

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	Case No. 13 C 1534
)	
v.)	
)	
ECOMMERCE MERCHANTS, LLC,)	
a Florida limited liability company,)	
also d/b/a Superior Affiliate Management,)	
)	
CRESTA PILLSBURY,)	
individually, and as an officer and managing)	
member of ECOMMERCE MERCHANTS, LLC,)	
)	
JAN-PAUL DIAZ,)	
individually, and as an officer and managing)	
member of ECOMMERCE MERCHANTS, LLC,)	
)	

JURISDICTION AND VENUE

Pillsbury, in connection with the matters alleged herein, transacts or has transacted business in this district and throughout the United States.

8. Defendant Jan-Paul Diaz (“Diaz”) is an officer and managing member of Ecommerce. At all times material to this Complaint, acting alone or in concert with others, he has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of Ecommerce, including the acts and practices set forth in this Complaint. Defendant Diaz, in connection with the matters alleged herein, transacts or has transacted business in this district and throughout the United States.

9. Defendant Joshua Brewer (“Brewer”) is an officer and manager of Ecommerce. At all times material to this Complaint, acting alone or in concert with others, he has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of Ecommerce, including the acts and practices set forth in this Complaint. Defendant Brewer, in connection with the matters alleged herein, transacts or has transacted business in this district and throughout the United States.

10. Defendant Daniel Stanitski (“Stanitski”), is an officer and manager of Ecommerce. At all times material to this Complaint, acting alone or in concert with others, he has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of Ecommerce, including the acts and practices set forth in this Complaint. Defendant Stanitski, in connection with the matters alleged herein, transacts or has transacted business in this district and throughout the United States.

COMMERCE

11. At all times material to this Complaint, Defendants have maintained a substantial course of trade in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFENDANTS’ BUSINESS ACTIVITIES

12. Defendants engage in and have engaged in the sending of unauthorized and unsolicited commercial electronic text messages (“text message spam”) to the mobile telephones and other wireless devices of consumers throughout the United States.

Background

13. Many mobile telephone and wireless device service providers operating in the United States (hereinafter “wireless service providers”) provide their subscribers with text messaging services. Text messaging services permit the transmission of text messages to wireless handsets from other wireless handsets, electronic mail accounts, and various Internet applications.

14. To transmit a text message to wireless handsets, a sender transmits the message electronically, either directly or indirectly through a wireless service provider’s text message router, which then transmits the message to the recipient through the wireless service provider’s interstate wireless network.

15. Text messaging is used by consumers to stay in touch with business colleagues and associates, customers, family members, and friends. Text messaging is also used by numerous employers, schools, police departments, fire departments, and emergency medical services across the country.

Defendants' Text Message Spam

16. Since at least March 2012, and continuing thereafter, Defendants transmitted or arranged for the transmission of at least 30 million unsolicited commercial electronic text messages to the wireless handsets of U.S. consumers for the primary purpose of promoting products and services, including purportedly free merchandise, such as \$1,000 gift cards to retail companies like Walmart and Best Buy, and products such as an Apple iPhone or iPad.

17. Many of the unsolicited text messages represent, expressly or by implication, that the consumer receiving the message has won a contest, or has been specially selected to receive a gift or prize. For example, the text messages contain statements such as: "Congratulations! [sic] You've been selected to receive a Free \$1000 Best Buy gift card. Enter the code 3326 to claim it

19. When consumers follow the website's direction and enter the code appearing in the text messages, they typically receive a message confirming that their code is "valid," after which they are taken to one of various websites operated by third parties. The third party websites reiterate and expand upon the initial promised free merchandise offer.

20. The third party websites, however, require consumers to participate in multiple other offers to qualify for the promised free merchandise. The consumer usually must complete over ten offers. In most cases, completing an offer entails paying money or incurring some other detriment, such as qualifying and applying for credit cards. Some of the offers have free trial periods, but require consumers to participate for a minimum period of time to qualify for the promised free merchandise. Many of these offers also contain negative option components in which consumers who do not cancel will be billed automatically. In addition, to qualify for the promised free merchandise, consumers are required to provide a variety of personal information, including their name, mailing address, email address, date of birth, cell phone number, and home phone number.

21. Defendants' text messages fail to clearly and conspicuously disclose that consumers must incur expenses or other obligations to obtain the promised free merchandise. The text messages also fail to clearly and conspicuously disclose the costs and obligations associated with participating in the third-party promotions, such as applying and qualifying for credit cards.

22. In most instances, it is not possible for a consumer to obtain the promised free merchandise without spending money.

The Recipients of Defendants' Text Message Spam

29. Misrepresentations or deceptive omissions of material fact constitute deceptive acts or practices prohibited by Section 5(a) of the FTC Act.

30. Acts or practices are unfair under Section 5 of the FTC Act if they cause substantial injury to consumers that consumers cannot reasonably avoid themselves and that is not outweighed by countervailing benefits to consumers or competition. 15 U.S.C. § 45(n).

Count I

31. Through the means described in Paragraphs 16-22, Defendants have represented, directly or indirectly, expressly or by implication, that consumers have won a contest or have been specifically selected to receive a gift prize that is without cost or obligation.

32. In numerous instances in which Defendants have made the representation set forth in Paragraph 31 of the Complaint, Defendants have failed to disclose or disclose adequately to consumers the material terms and conditions of the offer, including:

- a. that consumers must pay money or other consideration to receive the gift or prize; and
- b. the costs and obligations to receive the gift or prize.

33. Defendants' failure to disclose or disclose adequately the material information described in Paragraph 32 above, in light of the representation described in Paragraph 31 above, constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

Count II

34. In numerous instances, Defendants' practice of initiating or procuring the transmission of unauthorized or unsolicited commercial electronic text messages to the mobile telephones and other wireless devices of consumers in the United States has caused or is likely to

cause substantial injury to consumers that consumers cannot reasonably avoid themselves and that is not outweighed by countervailing benefits to consumers or competition.

35. Therefore, Defendants' practice as described in Paragraph 34 is unfair and violates Section 5 of the FTC Act, 15 U.S.C. §§ 45(a) and 45(n).

CONSUMER INJURY

36. Consumers have suffered and will continue to suffer substantial injury as a result of Defendants' violations of the FTC Act. ~~and~~ Additionally, Defendants have been unjustly enriched as a result of their unlawful acts or practices. Absent injunctive relief by this Court, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

37. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and such other relief as the Court may deem appropriate to halt and redress violations of any provision of law enforced by the FTC. The Court, in the exercise of its equitable jurisdiction, may award ancillary relief, ~~including~~ rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies, to prevent and remedy any violation of any provision of law enforced by the FTC.

PRAYER FOR RELIEF

Wherefore, Plaintiff FTC, pursuant to ~~Section~~ 13(b) of the FTC Act, 15 U.S.C. § 53(b), and the Court's own equitable powers, requests that the Court:

A. Award Plaintiff such preliminary injunctive and ancillary relief as may be necessary to avert the likelihood of consumer injury during the pendency of this action and to preserve the possibility of effective final relief, including but not limited to, temporary and preliminary injunctions, an order preserving assets, and an accounting;

