

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

FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	Case No. 05C 6911
)	
v.)	Judge David H. Coar
)	
BRIAN McMULLEN, also doing business as BM ENTERTAINMENT and B PIMP,)	Magistrate Judge Nan R. Nolan
)	
Defendant.)	
)	

STIPULATED ORDER FOR PERMANENT INJUNCTION AND FINAL JUDGMENT

On December 8, 2005, Plaintiff Federal Trade Commission (“Commission” or “FTC”) filed its Complaint for Injunctive and Other Equitable Relief against Defendant Brian McMullen (“McMullen”), also doing business as BM Entertainment and B Pimp, 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”), 15 U.S.C. § 7701 *et seq.* Plaintiff FTC and Defendant McMullen have consented to the entry of this Stipulated Order for Permanent Injunction and Final Judgment without a trial or adjudication of any issue of law or fact herein.

NOW, THEREFORE, the Commission and Defendant, having requested the Court to enter this Stipulated Order, and the Court having considered the Stipulated Order reached among the parties and for other cause appearing, it is **ORDERED, ADJUDGED, AND DECREED** as follows:

FINDINGS

1. This Court has jurisdiction over the subject matter of this case and the parties hereto.
2. Venue in the United States District Court for the Northern District of Illinois is proper under 15 U.S.C. § 53(b) and 28 U.S.C. § 1391(b).
3. The activities of Defendant are in or affecting commerce, as “commerce” is 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 Section 5 of the FTC Act, 15 U.S.C. § 45, and CAN-SPAM, 15 U.S.C. § 7701, *et seq.*
5. Defendant has entered into this Order freely and without coercion.
6. Defendant does not admit liability for any of the violations alleged in the Complaint.
7. Defendant waives all rights to seek judicial review or otherwise challenge or contest the validity of this Order. Defendant further waives and releases any claims he may have against the Commission, its employees, representatives or agents.
8. Defendant agrees that this Order does not entitle him to seek or obtain attorneys’ fees as a prevailing party under the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended by Pub. L. 104-121, 110 Stat. 847, 863-64 (1996), and Defendant further waives any right to attorneys’ fees that may arise under said provision of law.
9. This Order is in addition to and not in lieu of any other civil or criminal remedies that may be provided by law.

10. Entry of this Order is in the public interest.

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. **“Assisting others”** means providing any of the following goods or services to any person or entity: (1) performing customer service functions including, but not limited to, receiving and responding to customer complaints, receiving identifying and financial information from consumers, and communicating with consumers; (2) developing, providing, or arranging for the development or provision of marketing materials, including, but not limited to, Web site and commercial electronic message content; (3) providing names of, or arranging for the provision of, names of potential customers; or (4) performing marketing services of any kind.

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 document, the disclosure shall appear on the first page.

4. **“Commercial electronic mail (or “commercial email”) message”** 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 Brian McMullen, also doing business as BM Entertainment and B Pimp.

6. **“Document”** is synonymous in meaning and equal in scope to the same term as defined 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, through detection devices into reasonably usable form. A draft or non-identical copy is a separate document within the meaning of this term.

7. **“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. 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, but shall not include actions that constitute routine conveyance of such message. . . . [M]ore than one person may be considered to have initiated a message. 15 U.S.C. 7702(9).

10. **“Material”** means likely to affect a person’s choice of, or conduct regarding, goods or services.

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

12. **“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).

13. **“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 email 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. 15 U.S.C. § 7702(14).

14. “**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. 15 U.S.C. § 7702(16).

15. “**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 CONTROLLING THE ASSAULT OF NON-SOLICITED PORNOGRAPHY AND MARKETING ACT OF 2003

IT IS THEREFORE ORDERED, that Defendant, and his officers, agents, servants, employees, independent contractors, and attorneys, and those persons or entities in active concert or participation with him who receive actual notice of this Order by personal service, facsimile, or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other device, or any of them, are permanently restrained and enjoined from violating, or assisting others in violating, the provisions contained in Sections 5 and 6 of CAN-SPAM, 15 U.S.C. §§ 7704 and 7705, as currently promulgated or as it may hereafter be amended, or any rule, regulation, or requirement adopted pursuant thereto, including, but not limited to, initiating the transmission of a commercial electronic mail message that:

A. Contains, or is accompanied by, header information that is materially false or materially misleading in violation of Section 5(a)(1) of CAN-SPAM, 15 U.S.C. § 7704(a)(1);

B. Contains, or is accompanied by, 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 in violation of Section 5(a)(2) of CAN-SPAM, 15 U.S.C.

§ 7704(a)(2);

C. Fails to 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, in violation of Section 5(a)(5)(A)(ii) of CAN-SPAM, 15 U.S.C.

§ 7704(a)(5)(A)(ii);

D. Fails to include 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 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 in violation of Section 5(a)(3) of CAN-SPAM, 15 U.S.C. § 7704(a)(3);

E. Fails to include the sender's valid physical postal address in violation of Section 5(a)(5)(A)(iii) of CAN-SPAM, 15 U.S.C. § 7704(a)(5)(A)(iii); and

F. Fails to provide a clear and conspicuous identification that the message is an advertisement or solicitation in violation of Section 5(a)(5)(A)(i) of CAN-SPAM, 15 U.S.C. § 7704(a)(5)(A)(i); *provided, however*, that the requirements of this Subsection do not apply to commercial electronic mail messages transmitted only to recipients for whom Defendant has Affirmative Consent from such recipients.

Provided, however, in the event that Congress amends or modifies CAN-SPAM, or the Commission promulgates rules that modify or supersede CAN-SPAM, in whole or in part, Defendant shall comply fully and completely with all applicable requirements thereof, on and after the effective date of any such amendments, modifications or rules.

II.

EQUITABLE MONETARY RELIEF

IT IS FURTHER ORDERED that:

A. Judgment in the amount of \$24,193.09 (twenty-four thousand, one-hundred ninety-three dollars and nine cents) is hereby entered in favor of the Commission against Defendant as equitable monetary relief; *provided, however*, that this judgment shall be suspended until further Order of the Court pursuant to Section III of this Order (Right to Reopen), and provided further that this judgment shall be subject to the conditions set forth in Section III;

B. All funds paid pursuant to Section II.A and/or Section III of this Order shall be deposited into a fund, administered by the Commission or its agent, to be used for equitable relief, including, but not limited to, consumer redress and any attendant expenses for the administration of such equitable relief. Defendant will cooperate fully to assist the Commission in identifying consumers who may be entitled to redress pursuant to this Order. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after redress is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Defendant's practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited to the United States Treasury as disgorgement. Defendant shall have no right

to challenge the Commission's choice of remedies or the manner of distribution under this Section. The Commission, in its sole discretion, may use a designated agent to administer consumer redress;

C. The judgment entered pursuant to Paragraph A of this Section for equitable monetary relief is solely remedial in nature and is not a fine, penalty, punitive assessment, or forfeiture;

D. In the event of any default on any obligation to make payment under this Section, interest, computed pursuant to 28 U.S.C. § 1961, shall accrue from the date of default to the date of payment, and shall immediately become due and payable;

E. Defendant agrees that the facts as alleged in the Complaint filed in this action shall be taken as true, without further proof, in the event of any subsequent proceedings or litigation to enforce this Order or to collect amounts due pursuant to this Section, including, but not limited to, a non-dischargeability Complaint filed in a bankruptcy proceeding. Defendant waives any right to contest any allegations in Plaintiff's Complaint; and

F. Nothing herein shall be deemed or construed to prevent the Commission from initiating any appropriate proceedings to enforce the provisions of this Order.

III.

RIGHT TO REOPEN WITH SUM CERTAIN

IT IS FURTHER ORDERED that:

A. By agreeing to this Order, Defendant reaffirms and attests to the truthfulness, accuracy, and completeness of the financial statement signed on January 23, 2006. The Commission's agreement to this Order is expressly premised upon the truthfulness, accuracy, and

completeness of Defendant's financial condition, as represented in the above-referenced financial statement and related documents, which contain material information upon which the Commission relied in negotiating and agreeing to the terms of this Order.

B. If, upon motion of the Commission, the Court finds that Defendant failed to disclose any material asset, materially misrepresented the value of any asset, or made any other material misrepresentation in, or omission from, the financial statement and related documents described above, the Court shall enter judgment against Defendant, in favor of the Commission, in the amount of \$24,193.09 (twenty-four thousand, one-hundred ninety-three dollars and nine cents), which shall become immediately due and payable, less any amount previously paid. *Provided, however*, that in all other respects, this judgment shall remain in full force and effect, unless otherwise ordered by the Court.

C. In accordance with 31 U.S.C. § 7701, Defendant is hereby required, unless he has done so already, to furnish the Commission with his taxpayer identification number(s) (social security numbers or employer identification numbers) which shall be used for purposes of collecting and reporting on any delinquent amount arising out of Defendant's relationship with the government.

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

IV.

ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANT

IT IS FURTHER ORDERED that, within five (5) business days after receipt of this

Order as entered by the Court, Defendant shall submit to the Commission a truthful sworn statement acknowledging receipt of this Order.

V.

COMMISSION'S AUTHORITY TO MONITOR COMPLIANCE

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

A. Within ten (10) days of receipt of written notice from a representative of the Commission, Defendant shall submit additional written reports, sworn to or affirmed 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. The Commission is 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 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 lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 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)).

VI.

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,
 1. Defendant shall notify the Commission of the following:
 - a. any changes in residence, mailing addresses and telephone numbers, within ten (10) days of the date of such change;
 - b. any changes in employment status (including self-employment), and any change in the ownership of any business entity within ten (10) days of such change. Such notice shall include the name and address of each business Defendant is affiliated with or employed by, creates or forms, or performs services for; a statement of the nature of the business, and a statement of the Defendant's duties and responsibilities in connection with the business or employment; and
 - c. any changes in the Defendant's name or use of any aliases or fictitious names.

B. Defendant shall notify the Commission of any changes in the corporate structure of any business entity that Defendant directly or indirectly controls, or has an ownership interest in, 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 corporation; 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.

C. 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 he has complied and is complying with this Order. This report shall include, but not be limited to:

1. Defendant's then-current residence address, mailing address, and telephone number;
2. Defendant's then-current employment and business address(es), a description of the business activities of each such employer or business, and the title and responsibilities, for each such employer or business;
3. any other changes required to be reported under subparagraph A of this Section;

4. a copy of each acknowledgment of receipt of this Order, obtained pursuant to Section VIII of this Order;

5. a list of all names under which Defendant did or currently does business under since entry of this Order; and

6. a list of all domain names and web page addresses Defendant has registered or used since entry of this Order.

D. For 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 Enforcement
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20580
Re: *FTC v. Brian McMullen*
Civ. No. 05C 6911 (N.D. Ill.)

E. For the purposes of the compliance reporting required by this Section, representatives of the Commission are authorized to communicate directly with Defendant, unless Defendant indicates that he is represented by counsel and provides the name and address of such counsel to the Commission.

VII.

RECORD KEEPING PROVISIONS

IT IS FURTHER ORDERED that, for a period of six (6) years from the date of entry of this Order, Defendant, in connection with the any business involved in the marketing, advertising, promotion, offering for sale, or sale of goods or services via commercial email messages or other Internet-based mechanisms, and his agents, employees, officers, corporations,

successors, and assigns, and those 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 failing to create and retain the following records:

A. Accounting records that reflect the cost of goods or services sold, revenues generated, and the disbursement of such revenues;

B. Personnel records accurately reflecting: the name, 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;

C. Customer files containing the names, addresses, telephone numbers, dollar amounts paid, quantity of items or services purchased, and description of items or services purchased, to the extent such information is obtained in the ordinary course of business;

D. Complaints and refund requests (whether received directly, indirectly or through any third party) and any responses to those complaints or requests; and

E. 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, including copies of signed and dated acknowledgments of receipt of this Order, required by Section VIII of this Order, and all reports submitted to the Commission pursuant to this Order.

VIII.

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 as Control Person:** For any business that Defendant controls, directly or indirectly, or in which he has majority ownership interest, Defendant must deliver a copy of this Order to all principals, officers, directors, and managers of that business. Defendant must also deliver copies of this Order to all employees, agents, and representatives of that business who engage in conduct related to the subject matter of the Order. For current personnel, delivery shall be within five (5) days of service of this Order upon the Defendant. For new personnel, delivery shall occur prior to them assuming their responsibilities.

B. **Defendant as Employee or Non-control Person:** For any business where Defendant is not a controlling person of a business but otherwise engages in conduct related to the subject matter of this Order, Defendant must deliver a copy of this Order to all principals and managers of such business before engaging in such conduct.

C. 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 Section.

IX.

COOPERATION WITH COMMISSION COUNSEL

IT IS FURTHER ORDERED that Defendant, in connection with this action or any concurrent or subsequent investigations related to or associated with the transactions or the

occurrences that are the subject of the Complaint, shall cooperate in good faith with the Commission's reasonable requests for documents and testimony. Upon written notice, Defendant shall: (1) appear at such places and times as the Commission reasonably requests for interviews, conferences, pretrial discovery, review of documents, and for such other matters, after written notice, and (2) produce such documents and information in a manner as may be reasonably requested by the Commission. If requested in writing by the Commission, Defendant shall make himself available for trial testimony in any trial, deposition or other proceeding related to or associated with the transactions or the occurrences that are the subject of the Complaint, without the service of a civil investigative demand or subpoena.

X.

TRANSFER OF CUSTOMER LISTS

IT IS FURTHER ORDERED that Defendant is hereby restrained and enjoined from selling, renting, leasing, transferring, or otherwise disclosing the name, address, telephone number, credit card number, bank account number, electronic mail address, or other identifying information of any person who submitted such information to Defendant as a result of, derived from, or otherwise related to the activities alleged to be in violation of CAN-SPAM in the Commission's Complaint; *provided, however*, that Defendant may disclose such information to a law enforcement agency, to the Commission, or as required by any law, regulation, or court order.

XI.

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.

XII.

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.

XIII.

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.

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JUDGMENT IS THEREFORE ENTERED, pursuant to all the terms and conditions

recited above.

STIPULATED AND AGREED TO BY:

FOR THE PLAINTIFF:

William J. Hodor 7.11.06
Dated

William J. Hodor
Federal Trade Commission
55 East Monroe Street, Suite 1860
Chicago, Illinois 60603
(312) 960-5634 [Telephone]
(312) 960-5600 [Facsimile]

Attorney For Plaintiff
FEDERAL TRADE COMMISSION

FOR THE DEFENDANT:

Brian McMullen 6/5/06
Dated

Brian M. McMullen
104 Bessemer Avenue
East Pittsburgh, Pennsylvania 15112
(412) 824-0902 [Telephone]

DEFENDANT *PRO SE*

IT IS SO ORDERED, this 12th day of July, 2006

David H. Coar

Honorable David H. Coar
United States District Judge