

Dissenting Statement of Commissioner Jon Leibowitz  
In re Adteractive, Inc.

Staff deserves credit for bringing this case and for negotiating a settlement that includes useful injunctive relief. I am concerned, however, that the civil penalty that Adteractive must pay is a downward departure from our other CAN-SPAM Act cases and is not adequate to deter violations in the future. Therefore, I respectfully dissent.

Adteractive, Inc. is a corporation with annual revenues reportedly exceeding \$115 million.<sup>1</sup> According to the Commission's complaint, which alleged violations of both the CAN-SPAM Act and Section 5 of the FTC Act for unfair or deceptive acts or practices, the company offered "free" gifts such as a laptop or flat-screen television through spam emails and banner advertising. A consumer who responded to the email or banner ad would be taken to a website where, after providing personal information, he or she could then sign up for certain offers. Initial offers were optional, but three subsequent tiers of offers were mandatory – one could not get a free gift without "participating" in one or more of the offers from each of these tiers. The system was set up so the consumer would not see that offers in the final tier – as opposed to the first two rounds – required a substantial financial outlay (such as taking out a car loan or signing up for a satellite television subscription) or required opening several credit card accounts (likely affecting the consumer's credit score) to get the "free" laptop, camera, or TV. The intent of this process was obvious: to discourage consumers from making the substantial purchases or commitments required to get the free gift, after they had provided their personal information and had already signed up for or purchased the more modest products and services offered in tiers 1 and 2. Once they realized the nature of the scheme, of course, it was too late: the earlier purchases had already been made.

Because the relevant financial information and the number of spam emails disseminated cannot be made public, I am not permitted to specify the reasons why I believe that this civil penalty is inadequate. I note, however, that in its consent agreement with Jumpstart Technologies LLC, a closely analogous case,<sup>2</sup> the Commission obtained a settlement with a \$900,000 civil penalty.

---

<sup>1</sup> See Kristen Bole, *Adteractive: A Dot-Com that Learned Its Lessons*, San Francisco Business Times (October 14, 2005) (citing revenue of \$118 million).

<sup>2</sup> According to the Commission's complaint, Jumpstart offered consumers two "free" movie tickets in exchange for the email addresses of five friends – without properly disclosing that the consumer also had to sign up for a promotion to qualify for the tickets – and the friends were then repeatedly emailed to join as well.