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NORTHERN DISTRICT OF CALIFORNIA

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12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA

SI

14 UNITED STATES OF AMERICA,  
15 Plaintiff,  
16 v.  
17 ADTERACTIVE, INC., doing  
business as FreeGiftWorld.com  
and SamplePromtionsGroup.com,  
18 Defendant.  
19

CV No 07 — 5940

COMPLAINT FOR CIVIL  
PENALTIES, PERMANENT  
INJUNCTION, AND OTHER  
EQUITABLE RELIEF

20  
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 "Commission"), pursuant to  
24 Section 16(a)(1) of the Federal Trade Commission Act ("FTC Act"),  
25 15 U.S.C. § 56(a)(1), for its complaint alleges:

26 1. Plaintiff brings this action under Sections 5(a),  
27 5(m)(1)(A), 13(b), 16(a) and 19 of the FTC Act, 15 U.S.C.  
28 §§ 45(a), 45(m)(1)(A), 53(b), 56(a), and 57b, and under Section

1 7(a) of the Controlling the Assault of Non-Solicited Pornography  
2 and Marketing Act of 2003 ("CAN-SPAM" or the "CAN-SPAM Act"),  
3 15 U.S.C. § 7706(a), to obtain monetary civil penalties, a  
4 permanent injunction, and other equitable relief for defendant's  
5 violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and  
6 Section 5(a) of CAN-SPAM, 15 U.S.C. § 7704(a).

7 **JURISDICTION AND VENUE**

8 2. This Court has subject matter jurisdiction over this  
9 matter pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355 and  
10 15 U.S.C. §§ 45(m)(1)(A), 53(b), 56(a) and 57b. This action  
11 arises under 15 U.S.C. §§ 45(a) and 7706(a).

12 3. Venue is proper in this District under 28 U.S.C.  
13 §§ 1391(b) and (c), 1395(a), and 15 U.S.C. § 53(b).

14 **INTRADISTRICT ASSIGNMENT**

15 4. The events giving rise to the United States' claims  
16 occurred in substantial part in San Francisco County.

17 **DEFENDANT**

18 5. Defendant Adteractive, Inc. is a California corporation  
19 with its principal place of business located at 303 2<sup>nd</sup> Street,  
20 Suite 375, San Francisco, CA 94107. Adteractive does business as  
21 FreeGiftWorld.com and SamplePromotionsGroup.com. Since June 1,  
22 2004, Adteractive has formulated, directed, controlled, or  
23 participated in the acts and practices set forth in this  
24 complaint. Adteractive resides in the Northern District of  
25 California and transacts business within this District and  
26 throughout the United States.

27 **DEFINITIONS**

28 6. "Electronic mail message" (or "email") means a message

1 sent to a unique email address. 15 U.S.C. § 7702(6).

2 7. **"Electronic mail address"** means a destination, commonly  
3 expressed as a string of characters, consisting of a unique user  
4 name or mailbox (commonly referred to as the "local part") and a  
5 reference to an Internet domain (commonly referred to as the "domain  
6 part"), whether or not displayed, to which an email message can be  
7 sent or delivered. 15 U.S.C. § 7702(5).

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

13 9. **"Initiate,"** when used with respect to a commercial email  
14 message, means to originate or transmit such message or to procure  
15 the origination or transmission of such message. 15 U.S.C.  
16 § 7702(9).

17 10. **"Landing page"** means, in online marketing, a specific web  
18 page that a visitor reaches after clicking a link or advertisement  
19 in an email or banner ad. This page usually showcases content that  
20 is an extension of the link or ad.

21 11. **"Procure,"** when used with respect to the initiation of a  
22 commercial email message, means intentionally to pay or provide  
23 other consideration to, or induce, another person to initiate such  
24 a message on one's behalf. 15 U.S.C. § 7702(12).

25 12. **"Protected computer"** means a computer which is used in  
26 interstate or foreign commerce or communication, including a  
27 computer located outside the United States that is used in a manner  
28 that affects interstate or foreign commerce or communication of the

1 United States. 15 U.S.C. § 7702(13); 18 U.S.C. § 1030(e)(2)(B).

2 13. "Sender" means a person who initiates a commercial  
3 email message and whose product, service, or Internet website is  
4 advertised or promoted by the message. 15 U.S.C. § 7702(16).

5 DEFENDANT'S MARKETING PRACTICES

6 14. Since June 1, 2004, and continuing to the present,  
7 using the names "FreeGiftWorld.com" or  
8 "SamplePromotionsGroup.com," Defendant has offered consumers  
9 supposedly free merchandise, such as digital cameras, laptop  
10 computers, and flat-screen televisions.

11 15. Defendant advertises and markets its offers through  
12 email and Web-based ads. Defendant's emails contain subject  
13 lines such as: "Test and keep this Flat-Screen TV"; "Test it -  
14 Keep it - Microsoft® Xbox 360"; "Congratulations! Claim Your  
15 Choice of Sony, HP or Gateway Laptop!"; or "Congratulations!  
16 You've Been Chosen To Receive A Free \$1000 Check!"

17 16. Defendant's Web-based ads feature, among other things,  
18 trivia games or contests such as: "Who is this Celebrity? [Photo  
19 of Angelina Jolie] Participate Now and You'll Receive a FREE SONY  
20 PLAYSTATION 3." (Such products and items are referred to herein  
21 as "promised free merchandise.")

22 17. Defendant's emails and Web-based ads represent,  
23 expressly or by implication, that the consumer viewing the  
24 message has won a contest, or has been specially selected as a  
25 "secret shopper" to test new products that the consumer then can  
26 keep.

27 18. Defendant's emails and Web-based ads contain links  
28 that, when clicked on, take one to a landing page operated by

1 Defendant or its affiliates. The landing page recapitulates and  
2 expands upon Defendant's initial promised free merchandise offer.  
3 For example, the landing page for Defendant's email offer  
4 soliciting consumers to become "secret shoppers" by testing and  
5 keeping a flat-screen TV states, "Get this gift FREE\*! Just for  
6 Sampling Trial Offers." This is followed by a photo of the flat-  
7 screen TV, a list price of \$749 crossed out, and underneath in  
8 bold red letters is written, "FREE\*."

9 19. Defendant does not clearly and conspicuously disclose  
10 that to obtain the promised free merchandise one must incur  
11 expenses. A consumer must accept and pay for - in the  
12 Defendant's parlance, "complete" or "participate in" - a certain  
13 number of goods or services promoted by third parties to qualify  
14 for the promised free merchandise that Defendant promotes in its  
15 emails and Web-based ads. Moreover, Defendant does not clearly  
16 and conspicuously disclose the costs and obligations associated  
17 with participating in third-party promotions, such as applying  
18 and qualifying for credit cards or automobile loans.

19 20. On its landing page, Defendant requests the consumer to  
20 enter his or her email address, followed by his or her name and  
21 mailing address. Defendant uses this information, in part, to  
22 send to the consumer a "welcome" email containing a password and  
23 information on how to access the consumer's account on  
24 Defendant's website. A consumer must have access to his or her  
25 account to obtain the promised free merchandise. However, in  
26 numerous instances, the consumer did not receive Defendant's  
27 "welcome" email because some consumers' email providers have  
28 treated Defendant's email as spam, blocking it or filtering it so

1 that it never reached the consumer's inbox.

2 21. Once the consumer has submitted his or her personal  
3 information, Defendant leads the consumer through a series of web  
4 pages containing advertisements for various goods and services  
5 from third parties. However, defendant does not clearly and  
6 conspicuously disclose that these advertisements are an  
7 introductory tier of "optional" advertisements that do not  
8 qualify the consumer for the promised free merchandise.

9 22. After the consumer navigates Defendant's "optional"  
10 promotions - often taking up five or six consecutive computer  
11 screens, each with multiple offers - he or she eventually reaches  
12 a link that, when clicked, takes the consumer to the first of  
13 three tiers of offers in which the consumer must participate to  
14 obtain the promised free merchandise.

15 23. Defendant assigns a "level" to each of its advertised  
16 offers - the higher the "level," the more third-party promotions  
17 a consumer must "participate in" to receive the promised free  
18 merchandise. For example, for a "level 6" promised free  
19 merchandise offer, such as a digital camera, laptop, or flat-  
20 screen television, the consumer must participate in two "silver"  
21 third-party promotions, two "gold" third-party promotions, and  
22 two "platinum" third-party promotions.

23 24. Defendant's websites, email, and web-based ads  
24 primarily promote "level 6" promised free merchandise. The  
25 allure of these premium promised free merchandise offers entice  
26 consumers to participate in Defendant's program. However, for  
27 all of Defendant's promised free merchandise offers, except for  
28 its "level 1" offers, consumers must expend money to qualify for

1 the promised free merchandise. For example, one of Defendant's  
2 third-party "platinum" promotions (within a "level 6" promised  
3 free merchandise offer) requires the consumer to subscribe to a  
4 year of satellite television at a cost of almost \$600. Other  
5 third-party promotions include DVD deliveries, CDs and music  
6 subscriptions, or instructional materials.

7 25. Some of the offers have free trial periods, which  
8 require the consumer to participate for a minimum period of time  
9 to qualify for Defendant's promised free merchandise. Moreover,  
10 some of these offers contain negative option components in which  
11 the consumer who does not cancel will be billed automatically.

12 26. In some instances, the consumer stops trying to qualify  
13 for Defendant's promised free merchandise, either because of the  
14 cost involved or the time and effort required. Although the  
15 consumer has expended money or incurred other obligations in  
16 pursuit of Defendant's promised free merchandise, because he or  
17 she has not completed all of Defendant's required third-party  
18 promotions, the consumer does not receive the promised free  
19 merchandise.

20 27. In most instances, it is impossible for the consumer to  
21 qualify for Defendant's promised free merchandise without  
22 spending money.

23 **DEFENDANT'S EMAIL PRACTICES**

24 28. Since June 1, 2004, and continuing to the present,  
25 Defendant has initiated the transmission of commercial email  
26 messages to protected computers. The primary purpose of these  
27 commercial email messages has been the commercial advertisement  
28 or promotion of Internet websites operated for a commercial

1 purpose by Defendant.

2 29. Defendant is an "initiator" with respect to an email  
3 message when it has either originated or transmitted a message  
4 itself or has procured the origination or transmission of a  
5 message through payments or other consideration, or inducements,  
6 to others.

7 30. Defendant is a "sender" with respect to an email  
8 message when it has initiated a message and it is Defendant's  
9 websites that are being advertised or promoted by such message.

10 31. In numerous instances, to induce consumers to open and  
11 read its commercial emails, Defendant has initiated commercial  
12 email messages that contain subject headers that misrepresent the  
13 content or subject matter of the message, including, but not  
14 limited to, false representations that consumers have won a  
15 contest, or that consumers can "test and keep" products such as  
16 laptops and digital music players.

17 VIOLATIONS OF THE FTC ACT

18 32. As set forth below, Defendant has violated Section 5(a)  
19 of the FTC Act in connection with advertising, offering,  
20 marketing, and promoting of promised free merchandise.

21 COUNT I

22 33. In numerous instances, Defendant has represented,  
23 expressly or by implication, that Defendant's promised free  
24 merchandise is without cost or obligation.

25 34. Defendant has failed to clearly and conspicuously  
26 disclose to consumers the material terms and conditions of its  
27 program, including:

28 a. that consumers must pay money or other



1 consideration to participate in Defendant's  
2 program; and

3 b. the costs and obligations for participating in  
4 Defendant's program.

5 35. As a result of the representation set forth in  
6 Paragraph 32, Defendant's failure to clearly and conspicuously  
7 disclose the material information set forth in Paragraph 33 is  
8 deceptive, and violates Section 5(a) of the FTC Act, 15 U.S.C.  
9 § 45(a).

10 VIOLATION OF THE CAN-SPAM ACT

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

14 37. Section 5(a)(2) of CAN-SPAM, 15 U.S.C. § 7704(a)(2),  
15 states:

16 It is unlawful for any person to initiate the  
17 transmission to a protected computer of a  
18 commercial electronic mail message if such  
19 person has actual knowledge, or knowledge  
20 fairly implied on the basis of objective  
21 circumstances, that a subject heading of the  
22 message 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 (consistent with the criteria  
used in enforcement of section 45 of this  
title).

23 38. Section 7(e) of CAN-SPAM, 15 U.S.C. § 7706(e), states  
24 that in any action to enforce compliance through an injunction  
25 with Section 5(a)(2) and other specified sections of CAN-SPAM,  
26 the FTC need not allege or prove the state of mind required by  
27 such sections.



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

6 45. This Court, in the exercise of its equitable  
7 jurisdiction, may award ancillary relief to remedy injury caused  
8 by Defendant's violations of CAN-SPAM and the FTC Act.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff requests that this Court, as authorized  
11 by Sections 5(a), 5(m)(1)(A), 13(b) and 19 of the FTC Act,  
12 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b) and 57b, and pursuant to  
13 its own equitable powers:

- 14 1. Enter judgment against Defendant and in favor of  
15 Plaintiff for each violation alleged in this complaint;
- 16 2. Award Plaintiff monetary civil penalties from Defendant  
17 for every violation of CAN-SPAM;
- 18 3. Award Plaintiff such relief as the Court finds  
19 necessary to redress injury to consumers resulting from  
20 Defendant's violations of Section 5(a) of the FTC Act, 15 U.S.C.  
21 § 45(a), including, but not limited to, rescission of contracts,  
22 restitution, the refund of monies paid, and the disgorgement of  
23 ill-gotten monies;
- 24 4. Enter a permanent injunction to prevent future  
25 violations of the FTC Act and CAN-SPAM;
- 26 5. Order Defendant to pay the costs of this action; and  
27 award Plaintiff such other and additional relief as the Court may  
28 determine to be just and proper.

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Dated: November 20, 2007

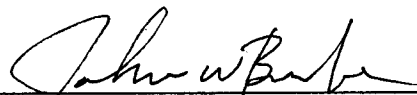
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Respectfully submitted,  
  
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