the CAN-SPAM Act, 15 U.S.C. § 7702(12), defines "procure," when used with respect to the initiation of a commercial email message, to mean:

> intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one's behalf.

11. Section 3(13) of the CAN-SPAM Act, 15 U.S.C. § 7702(13), defines "protected computer" by reference to 18 U.S.C. § 1030(e)(2)(B), which states that a protected computer is:

> 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.

12. Section 3(16) of the CAN-SPAM Act, 15 U.S.C. § 7702(16), defines "sender," when used with respect to a commercial email message, as:

> a person who initiates such a message and whose product, service, or Internet web site is advertised or promoted by the message.

13. Section 5(a)(3) of the CAN-SPAM Act, 15 U.S.C. § 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.

14. Sections 5(a)(5)(A)(ii) and (iii) of the CAN-SPAM Act, 15 U.S.C. §§ 7704(a)(5)(A) (ii) and (iii), state:

> (A) It is unlawful for any person to initiate the transmission of any commercial electronic mail message to a protected computer unless the message provides –
>
> (ii) clear and conspicuous notice of the opportunity under paragraph (3) to decline to receive further commercial electronic mail messages from the sender; and
>
> (iii) a valid physical postal address of the sender.

15. Section 7(a) of the CAN-SPAM Act, 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. 57a(a)(1)(B)).

DEFENDANT'S BUSINESS PRACTICES

16. Since at least January 1, 2004, and continuing to the present, Defendant has owned and operated an online digital photo developing service company. Defendant offers its services through its websites, including www.ofoto.com and www.kodakgallery.com, and also via frequent promotional emails to consumers.

17. In connection with the marketing and promotion of Defendant's business, Defendant has transmitted commercial email messages, either directly or through a third party service provider. In doing so, Defendant has procured the transmission of such messages and is thereby the initiator, as that term is defined under CAN-SPAM, of the email messages sent by its agents that promote and market Defendant's online services. In addition, because Defendant's websites are being advertised or promoted by such messages, Defendant is also the sender, as that term is defined under CAN-SPAM, of the email messages that its agents are transmitting on Defendant's behalf.

18. From February 2004 through July 2004, Defendant sent or caused to be sent a commercial email message to over 2 million registered consumers promoting its online services and its websites that did not include: (i) a functioning return email address or other Internet-based mechanism, clearly and conspicuously displayed, that 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 recipient's email address; (ii) clear and conspicuous notice of a recipient's opportunity to decline to receive future commercial email messages from Defendant at the recipient's email address; and (iii) a valid physical postal address of Defendant.

COUNT I

19. Defendant initiated the transmission, to protected computers, of a commercial electronic mail message to numerous registered consumers that advertised or promoted Defendant's services or Internet websites and failed to contain a functioning return email address or other Internet-based mechanism, clearly and conspicuously displayed, that a recipient could 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 electronic mail messages from that sender at the recipient's email address.

20. Therefore, Defendant's acts or practices, as described *supra*, violated Section 5(a)(3)(A)(i) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(3)(A)(i).

COUNT II

21. Defendant initiated the transmission, to protected computers, of a commercial electronic mail message to numerous registered consumers that advertised or promoted Defendant's services or Internet websites and failed to include clear and conspicuous notice of the recipient's opportunity to decline to receive further commercial electronic mail messages from Defendant at the recipient's email address.

22. Therefore, Defendant's acts or practices, as described *supra*, violated Section 5(a)(5)(A)(ii) and Section 5(a)(3) of the CAN-SPAM Act, 15 U.S.C. §§ 7704(a)(5)(A)(ii) and 7704(a)(3).

COUNT III

23. Defendant initiated the transmission, to protected computers, of a commercial electronic mail message to numerous registered consumers that advertised or promoted Defendant's services or Internet websites and failed to include Defendant's valid physical postal address.

24. Therefore, Defendant's acts or practices, as described *supra*, violated Section 5(a)(5)(A)(iii) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(5)(A)(iii).

INDIVIDUAL INJURY

25. Individuals throughout the United States have suffered and will suffer injury as a result of Defendant's violations of the CAN-SPAM Act. Absent injunctive relief by this Court, Defendant is likely to continue to injure consumers and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

26. Section 7(a) of the CAN-SPAM Act, 15 U.S.C. § 7706(a), provides that "[CAN-SPAM] 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. § 57a(a)(1)(B))." Accordingly, violations of the CAN-SPAM Act shall be enforced as if the violation 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)). That is, these provisions shall be enforced as if the violation had been a violation of an FTC trade regulation rule. Furthermore, Section 18(d)(3) of the FTC Act provides that "[w]hen any rule under subsection (a)(1)(B) of [Section 18] takes effect a subsequent violation thereof shall constitute an unfair or deceptive act or practice in violation of section 45(a)(1) of this title[.]" 15 U.S.C. § 57a(d)(3).

27. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), as modified by Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended, and as implemented by 16 C.F.R. § 1.98(d), authorizes this Court to award monetary civil penalties of not more than $11,000 for each violation of CAN-SPAM. Defendant's violations of CAN-SPAM were committed with the knowledge required by Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A).

28. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and other ancillary relief to prevent and remedy any violation of any provision of law enforced by the FTC.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court, as authorized by Sections 5(a), 5(m)(1)(A) and 13(b) of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A) and 53(b), and pursuant to its own equitable powers:

1. Enter judgment against Defendant and in favor of Plaintiff for each violation alleged in this complaint;

2. Award plaintiff monetary civil penalties from Defendant for every violation of the CAN-SPAM Act;

3. Permanently enjoin Defendant from violating the CAN-SPAM Act;

4. Order Defendant to pay the costs of this action; and

5. Award Plaintiff such other preliminary and permanent equitable relief as the Court may determine to be just and proper.

Dated: May 10, 2006

Respectfully Submitted,

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