

COPY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

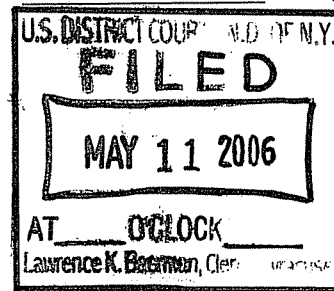
v.

ICE.COM, LLC, a New York corporation,

Defendant.

Civil No.

8:060580 (GLS/RFT)



COMPLAINT FOR CIVIL PENALTIES AND
PERMANENT INJUNCTIVE 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), 16(a), and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), 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 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), 57b, 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 New York is proper under 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b-c) and 1395(a).

DEFENDANT

4. Defendant ICE.com, LLC ("ICE.com"), is a New York corporation with an office and place of business located within the Northern District of New York at 1083 Main Street, Champlain, New York 12919. From February 8, 2005 through March 20, 2005, ICE.com has formulated, directed, controlled, or participated in the acts or practices set forth in this complaint. ICE.com transacts business within the Northern District of New York and throughout the United States.

COMMERCE

5. 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

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

7. 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).

8. Section 3(9) of the CAN-SPAM Act, 15 U.S.C. § 7702(9), defines “initiate,”

when used with respect to a commercial 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.

9. 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.

10. 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.

11. Section 3(14) of the CAN-SPAM Act, 15 U.S.C. § 7702(14), defines

“recipient,” when used with respect to a commercial email message, as:

an authorized user of the electronic mail address to which the message was sent or delivered.

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)(A) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(3)(A), 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. Section 5(a)(4)(A)(i) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(4)(A)(i) states:

(A) If a recipient makes a request using a mechanism provided pursuant to paragraph (3) not to receive some or any commercial electronic mail messages from such sender, then it is unlawful –

(i) for the sender to initiate the transmission to the recipient, more than 10 business days after the receipt of such request, of a commercial electronic mail message that falls within the scope of the request[.]

15. Section 7(a) of the CAN-SPAM Act, 15 U.S.C. § 7706(a), states:

[T]his Act shall be enforced by the Commission 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 retail shop that offers a selection of jewelry. Defendant sells its goods through its Internet website, www.ice.com, and via frequent promotional emails to consumers who affirmatively request and consent to receive those messages.

17. From February 8, 2005 through March 20, 2005, Defendant sent commercial email messages that advertised or promoted Defendant's Internet website, to a recipient's email address more than 10 business days after receipt of a request from the recipient not to receive future commercial email messages from Defendant.

COUNT I

18. In numerous instances, Defendant has initiated the transmission of commercial electronic mail messages to a recipient more than 10 business days after receipt of a request not to receive future commercial electronic mail messages from Defendant at the recipient's email address.

19. Therefore, Defendant's acts or practices, as described in paragraph 18, violated Section 5(a)(4)(A)(i) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(4)(A)(i).

INDIVIDUAL INJURY

20. 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

21. 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).

22. 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) (1997), 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).

23. 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), 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b) and 57b, 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 11th, 2006

OF COUNSEL:

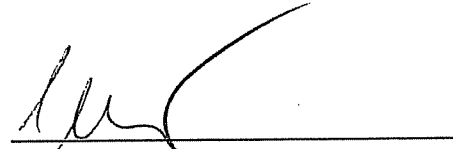
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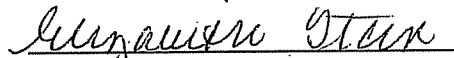
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