

FILED LODGED
RECEIVED COPY
JAN 09 2006
CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA
BY _____ J. DEPUTY

FILED RECEIVED
COPY
JAN 10 2006
CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA
BY _____ DEPUTY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Federal Trade Commission;

Plaintiff,

v.

**William Dugger, aka Billy
Johnson, dba Net Everyone;**

**Angelina Johnson, dba Net
Everyone; and**

John Vitale, dba Net Everyone;

Defendants.

Civil No. CV-06-0078-PHX-ROS

TEMPORARY RESTRAINING
ORDER

[FILED UNDER SEAL]

SEALED

Plaintiff, the Federal Trade Commission ("Commission"), having filed its complaint for a permanent injunction and other relief in this matter, pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) & 57b, and 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), and having moved *ex parte* for a Temporary Restraining Order pursuant to Rule 65 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 65, and the Court having considered the

I hereby attest and certify on 1-10-06
that the foregoing document is a full, true and correct
copy of the original on file in my office and in my custody.

Page 1 of 16

CLERK, U.S. DISTRICT COURT
DISTRICT OF ARIZONA

By [Signature] Deputy

(5)

complaint, declarations, exhibits, and memorandum of law filed in support thereof, and now being advised in the premises finds that:

1. This Court has jurisdiction over the subject matter of this case and there is good cause to believe it will have jurisdiction over all parties hereto;

2. There is good cause to believe that the defendants have engaged and are likely to engage in acts and practices that violate Sections 5(a) and (d) of CAN-SPAM, 15 U.S.C. § 7704(a), (d), and the FTC's Adult Labeling Rule, 16 C.F.R. Part 316.4, and that the Commission is therefore likely to prevail on the merits of this action;

3. There is good cause to believe that immediate and irreparable damage to the Court's ability to grant effective final relief in the form of redress or disgorgement will occur from the sale, transfer, or other disposition or concealment by defendants of their assets or records unless the defendants are immediately restrained and enjoined by Order of this Court. There is thus good cause for relieving the plaintiff of the duty to provide defendants with prior notice of the plaintiff's motion;

4. Weighing the equities and considering the plaintiff's likelihood of ultimate success, a temporary restraining order with equitable relief is in the public interest; and

5. No security is required of any agency of the United States for issuance of a restraining order. Fed. R. Civ. P. 65(c).

DEFINITIONS

1. **"Affirmative consent"** to receipt of a commercial email message means that:

a. 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

b. 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 the other party for the purpose of initiating commercial electronic mail messages. 15 U.S.C. § 7702(1).

2. **“Assets”** mean any legal or equitable interest in, right to, or claim to, any real and personal property, including without limitation, chattels, goods, instruments, equipment, including computers, servers and related equipment, fixtures, general intangibles, leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits, contracts, receivables, shares of stock, bonds, and all cash, wherever located, whether in the United States or abroad.

3. **“Commercial electronic mail message”** (or **“commercial email”**) means any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including the content on an Internet website operated for commercial purposes). 15 U.S.C. § 7702(2).

4. **“Defendants”** means William Dugger, Angelina Johnson, and John Vitale.

5. **“Document”** is synonymous in meaning and equal in scope to the usage of the term in Federal Rule of Civil Procedure 34(a), and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records including email, ICQ, or other electronic communications, 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 the term. Any document provided by one party to another pursuant to this Order shall be provided in a format that is accessible to the receiving party.

6. **“Electronic mail address”** (or **“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).

7. **“Electronic mail message”** (or **“email”**) means a message sent to a unique electronic mail address. 15 U.S.C. § 7702(6).

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. 15 U.S.C. § 7702(9).

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

11. **“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).

12. **“Sexually oriented material”** means any material that depicts sexually-explicit conduct as that term is defined in 18 U.S.C. § 2256, unless the depiction constitutes a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters. 15 U.S.C. § 7704(d)(4). Sexually-explicit conduct is defined by 18 U.S.C. § 2256 to mean actual or simulated: (a) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (b) bestiality; (c) masturbation; (d) sadistic or masochistic abuse; or (e) lascivious exhibition of the genitals or pubic area of any person.

ORDER

I. PROHIBITIONS AGAINST UNLAWFUL USE OF FALSE HEADERS AND RELAY COMPUTERS

IT IS THEREFORE ORDERED that defendants and their agents, servants, employees, and attorneys, and those persons in active concert or participation with them

who receive actual notice of this Order by personal service or otherwise, are temporarily restrained and enjoined from initiating the transmission of a commercial email:

A. That contains false or misleading header information;

B. That fails to identify accurately any computer that defendants use to initiate or transmit the message and to include an accurate Internet Protocol address for each such computer; or

C. That is relayed or retransmitted through a computer or computer network without either the direct, written authorization of the owner of the computer or computer network, or the indirect, written authorization of the owner of the computer or computer network given to a third party who provides a copy of such written authorization to defendants. A written authorization under this Part may be obtained electronically and shall include:

1. An express statement that the authorization may be reassigned if it is indirect;

2. A statement identifying the person giving the authorization and showing that person's ownership of or authority to act on behalf of the owner of the computer or computer network;

3. The email address of the person giving the authorization; and

4. The domain names or Internet Protocol addresses used to access such computer or computer network, the method by which the computer or computer network will be accessed, and the name of any computer program to be used for such access.

II. PROHIBITION AGAINST VIOLATING THE ADULT LABELING RULE

IT IS FURTHER ORDERED that defendants and their agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are temporarily restrained and enjoined from initiating the transmission of a commercial email that includes sexually oriented material:

- A. That does not contain the phrase "SEXUALLY-EXPLICIT: " as the first nineteen (19) characters at the beginning of the subject line of the message;
- B. That includes sexually oriented materials within the subject line of the message;
- C. That includes sexually oriented materials within the content of the message that is initially viewable by the recipient, when the message is opened by the recipient and absent any further action by the recipient; and
- D. That does not contain only the following information within the content of the message that is initially viewable by the recipient, when the message is opened by the recipient and absent any further action by the recipient:
1. The phrase "SEXUALLY-EXPLICIT: " in a clear and conspicuous manner;
 2. Clear and conspicuous notice that the message is an advertisement or solicitation;
 3. Clear and conspicuous notice of the opportunity of a recipient to decline to receive further commercial email messages from the defendants;
 4. A functioning return email 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 email message or other form of Internet-based communication requesting not to receive future commercial email messages from that sender at the email address where the message was received; and (ii) that remains capable of receiving such messages or communications for no less than 30 days after the transmission of the original message; and
 5. Clear and conspicuous display of a valid physical postal address of the sender.

Provided, however, that the requirements of this Paragraph do not apply to commercial emails transmitted only to persons who have given prior affirmative consent to receipt of the message. Defendants shall possess evidence of such prior affirmative

consent prior to sending emails to such persons, including a copy of any web page or other document on which such person indicated their consent. If the web page or other document on which consent was obtained does not identify defendants or their business by name, it shall be construed to give consent to the receipt of sexually oriented material only if it expressly states that the consent authorizing the receipt of sexually oriented material may be transferred to third parties.

III. PRESERVATION OF RECORDS

IT IS FURTHER ORDERED that defendants and their agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are temporarily restrained and enjoined from:

A. Destroying, erasing, mutilating, concealing, altering, transferring, or otherwise disposing of, in any manner, directly or indirectly, any contracts, accounting data, correspondence, advertisements, computer hard drives, computer tapes, discs, or other computer data storage media, books, written or printed records, handwritten notes, telephone logs, telephone scripts, receipt books, ledgers, personal and business canceled checks and check registers, bank statements, appointment books, copies of federal, state or local business or personal income or property tax returns, and other documents or records of any kind which relate to their business practices or business or personal finances of the defendants; and

B. Failing to create and maintain books, records, accounts, and data which, in reasonable detail, accurately, fairly, and completely reflect the defendants' incomes, disbursements, transactions, and use of monies.

IV. ASSET FREEZE

IT IS FURTHER ORDERED that defendants and their agents, servants, employees, and attorneys, and those persons in active concert or participation with them

who receive actual notice of this Order by personal service or otherwise, are temporarily restrained and enjoined from:

A. Transferring, liquidating, converting, encumbering, pledging, loaning, selling, concealing, dissipating, disbursing, assigning, spending, withdrawing, hypothecating, conveying, gifting, or otherwise disposing of any funds, real or personal property, accounts, contracts, lists of consumer names, shares of stock, or other assets, or any interest therein, wherever located, whether within the United States or within a jurisdiction outside the United States, that, are:

1. Owned or controlled by, or held for the benefit of, any defendant in whole or in part;

2. In the actual or constructive possession of any defendant;

3. Held by an agent of any defendant as a retainer for the agent's provision of services to defendants; or

4. Owned, controlled by, or in the actual or constructive possession of, or otherwise held for the benefit of, any corporation, partnership, or other entity directly or indirectly owned, managed, or controlled by any defendant, including, without limitation, any assets held by or for, or subject to access by, any of the defendants, at any bank or savings and loan institution, or with any broker-dealer, escrow agent, title company, commodity trading company, precious metals dealer, or other financial institution or depository of any kind;

B. Opening or causing to be opened any safe deposit boxes titled in the name of any defendant or subject to access by any defendant;

C. Obtaining a personal or secured loan encumbering the assets of any defendant, or of any corporation, partnership, or other entity directly or indirectly owned, managed, or controlled by any defendant;

D. Incurring liens or other encumbrances on real property, personal property or other assets in the name, singly or jointly, of any defendant or of any corporation, partnership, or other entity directly or indirectly owned, managed, or controlled by any defendant; or

E. Incurring charges or cash advances on any credit or debit card issued in the name, singly or jointly, of any defendant, or any corporation, partnership, or other entity directly or indirectly owned, managed, or controlled by any defendant.

V. RETENTION OF ASSETS BY FINANCIAL INSTITUTIONS AND BROKERS

IT IS FURTHER ORDERED that pending determination of the plaintiff's request for a preliminary injunction, any financial or brokerage institution, business entity, or person that holds, controls, or maintains custody of any account or asset of any defendant, or has held, controlled, or maintained custody of any account or asset of any defendant at any time since January 1, 2005, shall:

A. Hold and retain within its control, and prohibit any defendant from withdrawing, removing, assigning, transferring, pledging, encumbering, disbursing, dissipating, converting, selling, or otherwise disposing of any such asset except as directed by further order of the Court;

B. Deny defendants access to any safe deposit box that is:

1. Titled in the name of any defendant, either individually or jointly; or
2. Otherwise subject to access by any defendant;

C. Provide counsel for the Commission, within five (5) business days of receiving a copy of this Order, a sworn statement setting forth:

1. The identification number of each such account or asset titled in the name, individually or jointly, of any of the defendants, or held on behalf of, or for the benefit of, any of the defendants;

2. The balance of each such account, or a description of the nature and value of each such asset as of the close of business on the day on which this Order is served, and, if the account or other asset has been closed or removed, the date closed or removed, the total funds removed in order to close the account, and the name of the person or entity to whom such account or other asset was remitted;
and

3. The identification of any safe deposit box that is either titled in the name, individually or jointly, of any defendant, or is otherwise subject to access by any defendant; and

D. Upon the request by the Commission, promptly provide the Commission with copies of all records or other documentation pertaining to such account or asset, including but not limited to originals or copies of account applications, account statements, signature cards, checks, drafts, deposit tickets, transfers to and from the accounts, all other debit and credit instruments or slips, currency transaction reports, 1099 forms, and safe deposit box logs. Any such financial institution, account custodian, or other aforementioned entity may arrange for the Commission to obtain copies of any such records which the Commission seeks, provided that such institution or custodian may charge a reasonable fee not to exceed fifteen cents per page copied.

VI. SERVICE OF ORDER BY FACSIMILE AND EMAIL AUTHORIZED

IT IS FURTHER ORDERED that copies of this Order may be served by any means, including facsimile transmission or electronic mail, upon any entity or person that may have possession, custody, or control of any documents of the defendants, or that may be subject to any provision of this Order.

VII. DUTIES OF HOSTS OF DEFENDANTS' COMPUTER EQUIPMENT

IT IS FURTHER ORDERED that pending determination of the plaintiff's request for a preliminary injunction, any person who owns or controls any business premises or other location on which any computer equipment owned or leased by any defendant is located shall:

A. Disconnect any such computer equipment from the Internet and from any other means of remote access by defendants or any other person, and take no step to reconnect the computer equipment except as authorized by a further Order of this Court;

B. Deny the defendants and any other person access to the computer equipment except as authorized by a further Order of this Court;

C. Prevent the removal of the computer equipment from its present location except as authorized by a further Order of this Court; and

D. Provide counsel for the Commission, within three (3) business days of receipt of a copy of this Order, with a sworn statement disclosing the location of the computer equipment, and describing, to the extent known, the make(s) and model(s) of the computer equipment, as well as the operating system(s) in use, and the number, size and capacity of any mass storage arrays or devices, in order that the Commission may arrange for imaging of the contents of any such mass storage arrays or devices.

VIII. REQUIRED ASSET AND OTHER DISCLOSURES BY DEFENDANTS

IT IS FURTHER ORDERED that each defendant and his or her agents, servants, employees, and attorneys, and those persons in active concert or participation with any of them who receive actual notice of this Order by personal service or otherwise, are temporarily restrained and enjoined from failing to prepare and deliver to counsel for the Commission at the address given in Paragraph XIV of this Order, within forty-eight (48) hours of service of this Order:

A. A completed financial statement for the defendant individually signed by the defendant on the form appended to this Order as Attachment A (Financial Statement of Individual Defendant), and a completed financial statement signed by the defendant for each business entity under which the defendant conducts business or of which the defendant is an officer, and for each trust for which the defendant is a trustee, on the form appended to this Order as Attachment B (Financial Statement of Corporate Defendant). The financial statement shall be accurate as of the date of entry of this Order. Each defendant shall include in the financial statement a full accounting of all funds and assets, whether located inside or outside of the United States, that are: (a) titled in the name of the defendant, jointly, severally or individually; (b) held by any person or entity for the benefit of the defendant; or (c) under the direct or indirect control of the defendant;

B. A copy of any document identifying any computers used by the defendant to relay or retransmit email messages, reflecting the purchase or lease of access to these computers, or authorizing the use of these computers by the defendant;

C. A copy of any document showing that any recipient of defendants' email messages has given the defendant prior affirmative consent to send the messages.

D. A complete and accurate list of all Internet domains, Internet Protocol addresses, and websites owned or registered by the defendant or on which the defendant has posted any web pages or other content since January 1, 2005, and the name and other identifying and payment information used by the defendant to purchase, register, or post content on the domain, address, or website; and

IX. ACCESS TO BUSINESS PREMISES AND RECORDS

IT IS FURTHER ORDERED that defendants shall identify and allow plaintiff's representatives immediate access to their business premises, mail drops, storage facilities, and all other business locations owned, leased, controlled, or used by any defendant, in whole or in part. The purpose of the access shall be to effect service and to inspect and copy correspondence, emails, financial data, or any other document or computer equipment containing information about defendants' business and assets. Plaintiff shall have the right to remove documents and computer equipment from the business premises of any defendant in order that they may be inspected, inventoried, and copied. Plaintiff shall return any such removed documents or computer equipment to such defendant within five (5) business days, or such time-period as is agreed upon by plaintiff and the defendant. Defendants, to the extent they are in possession of documents or computer equipment containing information relevant to this action, shall provide plaintiff with any necessary means of access to the documents or computer equipment, including, without limitation, keys and combinations to locks, computer access codes and passwords, and storage area access information;

If, at the time of service of this Order, correspondence, email, financial data, or any other documents or computer equipment containing information about defendants'

business and assets is located outside of Phoenix, Arizona, or in the personal residence of any defendant, then such defendant shall, within forty-eight (48) hours of service of this Order, produce such correspondence, email, financial data, or any other document and computer equipment to plaintiff in care of Diane Henson, Supervisory Legal Assistant, United States Attorney's Office, Two Renaissance Square, 40 N. Central Ave. - Ste. 1200, Phoenix, AZ 85004-4408, or in care of Caren Kusaka, Administrative Officer, United States Attorney's Office, PJKK Federal Building, 300 Ala Moana Blvd, Room 6-100, Honolulu, HI 96850.

X. FOREIGN ASSET REPATRIATION

IT IS FURTHER ORDERED that within five (5) business days following service of this Order, each defendant shall:

- A. Repatriate to the United States all funds or assets in foreign countries held (1) by any defendant; (2) for any defendant's benefit; or (3) under any defendant's direct or indirect control;
- B. On the same business day as any repatriation under Paragraph A above,
 1. Notify plaintiff of the name and location of the financial institution or other entity that is the recipient of such funds or assets; and
 2. Serve a copy of this Order on any such financial institution or other entity;
- C. Provide plaintiff with a full accounting of all funds and assets outside of the territory of the United States held: (1) by any defendant; (2) for any defendant's benefit; or (3) under any defendant's direct or indirect control; and
- D. Hold and retain all repatriated funds and assets and prevent any transfer, disposition, or dissipation whatsoever of any such funds or assets.

XI. INTERFERENCE WITH REPATRIATION PROHIBITED

IT IS FURTHER ORDERED that the defendants are hereby temporarily restrained and enjoined from taking any action, directly or indirectly, which may result in the encumbrance or dissipation of foreign assets, or in the hindrance of the repatriation required by Paragraph X of this Order, including, but not limited to:

A. Sending any statement, letter, fax, email, or wire transmission, telephoning or engaging in any other act, directly or indirectly, that results in a determination by a foreign trustee or other entity that a “duress” event has occurred under the terms of a foreign trust agreement until such time that all assets have been fully repatriated pursuant to Paragraph X of this Order.

B. Notifying any trustee, protector, or other agent of any foreign trust or other related entities of either the existence of this Order, or of the fact that repatriation is required pursuant to a Court Order, until such time that all assets have been fully repatriated pursuant to Paragraph X of this Order.

XII. CONSUMER CREDIT REPORTS

IT IS FURTHER ORDERED that plaintiff Commission may obtain credit reports concerning any defendant, pursuant to Section 604(1) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(1), and that upon written request, any credit reporting agency from which such reports are requested shall provide them to plaintiff Commission.

XIII. DEFENDANTS’ DUTY TO DISTRIBUTE THIS ORDER

IT IS FURTHER ORDERED that defendants shall immediately provide a copy of this Order to each affiliate, subsidiary, division, successor, assign, officer, director, employee, independent contractor, webmaster, agent, attorney, and representative of any defendant, and shall, within ten (10) days from the date of entry of this Order, provide the Commission with a sworn statement that defendants have complied with this provision of

the Order, which statement shall include the names and addresses of each such person or entity who received a copy of the Order.

XIV. SERVICE UPON PLAINTIFF

IT IS FURTHER ORDERED that for the purposes of this Order, all correspondence and pleadings to the Commission shall be addressed to:

Lawrence Hodapp, Esq.
Craig Tregillus, Esq.
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
(202) 326-3395 (facsimile).

Notice may be provided by e-mail to lhodapp@ftc.gov and ctregillus@ftc.gov.

XV. ORDER TO SHOW CAUSE

IT IS FURTHER ORDERED, pursuant to Fed. R.Civ. P. 65(b), that defendants shall appear before this Court on the 20 day of January, 2006 at ~~8:00~~ 2:00 o'clock ^{P.M.} ~~A.M.~~, at the United States Courthouse, Room 604 to show cause, if there is any, why this Court should not enter a preliminary injunction, in substantially the form of this order, pending final ruling on the Complaint against defendants, enjoining them from further violations of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), Sections 5(a) and (d) of CAN-SPAM, 15 U.S.C. § 7704(a), (d), and the FTC's Adult Labeling Rule, 16 C.F.R. Part 316.4, and imposing such additional relief as may be appropriate.

Defendants shall serve answering pleadings or materials on counsel for the Commission ~~not less than~~ on or before January 17, 2006 business days prior to the hearing on the Commission's request for a preliminary injunction. Plaintiff may submit reply pleadings or materials by January 17, 2006.

XVI. DURATION OF TEMPORARY RESTRAINING ORDER

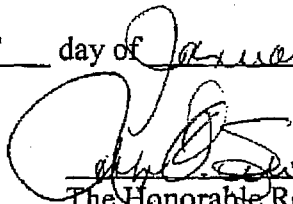
IT IS FURTHER ORDERED that the Temporary Restraining Order granted herein shall expire ten (10) days after entry, unless, for good cause shown, the Order is extended, or unless, as to any defendant, the defendant consents that it should be extended for a longer period of time.

XVII. RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes.

IT IS SO ORDERED.

DATED this 9 day of January, 2006.



The Honorable Roslyn O. Silver
United States District Judge