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

12
13 **UNITED STATES OF AMERICA**

14
15 Plaintiff,

16 v.

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

19
20 Defendant.

Civ. No. _____

STIPULATED FINAL ORDER
FOR CIVIL PENALTIES
AND PERMANENT
INJUNCTIVE RELIEF

21 Plaintiff, the United States of America, acting upon
22 notification and authorization to the Attorney General by the
23 Federal Trade Commission ("FTC" or the "Commission"), pursuant
24 to Section 16(a)(1) of the Federal Trade Commission Act ("FTC
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1 Act"), 15 U.S.C. § 56(a)(1), has filed a complaint pursuant to
2 Sections 5(a)(1), 5(m)(1)(A), 13(b), 16(a), and 19 of the FTC
3 Act, 15 U.S.C. §§ 45(a)(1), 45(m)(1)(A), 53(b), 56(a), and 57b
4 and under Section 7(a) of the Controlling the Assault of Non-
5 Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM" or
6 the "CAN-SPAM Act"), 15 U.S.C. § 7706(a), to secure civil
7 penalties, a permanent injunction, and other equitable relief for
8 Defendant's violations of Section 5(a) of CAN-SPAM, 15 U.S.C.
9 § 7704(a). Defendant has waived service of the Summons and
10 Complaint; the parties have been represented by the attorneys
11 whose names appear hereafter; and the parties have agreed to
12 settlement of this action upon the following terms and
13 conditions, without adjudication of any issue of fact or law and
14 without Defendant admitting liability for any of the matters
15 alleged in the Complaint.
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19 THEREFORE, on the joint motion of the parties, it is hereby
20 ORDERED, ADJUDGED AND DECREED as follows:

21 **FINDINGS**

22 1. This Court has jurisdiction over the subject matter of
23 this action pursuant to 15 U.S.C. §§ 45(m)(1)(A), 53(b), 56(a),
24 57b, and 7706(a), and 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355.
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1 2. Plaintiff and Defendant consent to jurisdiction and
2 venue in this District.

3 3. The activities of Defendant are in or affecting
4 commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
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6 4. The complaint states a claim upon which relief may be
7 granted against Defendant under Section 5(a) of the CAN-SPAM Act,
8 15 U.S.C. § 7704(a), and Sections 5(a), 5(m)(1)(A), 13(b) and 19
9 of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), and 57b.
10

11 5. Defendant has entered into the stipulated Judgment and
12 Order for Permanent Injunction ("Order") freely and without
13 coercion.

14 6. Defendant hereby waives all rights to appeal or
15 otherwise challenge or contest the validity of this Order.
16

17 7. Defendant agrees that this Order does not entitle
18 Defendant to seek or to obtain attorneys' fees as a prevailing
19 party under the Equal Access to Justice Act, 28 U.S.C. § 2412,
20 and Defendant further waives any rights to attorneys' fees that
21 may arise under said provision of law.

22 8. Entry of this Order is in the public interest.
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1 DEFINITIONS

2 For the purpose of this Order, the following definitions
3 shall apply:

- 4 1. "Commercial electronic mail ('email') message" means
5 any electronic mail message the primary purpose of
6 which is the commercial advertisement or promotion of a
7 commercial product or service (including content on an
8 Internet website operated for a commercial purpose) and
9 that further satisfies the requirements of 16 C.F.R.
10 316.1 *et seq*, as it exist now and may be amended.
11
12 2. Unless otherwise specified, "Defendant" means Yesmail,
13 Inc., d/b/a @Once Corporation, and its successors,
14 assigns, affiliates, or subsidiaries.
15
16 3. "Document" is synonymous in meaning and equal in scope
17 to the usage of the term in Federal Rule of Civil
18 Procedure 34(a), and includes writings, drawings,
19 graphs, charts, photographs, audio and video
20 recordings, computer records, and other data
21 compilations from which information can be obtained and
22 translated, if necessary, into reasonably usable form
23 through detection devices. A draft or non-identical
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1 copy is a separate document within the meaning of the
2 term.

3 4. "Electronic mail ('email') address" means a
4 destination, commonly expressed as a string of
5 characters, consisting of a unique user name or mailbox
6 (commonly referred to as the "local part") and a
7 reference to an Internet domain (commonly referred to
8 as the "domain part"), whether or not displayed, to
9 which an electronic mail message can be sent or
10 delivered.
11

12 5. "Electronic mail ('email') message" means a message
13 sent to a unique electronic mail address.
14

15 6. "Initiate," when used with respect to a commercial
16 electronic mail message, means to originate or transmit
17 such message or to procure the origination or
18 transmission of such message, but shall not include
19 actions that constitute routine conveyance of such
20 message. For purposes of this Order, more than one
21 person may be considered to have initiated a message.
22

23 7. "Person" means a natural person or a corporation,
24 partnership, proprietorship, limited liability company,
25 or other organization or legal entity, including an
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1 association, cooperative, or agency, or other group or
2 combination acting as an entity.

3 8. "Procure," when used with respect to the initiation of
4 a commercial electronic mail message, means
5 intentionally to pay or provide other consideration to,
6 or induce, another person to initiate such a message on
7 one's behalf.
8

9 9. "Recipient," when used with respect to a commercial
10 electronic mail message, means an authorized user of
11 the electronic mail address to which the message was
12 sent or delivered. If a recipient of a commercial
13 electronic mail message has one or more electronic mail
14 addresses in addition to the address to which the
15 message was sent or delivered, the recipient shall be
16 treated as a separate recipient with respect to each
17 such address. If an electronic mail address is
18 reassigned to a new user, the new user shall not be
19 treated as a recipient of any commercial electronic
20 mail message sent or delivered to that address before
21 it was reassigned.
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1 address where the message was received; and (ii)
2 remains capable of receiving such messages or
3 communications for no less than 30 days after the
4 transmission of the original message;

5
6 B. Does not include clear and conspicuous notice of the
7 opportunity to decline to receive further commercial
8 email from the sender; and

9 C. Is sent to a recipient's email address more than ten
10 business days after the sender or the person who
11 initiated such a message receives a request from that
12 recipient not to receive future commercial email
13 messages from the sender at the recipient's email
14 address.
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16 **II. CIVIL PENALTIES**

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18 IT IS FURTHER ORDERED that Defendant shall pay to Plaintiff
19 a civil penalty, pursuant to section 5(m)(1)(A) of the Federal
20 Trade Commission Act, 15 U.S.C. § 45(m)(1)(A), in the amount of
21 \$50,717 as follows:

22 A. Defendant shall make the payment required by this Part
23 within ten (10) business days of the date of entry of
24 this Order by electronic fund transfer or certified or
25 cashier's check in accordance with the instructions
26

1 provided by the Office of Consumer Litigation, Civil
2 Division, U.S. Department of Justice, Washington, D.C.
3 20530, for appropriate disposition; and

- 4
5 B. In the event of any default in payment, which default
6 continues for ten (10) business days beyond the due
7 date of payment, the entire unpaid penalty, together
8 with interest, as computed pursuant to 28 U.S.C.
9 § 1961, from the date of default to the date of
10 payment, shall immediately become due and payable.
11

12 **III. COMPLIANCE REPORTING BY DEFENDANT**

13 IT IS FURTHER ORDERED that, in order that compliance with
14 the provisions of this Order may be monitored:

- 15 A. For a period of five (5) years from the date of entry
16 of this Order, Defendant shall notify the Commission of
17 any changes in corporate structure that may affect
18 compliance obligations arising under this Order,
19 including but not limited to a dissolution, assignment,
20 sale, merger, or other action that would result in the
21 emergence of a successor entity; the creation or
22 dissolution of a subsidiary, parent, or affiliate that
23 engages in any acts or practices subject to this Order;
24 the filing of a bankruptcy petition; or a change in the
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1 corporate name or address, at least seven (7) days
2 prior to such change, *provided* that, with respect to
3 any proposed change in the corporation about which
4 Defendant learns less than seven (7) days prior to the
5 date such action is to take place, Defendant shall
6 notify the Commission as soon as is practicable after
7 obtaining such knowledge;
8

9 B. One hundred eighty (180) days after the date of entry
10 of this Order, Defendant shall provide a written report
11 to the FTC, sworn to under penalty of perjury, setting
12 forth in detail the manner and form in which it has
13 complied and is complying with this Order. This report
14 shall include, but not be limited to:
15

- 16 1. A copy of each acknowledgment of receipt of this
17 Order, obtained pursuant to Section V of this
18 Order; and
19
- 20 2. Any changes required to be reported pursuant to
21 subsection A of this Section;
22

23 C. For the purposes of this Order, Defendant shall, unless
24 otherwise directed in writing by the Commission's
25 authorized representatives, mail all written
26 notifications to the Commission to:

1 Associate Director for the
2 Division of Enforcement
3 Federal Trade Commission
4 601 New Jersey Avenue, N.W.
5 Washington, D.C. 20580
6 Re: United States v. Yesmail, Inc.
7 Civ. No. _____

8 D. For the purposes of this Order, Defendant shall, unless
9 otherwise directed in writing by a representative of
10 Plaintiff, identify all written notifications required
11 to be sent to Plaintiff as in reference to
12 DJ# 102-3371, and mail them to:

13 Director, Office of Consumer Litigation
14 U.S. Department of Justice - Civil Division
15 P.O. Box 386
16 Washington, D.C. 20044

17 E. For purposes of the compliance reporting and monitoring
18 required by this Order, representatives of Plaintiff
19 and the Commission are authorized to communicate
20 directly with Defendant's officers.

21 **IV. RECORD KEEPING PROVISIONS**

22 IT IS FURTHER ORDERED that, for a period of five (5) years
23 from the date of entry of this Order, Defendant is hereby
24 restrained and enjoined from failing to create and retain the
25 following records in connection with the marketing, advertising,
26 promotion, offering for sale, or sale of goods or services, via

1 commercial email messages, and from failing to make such records
2 (or reports concerning such records) available for inspection and
3 copying within ten (10) days of receipt of a written request from
4 a representative of Plaintiff or Commission:
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6 A. Standard accounting records generated in the ordinary
7 course of business including, but not limited to,
8 balance sheets, income statements, and annual reports;
9

10 B. Records accurately reflecting during their employment:
11 the name, physical address, and telephone number of
12 each person employed by Defendant, including as an
13 independent contractor, with responsibilities relating
14 to compliance with this Order; that person's job title
15 or position; the date upon which the person commenced
16 work; and the date and reason for the person's
17 termination, if applicable;
18

19 C. Records that reflect, for every written or oral
20 consumer complaint received by Defendant relating to
21 the activities of promoting goods and services via
22 commercial email messages, whether directly or
23 indirectly or through any third party, (1) the name,
24 address, and telephone number provided by the
25 complaining consumer; (2) the written complaint or
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1 request, if any; (3) the basis of the complaint or
2 request if known; (4) the nature and result of any
3 investigation conducted concerning the complaint or
4 request; (5) each response and the date of such response
5 to the complaint or request; (6) any final resolution
6 of the complaint or request, and the date of such
7 resolution; and (7) in the event of a denial of any
8 resolution, the reason for the denial; and
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10 D. All other records and documents reasonably necessary to
11 demonstrate full compliance with each provision of this
12 Order, including but not limited to, all documents
13 obtained, created, generated or which in any way relate
14 to the requirements, provisions, or terms of this
15 Order, copies of signed and dated acknowledgments of
16 receipt of this Order, and all reports submitted to the
17 FTC pursuant to this Order.
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20 **V. DISTRIBUTION OF ORDER BY DEFENDANT**

21 IT IS FURTHER ORDERED that, for a period of five (5) years
22 from the date of entry of this Order, Defendant shall deliver
23 copies of this Order as directed below:
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1 A. Defendant must deliver a copy of this Order to all its
2 officers, directors, and managers. Defendant must also
3 deliver a copy of this Order to all its employees,
4 agents, independent contractors, and persons who engage
5 in conduct related to the subject matter of this Order.
6 For current personnel, delivery shall be within five
7 (5) days of service of this Order. For new personnel,
8 delivery shall occur prior to their assuming their
9 responsibilities; and

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12 B. Defendant must secure a signed and dated statement
13 acknowledging receipt of this Order, within thirty (30)
14 days of delivery, from all persons receiving a copy or
15 summary of this Order pursuant to this Part.

16 **VI. ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANT**

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18 IT IS FURTHER ORDERED that Defendant, within five (5)
19 business days of receipt of this Order as entered by the Court,
20 must submit to the Commission a truthful sworn statement
21 acknowledging receipt of this Order.

22 **VII. FEES AND COSTS**

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24 IT IS FURTHER ORDERED that each party to this Order hereby
25 agrees to bear its own costs and attorneys' fees incurred in
26 connection with this action.

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VIII. 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.

IX. 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.

X. COMPLETE SETTLEMENT

The parties, by their respective counsel, hereby consent to entry of the foregoing Order, which shall constitute a final judgment and order in this matter. The parties further stipulate and agree that the entry of the foregoing Order shall constitute full, complete, and final settlement of this action.

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FOR THE PLAINTIFF:

UNITED STATES OF AMERICA:

PETER D. KEISLER
Assistant Attorney General

EUGENE M. THIROLF
Director, Office of Consumer Litigation

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Email: Elizabeth.Stein2@usdoj.gov

1 FOR THE FEDERAL TRADE COMMISSION

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3
4 _____
LOIS C. GREISMAN
Associate Director for Marketing Practices

5
6 _____
Karen S. Hobbs
7 Attorney, Federal Trade Commission
600 Pennsylvania Ave., N.W.
8 Washington, D.C. 20580

9
10 FOR THE DEFENDANT:

11 _____
12 Trent J. Martinet
Erickson & Sederstrom, P.C.
13 One Regency Westpointe
10330 Regency Parkway Drive
14 Omaha, NE 68114

15 _____
16 Yesmail, Inc., d/b/a @Once Corporation
BY: _____
17 959 Skyway Road
Suite 150
18 San Carlos, California 94070

19
20
21
22 **SO ORDERED** this _____ day of _____, 2006.

23
24 _____
United States District Judge