

COPY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA Civil No. <u>06-cv-00000</u>	<u>SECRET (SECRET)</u>
Plaintiff	U.S. DISTRICT COURT - N.D. N.Y.
v.	<b>FILED</b> MAY 11 2006
ICE.COM, LLC, a New York corporation, Defendant	AT <u>10</u> O'CLOCK

**COMPLAINT FOR CIVIL PENALTIES AND  
PERMANENT INJUNCTIVE RELIEF**

Plaintiff, the United States of America, acting upon notification and authorization to

~~the Attorney General and the Federal Trade Commission ("FTC" or "Commission") pursuant~~

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

1. Plaintiff brings this action under Sections 5(a), 5(m)(1)(A), 13(h), 16(a), and  
19 of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), 56(a), and 57b, and under  
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), to secure civil  
penalties, a permanent injunction, and other equitable relief for Defendant's violations of  
Section 5(a) of CAN-SPAM, 15 U.S.C. § 7704(a).

**JURISDICTION AND VENUE**

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

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

ICB.com is a New York corporation with an office and place of business located within the Northern District of New York at 1083 Main Street, Champlain, New York 12919. From February 8, 2005 through March 20, 2005,

ICB.com has formulated, directed, contributed, or participated in the acts or practices set forth in this complaint. ICB.com transacts business with the Northern District of New York and throughout the United States.

**COMMERCE**

5. At all times relevant to this complaint, Defendant has maintained a substantial presence in the Northern District of New York and throughout the United States, as required by 15 U.S.C. § 44.

**THE CAN-SPAM ACT**

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

7. Section 3(2) of the CAN-SPAM Act, 15 U.S.C. § 7702(2), defines

“commercial electronic mail message” to mean:

any electronic mail message the primary purpose of which is the commercial promotion of a commercial product or service (including any such message that is transmitted to a recipient who has consented to receive such a message);

when used with respect to a commercial email message, to mean:

to originate or transmit such message or to procure the origination or transmission of such message, but shall not include actions that constitute the initiation of such message. For purposes of this paragraph, more than one person may be considered to have initiated a message.

“procure,” when used with respect to the initiation of a commercial email message, to mean:

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

10. Section 3(13) of the CAN-SPAM Act, 15 U.S.C. § 7702(13) defines

“protected computer” by reference to 18 U.S.C. § 1030(e)(2)(B), which states that a protected computer is:

any computer which is used in interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States.

11. Section 3(14) of the CAN-SPAM Act, 15 U.S.C. § 7702(14), defines

“recipient,” when used with respect to a commercial email message, as:

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

12. Section 3(16) of the CAN-SPAM Act, 15 U.S.C. § 7702(16), defines "sender,"

when used with respect to a commercial email message, as:

Web site is advertised or promoted by the message

13. Section 5(a)(3)(A) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(3)(A), states:

It is unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message that does not contain a functioning electronic mail address of the sender, which Internet-based mechanism, clearly and conspicuously displayed, that –

(i) provides a recipient the ability to submit, in a manner specified in the message,

an electronic mail address to which the sender is required to respond;

(ii) provides a recipient the ability to opt out of receiving future commercial electronic

mail messages from that sender at the electronic mail address where the

message was received; and

(iii) remains capable of receiving such messages or communications for

no less than 30 days after the transmission of the original message.

14. Section 5(a)(4)(A)(i) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(4)(A)(i) states:

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

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

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

This Act shall be enforced by the Commission as if the violation of this Act

**DEFENDANT'S BUSINESS PRACTICES**

16. Since at least January 1, 2004, and continuing to the present, Defendant has

... that offer a selection of jewelry. Defendant sells its  
...  
consumers who affirmatively request and consent to receive those messages.

17. From February 8, 2005 through March 20, 2005, Defendant sent commercial email messages that advertised or promoted Defendant's Internet website, to a recipient's

... 10 business days after receipt of a request from the recipient not to

**COUNT I**

18. In numerous instances, Defendant has initiated the transmission of commercial

... to a recipient more than 10 business days after receipt of a request  
not to receive future commercial electronic mail messages from Defendant at the recipient's  
email address.

19. Therefore, Defendant's acts or practices, as described in paragraph 18, violate  
Section 5(a)(4)(A)(i) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(4)(A)(i).

**INDIVIDUAL INJURY**

...  
... result of Defendant's violations of the CAN-SPAM Act. Absent injunctive relief by this  
Court, Defendant is likely to continue to injure consumers and harm the public interest

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

21. Section 7(a) of the CAN-SPAM Act, 15 U.S.C. § 7706(a), provides that

“[CAN-SPAM] shall be enforced by the [FTC] as if the violation of this Act were an unfair or

deceptive practice as described under section 18(a)(1)(B) of the [FTC Act] (15 U.S.C.

§ 57a(a)(1)(B)).” Accordingly, violations of the [CAN-SPAM Act]

constitute a deceptive practice as described under section 18(a)(1)(B) of

the [FTC Act] (15 U.S.C. § 57a(a)(1)(B)). That is, these provisions shall be enforced as if

violations had been a violation of an FTC trade regulation rule. Furthermore, Section 18(d)(3)

of the FTC Act provides that “[w]hen any rule under subsection (a)(1)(B) of [Section 18]

takes effect a subsequent violation thereof shall constitute an unfair or deceptive act or

practice in violation of section 15(a)(1) of this title.” 15 U.S.C. § 57(d)(3)

22. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A) as modified by

Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 2000 (15 U.S.C. § 4601)

as amended, and as amended by 15 U.S.C. § 1, 2007 (17), shall be applied

to any monetary civil penalties of not more than \$11,000 for each violation of CAN-SPAM

Defendant's violations of CAN-SPAM were committed with the knowledge required by

Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A).

23. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant

injunctive and other ancillary relief to prevent and remedy any violation of any provision of

law enforced by the FTC.

**PRAYER FOR RELIEF**

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

~~1. Award Plaintiff monetary civil penalties from Defendant in favor of Plaintiff for each violation alleged in~~

this complaint;

2. Award plaintiff monetary civil penalties from Defendant for every violation of the CAN-SPAM Act;

~~3. Permanently enjoin Defendant from violating the CAN-SPAM Act;~~

~~4. Order Defendant to pay the costs of this action; and~~

5. Award Plaintiff such other preliminary and permanent equitable relief as the Court may determine to be just and proper.

Dated: May 11th, 2006

Respectfully submitted,

OF COUNSEL:

FOR THE UNITED STATES OF AMERICA

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