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FILED
06 OCT 24 PM 12:00
THOMAS WILKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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SBA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

C 06 6611

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 YESMAIL, INC, d/b/a @ONCE
CORPORATION, a Delaware
17 corporation,

18 Defendant.

No. _____

COMPLAINT FOR CIVIL
PENALTIES AND
PERMANENT INJUNCTIVE
RELIEF

19
20 Plaintiff, the United States of America, acting upon
21 notification and authorization to the Attorney General by the
22 Federal Trade Commission ("FTC" or "Commission"), pursuant to
23 Section 16(a)(1) of the Federal Trade Commission Act ("FTC Act"),
24 15 U.S.C. § 56(a)(1), for its complaint alleges:

25 1. Plaintiff brings this action under Sections 5(a),
26 5(m)(1)(A), 13(b), 16(a), and 19 of the FTC Act, 15 U.S.C.

1 §§ 45(a), 45(m)(1)(A), 53(b), 56(a), and 57b, and under Section
2 7(a) of the Controlling the Assault of Non-Solicited Pornography
3 and Marketing Act of 2003 ("CAN-SPAM" or the "CAN-SPAM Act"),
4 15 U.S.C. § 7706(a), to secure civil penalties, a permanent
5 injunction, and other equitable relief for Defendant's violations
6 of Section 5(a) of CAN-SPAM, 15 U.S.C. § 7704(a).

7
8 **JURISDICTION AND VENUE**

9 2. Subject matter jurisdiction is conferred upon this
10 Court by 15 U.S.C. §§ 45(m)(1)(A), 53(b), 56(a), 57b, and
11 7706(a), and 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355. This
12 action arises under 15 U.S.C. § 45(a).

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

16 **INTRADISTRICT ASSIGNMENT**

17 4. The events giving rise to the United States' claims
18 occurred in substantial part in San Mateo County.

19 **DEFENDANT**

20 5. Defendant Yesmail, Inc., d/b/a @Once Corporation
21 ("Yesmail"), is a Delaware corporation with an office and place
22 of business located within the Northern District of California at
23 959 Skyway Road, Suite 150, San Carlos, California 94070. Since
24 at least September 2004, Yesmail has formulated, directed,
25 controlled, or participated in the acts or practices set forth in
26 this complaint. Yesmail transacts business within the Northern
District of California and throughout the United States.

1 **COMMERCE**

2 6. At all times relevant to this complaint, Defendant has
3 maintained a substantial course of trade in or affecting
4 commerce, as "commerce" is defined in Section 4 of the FTC Act,
5 15 U.S.C. § 44.

6 **THE CAN-SPAM ACT**

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

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

12 any electronic mail message the primary purpose of
13 which is the commercial advertisement or promotion of a
14 commercial product or service (including content on an
15 Internet website operated for a commercial purpose).

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

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

25 10. Section 3(12) of the CAN-SPAM Act, 15 U.S.C.
26 § 7702(12), defines "procure," when used with respect to the
initiation of a commercial email message, to mean:

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

4
5 11. Section 3(13) of the CAN-SPAM Act, 15 U.S.C.

6 § 7702(13), defines "protected computer" by reference to
7 18 U.S.C. § 1030(e)(2)(B), which states that a protected computer
8 is:

9 a computer which is used in interstate or foreign
10 commerce or communication, including a computer located
11 outside the United States that is used in a manner that
12 affects interstate or foreign commerce or communication
13 of the United States.

14 12. Section 3(14) of the CAN-SPAM Act, 15 U.S.C.

15 § 7702(14), defines "recipient," when used with respect to a
16 commercial email message, as:

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

19 13. Section 3(16) of the CAN-SPAM Act, 15 U.S.C.

20 § 7702(16), defines "sender," when used with respect to a
21 commercial email message, as:

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

25 14. Section 5(a)(3)(A) of the CAN-SPAM Act, 15 U.S.C.

26 § 7704(a)(3)(A), states:

It is unlawful for any person to initiate the
transmission to a protected computer of a commercial

1 electronic mail message that does not contain a
2 functioning return electronic mail address or other
3 Internet-based mechanism, clearly and conspicuously
4 displayed, that -

5 (i) a recipient may use to submit, in a manner
6 specified in the message, a reply electronic mail
7 message or other form of Internet-based
8 communication requesting not to receive future
9 commercial electronic mail messages from that
10 sender at the electronic mail address where the
11 message was received; and

12 (ii) remains capable of receiving such messages or
13 communications for no less than 30 days after the
14 transmission of the original message.

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

16 § 7704(a)(4)(A)(i) states:

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

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

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

[T]his Act shall be enforced by the Commission as if
the violation of this Act were an unfair or deceptive

1 act or practice proscribed under section 18(a)(1)(B) of
2 the [FTC Act] (15 U.S.C. 57a(a)(1)(B)).

3 **DEFENDANT'S BUSINESS PRACTICES**

4 17. Since at least September 2004, Defendant has owned and
5 operated an email marketing company. The marketing services that
6 Defendant provides to its clients include ongoing web hosting,
7 data processing, data management, and consulting services.

8 18. In connection with the email marketing services that
9 Defendant provides to its clients, Defendant transmits commercial
10 email messages. Defendant is an "initiator," as that term is
11 defined under CAN-SPAM, of the email messages sent on behalf of
12 its clients.

13 19. As such, Defendant receives and processes unsubscribe
14 requests from recipients of the email messages it sends on behalf
15 of certain clients.

16 20. Defendant's spam filtering software identified and
17 filtered out certain "reply to" unsubscribe requests from
18 recipients, filtering such requests as "spam."

19 21. As a result, Defendant failed to honor such unsubscribe
20 requests, and sent thousands of commercial email messages on
21 behalf of its clients to a recipient's email address more than
22 ten business days after receipt of a request* from the recipient
23 not to receive future commercial email messages from Defendant's
24 clients.

25 **COUNT I**

26 22. In numerous instances, Defendant has initiated the
transmission of commercial electronic mail messages to a
recipient more than ten business days after receipt of a request

1 not to receive further commercial electronic mail messages from
2 Defendant at the recipient's email address.

3 23. Therefore, Defendant's acts or practices, as described
4 in paragraph 20, violated Section 5(a)(4)(A)(i) of the CAN-SPAM
5 Act, 15 U.S.C. § 7704(a)(4)(A)(i).

6 **CONSUMER INJURY**

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

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

13 25. Section 7(a) of the CAN-SPAM Act, 15 U.S.C. § 7706(a),
14 provides that "[CAN-SPAM] shall be enforced by the [FTC] as if
15 the violation of this Act were an unfair or deceptive act or
16 practice proscribed under section 18(a)(1)(B) of the [FTC Act]
17 (15 U.S.C. § 57a(a)(1)(B))." Accordingly, violations of the CAN-
18 SPAM Act shall be enforced as if the violation were an unfair or
19 deceptive act or practice proscribed under section 18(a)(1)(B) of
20 the FTC Act (15 U.S.C. § 57a(a)(1)(B)). That is, these
21 provisions shall be enforced as if the violation had been a
22 violation of an FTC trade regulation rule. Furthermore, Section
23 18(d)(3) of the FTC Act provides that "[w]hen any rule under
24 subsection (a)(1)(B) of [Section 18] takes effect a subsequent
25 violation thereof shall constitute an unfair or deceptive act or
26 practice in violation of section 45(a)(1) of this title[.]"
15 U.S.C. § 57a(d)(3).

1 26. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C.
2 § 45(m)(1)(A), as modified by Section 4 of the Federal Civil
3 Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as
4 amended, and as implemented by 16 C.F.R. § 1.98(d) (1997),
5 authorizes this Court to award monetary civil penalties of not
6 more than \$11,000 for each violation of CAN-SPAM. Defendant's
7 violations of CAN-SPAM were committed with the knowledge required
8 by Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A).

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

13 **PRAYER FOR RELIEF**

14 WHEREFORE, Plaintiff requests that this Court, as authorized
15 by Sections 5(a), 5(m)(1)(A), 13(b) and 19 of the FTC Act,
16 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b) and 57b, and pursuant to
17 its own equitable powers:

- 18 1. Enter judgment against Defendant and in favor of Plaintiff
19 for each violation alleged in this complaint;
- 20 2. Award plaintiff monetary civil penalties from Defendant for
21 every violation of the CAN-SPAM Act;
- 22 3. Permanently enjoin Defendant from violating the CAN-SPAM
23 Act;
- 24 4. Order Defendant to pay the costs of this action; and
- 25 5. Award Plaintiff such other preliminary and permanent
26 equitable relief as the Court may determine to be just and
proper.

1 Dated: October 24, 2006

Respectfully submitted,

2 OF COUNSEL:


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