

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

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APR 15 2003

MICHAEL J. DUBBINS
CLERK, U.S. DISTRICT COURT

FEDERAL TRADE COMMISSION,)
)
)
Plaintiff,) Case No. 03 C 2540
)
v.) Judge James B. Zagel
)
BRIAN D. WESTBY,) Magistrate Judge Arlander Keys
)
)
Defendant.)

**MEMORANDUM SUPPORTING PLAINTIFF'S MOTION FOR TEMPORARY
RESTRAINING ORDER, OTHER EQUITABLE RELIEF, AND ORDER TO
SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE**

I. INTRODUCTION

The FTC brings this action to halt Defendant from sending deceptive unsolicited commercial e-mail ("spam"). Defendant is a "spammer" who sends consumers bulk e-mail with innocuous subject lines such as "re: your email address" or "Payment Declined" which suggest that the sender has a pre-existing relationship with the recipient. But, when consumers open Defendants' e-mail, they are greeted with photos of naked women who supposedly make up a network of housewives in need of sex. The deceptive subject lines enable the spam to evade filters meant to block spam and expose consumers – including children and individuals at their workstations – to unwanted, and often graphic, sexual material.

Compounding the problem with this spam, the e-mails contain forged "from" and "reply-to" lines, a practice often referred to as "spoofing." Spoofing fools the e-mail system by making

it look like an e-mail came from the innocent third party whose e-mail address is placed in the “from” or “reply-to” line. Innocent consumers whose e-mail address is “spoofed” are often victimized by large volumes of undeliverable e-mail which floods back to them, disrupting their computer systems. Later, these same innocent consumers are often subjected to a wave of angry e-mails from those who have received this spam and hold the “spoofed” e-mail address accountable.

Defendant’s ongoing acts are deceptive and unfair practices in violation the FTC Act, 15 U.S.C. § 45(a), and are causing a great deal of harm. Millions of spam e-mails have been sent to consumers across the country. Consumers have forwarded over 46,000 e-mail complaints regarding Defendant’s spam to the FTC’s spam database at uce@ftc.gov in the last nine months alone. (PX 33 ¶¶ 3-4.) The FTC has attached 30 declarations from consumers who received deceptive spam from Defendant from November 2002 through March 2003. (See PX 1-30.) The FTC seeks a temporary restraining order to bring these ongoing and harmful practices to a swift end. See 15 U.S.C. §§ 45(a), 53(b).¹

II. DEFENDANT

Defendant Brian D. Westby (“Westby”) runs a bulk e-mail or “spamming” operation. Westby has registered over 20 Internet domain names for use in this operation. (PX 32 ¶¶ 5-10, Atts. C-H; PX 31 ¶¶ 4-6, Att. C; PX 34 ¶ 8, Att. A.) These domain names – which include marriedbutlonely.net, sexymatch.org, datematch.org, shaggweb.com, sexyadultpages.net, directsexcontent.com and premiumescorts.net – predominantly operate adult Web sites. (PX 32

¹ Plaintiff’s Proposed Temporary Restraining Order is attached to its Motion for a Temporary Restraining Order, Other Equitable Relief and an Order to Show Cause Why a Preliminary Injunction Should Not Issue.

¶¶ 3-8, 11, Atts. A-I; PX 34 ¶ 8, Att. A.) The Web sites mostly advertise for “Married But Lonely,” which purports to contain information about married women who are looking for discreet affairs. (PX 32 ¶¶ 3, 4, 11, Atts. A, B, I.)

Since at least May 2002, Defendant Westby has sent spam, or authorized spam to be sent, in an attempt to drive traffic to his “Married But Lonely” adult Web sites. Consumers who open the “Married But Lonely” spam are invited to click on a hyperlink to visit one of Defendant’s adult Web sites. (PX 1 ¶ 4; PX 2 ¶ 2; PX 3 ¶ 4; PX 4 ¶ 3; PX 5 ¶ 2; PX 9 ¶ 2; PX 10 ¶ 2; PX 11 ¶ 2; PX 16 ¶ 6; PX 18 ¶ 3; PX 19 ¶ 2; PX 22 ¶ 3; PX 24 ¶ 2; PX 25 ¶ 2; PX 33 ¶¶ 5-6.) Once they have arrived at a Married But Lonely Web site, consumers are invited to gain full access to the Web site, as well as other adult sites, by paying a fee to one of several third party adult verification services. (PX 32 ¶¶ 3-4, 11, Att. A pp. 5-7, 13-15, 21, Att. B pp. 10-12, Att. I pp. 7-10; PX 34 ¶¶ 1-8, Att. A.) Defendant gets a commission from the sign-up fee paid to the third party adult verification service. (PX 34 ¶¶ 7, 12; PX 31 ¶ 4, Att. A pp. 1-19.)

Defendant has made well over \$1 million from commissions generated by his “Married But Lonely” spam. Indeed, during just a ten week period from December 16, 2002 through February 28, 2003, Westby was paid \$844,000 by one adult verification service for signing up new customers. (PX 34 ¶¶ 7, 12.) Westby has been sending this spam for many months (PX 3 ¶ 2; PX 6 ¶ 2; PX 9 ¶ 2; PX 10 ¶ 2; PX 13 ¶ 2; PX 14 ¶ 2; PX 19 ¶ 2; PX 25 ¶ 2), and he has done business with other verification services (PX 31 ¶ 4, Att. A pp. 1-19; PX 32 ¶ 11, Att. I pp. 7-10). In short, Westby profits handsomely from this spam.

Direct evidence shows that Westby knows that his spam is a problem. Although consumers have a difficult time complaining directly to Westby because the spam contains

forged addresses, some computer savvy consumers have found Westby and complained directly to him. (PX 6 ¶ 4, Att. A; PX 9 ¶ 5; PX 12 ¶ 4; PX 23 ¶ 7.) Many others have complained about Defendant's spam to the adult verification services. (PX 34 ¶ 9, Att. C; PX 31 ¶ 4, Att. A pp. 20-45.) Citing the complaints, one adult verification service terminated Defendant's Web sites from its network in March 2003. (PX 34 ¶ 11, Att. D.) Nevertheless, the spam continues, and Defendant Westby's Web sites are still active. (PX 32 ¶ 11, Att. I; PX 33 ¶ 4.)

III. JURISDICTION AND VENUE

This matter is properly before the Court. The Court has subject matter jurisdiction over the FTC Act claims pursuant to 28 U.S.C. §§ 1331, 1337(a) and 1345. This Court also has personal jurisdiction over Defendant. The FTC Act provides for nationwide service of process. *See* 15 U.S.C. § 53(b). "Where a federal statute provides for nationwide service of process, as the FTC Act does, personal jurisdiction may be obtained over any defendant having minimum contacts with the United States as a whole." *FTC v. Bay Area Bus. Council, Inc.*, No. 02 C 5762, 2003 WL 1220245, at *2 (N.D. Ill. March 14, 2003); *see also United Rope Distributors, Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532, 534 (7th Cir. 1991). Defendant here clearly has established the minimum contacts necessary to give rise to personal jurisdiction.

Venue is also proper in the Northern District of Illinois. Pursuant to the FTC Act, an action may be brought where a corporation or person "resides or transacts business." *See* 15 U.S.C. § 53(b). Here, Defendant has transacted considerable business in this district. Consumers have received Defendant's spam in this district (*see* PX 4 ¶ 1; PX 10 ¶ 1; PX 16 ¶ 1), consumers in this district have had their e-mail addresses "spoofed" (*see* PX 29 ¶ 1), and consumers can view and purchase products in this district from Defendant's commercial Internet Web sites (*see* PX 32 ¶¶ 3-4, 11, Atts. A, B, I.) Accordingly, this case is properly filed in this district.

IV. DEFENDANT'S DECEPTIVE BUSINESS PRACTICES

Defendant Westby has been sending, or authorizing others to send, spam aimed at driving traffic to his "Married But Lonely" adult Web sites since May 2002. Defendant's spam employs a number of tricks that are deceiving and harming millions of consumers. First, the subject lines are deceptive and clearly calculated to get consumers to open and view the body of (and, indeed, the bodies contained within) these e-mails. Second, the practice of "spoofing" causes considerable damage to a variety of innocent third parties. Third, the e-mails contain an "unsubscribe" link that does not work. These tricks cloak the unsolicited nature of the spam, hide the identity of the true sender of the spam, and prevent consumers from stopping the spam.

A. The Subject Lines of Defendant's E-mail Misrepresent the Contents

Defendant's spam often contains a subject line that does not at all relate to the sexually explicit contents inside the e-mail.² Defendant's spam often contains an innocent sounding subject line, suggesting that the sender has a business or social relationship with the recipient. (PX 1 ¶¶ 3-4; PX 2 ¶ 4, Att. A ["Fwd: You may want to reboot your computer"; "New movie info"]; PX 3 ¶ 3; PX 4 ¶ 3, Att. A ["don't forget about me!"]; PX 7 ¶ 2; PX 8 ¶ 2, Att. A ["Fwd: Wanna hear a joke?"]; PX 9 ¶ 3; PX 10 ¶ 3, Att. A ["Re: Please re-send the email"]; PX 13 ¶ 3, Att. A ["re: your email address"]; PX 14 ¶¶ 3-5, Att. A ["Fwd: Can you cheer me up?"]; PX 15 ¶ 3; PX 16 ¶ 4, Att. A ["What is wrong?"], Att. B ["Did you hear the news?"]; PX 17 ¶ 3; PX 18 ¶ 3, Att. A ["Why don't you like me?"]; PX 19 ¶¶ 3-4; PX 21 ¶ 2; PX 22 ¶ 3, Att. A ["Payment

² E-mails contain a subject line that appears in a consumer's inbox when the e-mail arrives. The subject line purports to tell a consumer the content of an e-mail. The subject line of an e-mail is a piece of information that consumers use to determine whether to open an e-mail that they receive. (PX 1 ¶ 3; PX 2 ¶ 3; PX 3 ¶ 3; PX 4 ¶ 3; PX 13 ¶ 3; PX 14 ¶ 3; PX 15 ¶ 3; PX 17 ¶ 3; PX 19 ¶ 3; PX 21 ¶ 2; PX 22 ¶ 3; PX 24 ¶ 3.)

Declined”]; PX 24 ¶ 3, Att. A [“I found your address”], Att. B [“your software”]; PX 25 ¶ 3 [“Re: your email address”]). However, the innocent subject lines of Defendant’s e-mail often do not relate at all to the subject matter in the body of the e-mail. Instead, opening the e-mail regularly causes the recipient immediately to view sexually explicit, adult-oriented images and/or material. (PX 1 ¶¶ 3-4, Att. A; PX 2 ¶ 3; PX 3 ¶ 3; PX 4 ¶ 3; PX 7 ¶ 2; PX 8 ¶ 2, Att. A; PX 9 ¶ 3, Att. A; PX 13 ¶ 3; PX 14 ¶¶ 3-4, Att. A; PX 15 ¶ 3, Att. A; PX 16 ¶¶ 3-7, Atts. A, B, D; PX 17 ¶ 4, Att. A; PX 18 ¶ 3, Att. A; PX 19 ¶¶ 3-4, Att. A; PX 20 ¶ 3, Att. A; PX 21 ¶ 2, Att. A; PX 22 ¶ 3; PX 24 ¶ 3, Att. A; PX 25 ¶ 3, Att. A; PX 26 ¶¶ 2-3, Att. A.) Based on the subject lines, consumers have no reason to expect to see sexually explicit material in the body of the e-mail, and it is often unwanted. The deceptive subject lines induce consumers to open an e-mail that they would otherwise delete. (PX 1 ¶¶ 3-4; PX 3 ¶ 3; PX 4 ¶ 3; PX 13 ¶ 3; PX 14 ¶ 3; PX 15 ¶ 3; PX 19 ¶ 3; PX 21 ¶ 2; PX 22 ¶ 3; PX 24 ¶ 3.)

These deceptive subject lines cause several problem for the public. First, because of its deceptive nature, the spam slips through filters aimed at minimizing the amount of unsolicited e-mail consumers receive. (PX 1 ¶ 2; PX 17 ¶ 6; PX 22 ¶ 4; PX 34 ¶ 10, Att. C p. 24.) Second, these e-mails have been received at computers where children have access, potentially exposing children to inappropriate adult-oriented materials. (PX 7 ¶ 4; PX 15 ¶ 4; PX 16 ¶ 8; PX 17 ¶ 5; PX 20 ¶ 4; PX 34 ¶ 10, Att. C pp. 18-22.) Third, the e-mails have been received at consumers’ workstations, providing the opportunity for workers to inadvertently violate work policies. (PX 7 ¶ 2; PX 14 ¶ 4; PX 17 ¶ 6; PX 34 ¶ 10, Att. C p. 23.) Fourth, in at least one instance Defendant’s spam was sent to a bank’s customer service e-mail address and resulted in customer service employees deleting messages that the employees believed were “Married But Lonely” spam but

were really actual messages from bank customers. (PX 25 ¶¶ 4-5.) In all cases, consumers have suffered other injury, including annoyance and lost time spent opening messages that they would otherwise delete.

B. Defendant Engages in E-mail “Spoofing”

Defendant’s spam also forges the “from” and “reply-to” lines of the e-mail by inserting the e-mail addresses of innocent third parties. This “spoofing” practice makes an e-mail appear to come from an address from which it did not actually originate – the “spoofed” address.³ Spoofing steals the Internet identity of innocent third parties and imposes large costs on their computer systems.

Spoofing can cause serious harm to its victims. When an outgoing e-mail is undeliverable, it is automatically returned to the address listed in the “from” or “reply-to” field. (PX 27 ¶ 3; PX 28 ¶ 3; PX 29 ¶ 4; PX 30 ¶ 6.) Among the millions of outgoing spam e-mails Defendant sends, thousands are undeliverable for various reasons, such as the recipient has closed the account, the address is misspelled, or the recipient’s mailbox is full. In these instances, the spam bounces back to the “spoofed” address, flooding the spoofed victim’s e-mail account with spam. (*Id.*) Similarly, the “spoofed” e-mail addresses are often deluged with angry “do not spam me” responses from consumers who have received spam that appears to originate from the spoofed account. (PX 27 ¶¶ 3-4; PX 28 ¶ 4; PX 29 ¶¶ 4-5; PX 30 ¶¶ 6-7.) These victims of spoofing cannot protect themselves since the “from” and “reply-to” addresses are inserted by the sender of the e-mail. (PX 27 ¶ 5; PX 28 ¶ 5; PX 29 ¶ 6; PX 30 ¶ 9.)

³ Spoofing is used to disguise the identity of the sender, to make recipients open e-mails they may not otherwise open, or to bypass e-mail filters. *See Washington v. Heckel*, 24 P.3d 404, 407 n. 4 (Wash. 2001) (defining spoofing and discussing spam in general).

The FTC has submitted sworn declarations of several of Defendant Westby's victims whose e-mail addresses were spoofed. (PX 12, 23, 27-30.) One Internet service provider whose e-mail address was spoofed received tens of thousands of "bounce" e-mails that forced the company to shut down its e-mail server for several hours, preventing the company's customers from sending or receiving e-mail and causing large numbers of customers to complain and cancel their service with the company. (PX 28 ¶ 3.) The company additionally received angry messages from consumers who accused it of assisting a spammer. (*Id.*) Two consumers whose individual e-mail addresses Defendant spoofed received well over a hundred bounced messages in a week, as well as numerous e-mails from spam recipients accusing the "spoofing" victims of spamming. (PX 12 ¶¶ 2-3; PX 23 ¶¶ 2-3.) Both of these consumers have owned their e-mail addresses for approximately 10 years and consider their personal reputations damaged by the spam accusations directed against their e-mail addresses. (PX 12 ¶ 5; PX 23 ¶¶ 4-6.)

C. Defendant's E-mail Removal Mechanisms Do Not Function.

Consumers who receive Defendant's spam cannot unsubscribe from receiving further e-mail despite Defendant's promises otherwise. Many of Defendant's e-mails have a "remove me" link or e-mail address for consumers who wish to receive no future e-mail from Defendant. (PX 5 ¶ 2; PX 9 ¶ 5; PX 11 ¶ 3; PX 13 ¶ 5; PX 16 ¶¶ 4-5; PX 18 ¶ 3; PX 24 ¶ 3; PX 26 ¶ 4.) However, these removal mechanisms do not function as represented. After following the directions to unsubscribe contained in Defendant's spam, consumers continue to receive Defendant's unwanted spam. (PX 5 ¶ 3; PX 9 ¶ 5; PX 11 ¶ 3; PX 13 ¶ 5, Att. B; PX 16 ¶¶ 4-7; PX 18 ¶ 3; PX 24 ¶ 3, Att. B; PX 26 ¶ 4; PX 31 ¶ 4, Att. A pp. 37, 39; PX 34 ¶ 10, Att. C p. 25.)

V. ARGUMENT

Defendant's spam operation engages in practices that violate the FTC Act and harm consumers. We ask that the Court bring Defendant's unfair and deceptive practices to an immediate end. The FTC seeks a temporary restraining order enjoining Defendant and any agents from using deceptive practices in e-mail and from engaging in spoofing. As discussed in more detail below, this Court has full authority to enter the relief sought by Plaintiff, and the facts strongly support such relief.

A. **This Court Has the Authority to Grant the Relief Requested.**

The FTC Act provides that "in proper cases the [FTC] may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. 53(b). Matters involving false and deceptive advertising are "proper cases" for injunctive relief under the FTC Act. *See FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1028 (7th Cir. 1988). Moreover, "[t]he district court's authority [under the FTC Act] to grant a permanent injunction also includes the power to grant other ancillary relief sought by the Commission" and "order any ancillary equitable relief necessary to effectuate the exercise of the granted powers." *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997). Courts in this district have repeatedly exercised their authority to grant temporary restraining orders in FTC fraud actions. *See, e.g., FTC v. CSCT, Inc.*, 03 C 880 (N.D. Ill. Feb. 11, 2003) (Coar, J.); *FTC v. Bay Area Bus. Council, Inc.*, 02 C 5762 (N.D. Ill. Aug. 15, 2002) (Darrah, J.); *FTC v. Stuffingforcash.com, Inc.*, 02 C 5022 (N.D. Ill. July 16, 2002) (Norgle, J.); *FTC v. TLD Network Ltd.*, No. 02 C 1475 (N.D. Ill. Feb. 28, 2002) (Holderman, J.); *FTC v. 1st Financial Solutions, Inc.*, No. 01 C 8790 (N.D. Ill. Nov. 19, 2001) (Kocoras, J.); *FTC v. Growth Plus Int'l Marketing, Inc.*, 2001 WL 128139 (N.D. Ill. Jan. 9, 2001) (Aspen, J.).

B. This Court Should Immediately Issue a Temporary Restraining Order and Other Appropriate Equitable Relief.

The injunctive relief requested by the FTC is warranted in this case. The FTC Act authorizes injunctive relief “[u]pon a proper showing that, weighing the equities and considering the FTC’s likelihood of ultimate success, such action would be in the public interest.” 15 U.S.C. § 53(b). Unlike litigation between private parties, “it is not necessary for the FTC to demonstrate irreparable injury” under the FTC Act. *World Travel*, 861 F.2d at 1029. Instead, to obtain equitable relief under the FTC Act, the FTC must merely demonstrate: (1) a likelihood of success on the merits, and (2) that the balance of the equities tips in its favor. *Id.* As demonstrated below, the FTC has more than satisfied this standard here.

1. There Is A Substantial Likelihood That the FTC Will Prevail on the Merits.

The FTC Act prohibits “unfair or deceptive acts or practices.” 15 U.S.C. § 45(a). As indicated in Section IV above, there is ample evidence that Defendant continues to engage in repeated deceptive and unfair acts in violation of the FTC Act.

a. Defendant’s spam contains deceptive misrepresentations.

A material representation or omission that is likely to mislead consumers acting reasonably under the circumstances is “deceptive” and violates the FTC Act. *See World Travel*, 861 F.2d at 1029. Generally, a claim is “material” if it “involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product.” *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992). Moreover, initial misrepresentations are deceptive by law, even if they are followed by subsequent truthful statements. *See, e.g., Encyclopedia Britannica, Inc. v. FTC*, 605 F.2d 964 (7th Cir. 1979) (holding sales tactics

deceptive when sales people did not disclose the purpose of their visit in initial contact with prospective customers); *Carter Products, Inc. v. FTC*, 186 F.2d 821 (7th Cir. 1951) (holding that deception in advertisement of anti-perspirant not cured by statements on product package).

Defendant's spam defrauds consumers by misrepresenting several material facts to consumers. First, as set forth in Section IV.A, the subject lines of Defendant's spam misrepresent the contents of the e-mail. In numerous instances, Defendant's spam contains subject lines such as "Fwd: You may want to reboot your computer" or "Re: your email address" that suggest that the e-mail sender has a pre-existing social or business relationship with the recipient. As previously shown, however, those representations are often false. The contents of the e-mail often do not relate to the e-mail's subject line. In numerous instances, spam containing such subject lines are sexually explicit solicitations to visit Defendant's adult-oriented Web sites, and sexually explicit images are shown immediately upon opening the message.

The "door opening" representations contained in the subject line of the e-mails are material because consumers often base their decision regarding whether or not to open an e-mail on the information contained in the subject line. Consumers suffer injury – including unwanted exposure of minors to explicit pornographic images and the improper viewing of such images at work – immediately upon being induced to open the e-mail.

Defendant's spam also misrepresents the ability of consumers to remove themselves from future mailings. As demonstrated in Section IV.C, the unsubscribe mechanisms provided in Defendant's spam do not function. The representations are material because consumers believe in and act upon the representations by sending e-mail messages and clicking on hyperlinks seeking removal.

b. Defendant engages in the unfair practice of e-mail spoofing.

In addition to misrepresenting material facts in the e-mails, Defendant unfairly engages in the practice of e-mail “spoofing.” An act or practice is “unfair” under the FTC Act if: (1) it causes, or is likely to cause, injury to consumers that is substantial; (2) the harm is not outweighed by countervailing benefits to consumers or competition; and (3) the harm is not reasonably avoidable. *See* 15 U.S.C. § 45(n); *see also Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1363-64 (11th Cir. 1988). Defendant’s e-mail “spoofing” clearly establishes the elements of unfairness.

First, consumer injury here is substantial. Consumers whose e-mail addresses Defendant misappropriates receive hundreds of undeliverable spam and angry responses. These e-mails clog the recipients’ mailboxes and may shut down their ability to receive desired e-mail, cause the loss of goodwill, and cost time and money to remedy. *See* Section IV.B, *supra*; *see also FTC v. Windward Marketing, Ltd.*, 1997 U.S. Dist. LEXIS 17114, at *31 (N.D. Ga. Sept. 30, 1997) (a finding of substantial injury may be established by showing that consumers “were injured by a practice for which they did not bargain”); *FTC v. J.K. Publications, Inc.*, 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000) (injury may be substantial if it causes small harm to a large class of people).

Second, the injury to consumers here is not outweighed by benefits to consumers or competition. Allowing Defendant effectively to steal another person’s identity in order to avoid the consequences of his own actions cannot provide countervailing benefits to consumers or to competition. *See Windward Marketing*, 1997 U.S. Dist. LEXIS 17114, at *32 (the second prong of the test is easily satisfied “when a practice produces clear adverse consequences for consumers

that are not accompanied by an increase in services or benefits to consumers or by benefits to competition”); *J.K. Publications*, 99 F. Supp. 2d at 1201 (same).

Finally, consumers cannot reasonably avoid being injured in this case. With regard to this element, the focus is on “whether consumers had a free and informed choice that would have enabled them to avoid the unfair practice.” *Windward Marketing*, 1997 U.S. Dist. LEXIS 17114, at *32; *see also J.K. Publications*, 99 F. Supp. 2d at 1201. Here, consumers can do nothing to prevent Defendant from sending spam with “spoofed” addresses. Victimized consumers learn of the problem only after their addresses have been spoofed, and the injury already has occurred. Accordingly, Defendant’s practice of e-mail “spoofing” is unfair and violates the FTC Act.

c. Defendant is liable for deceptive or unfair acts of any agents.

Because the “Married But Lonely” spam forges the identity of the sender, it is unclear whether Westby sends the spam himself or whether he employs someone else to send it. Even if he does hire someone to send the spam, he is still liable for these practices. Westby is liable for deceptive or unfair practices he engages in himself or for those of his employees or agents who are acting on his behalf. Under the FTC Act, a principal is liable for misrepresentations made by agents with actual or apparent authority to make such representations, regardless of any unsuccessful efforts by the principal to prevent such misrepresentations. *See Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1438-39 (9th Cir. 1986); *FTC v. Skybiz.com, Inc.*, 2001 WL 1673645, at *9 (N.D. Okla. Aug. 31, 2001); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 527 (S.D.N.Y. 2000). It is inappropriate for a principal to “‘reap the fruits from their [agents’] acts and doings without incurring such liabilities as attach thereto.’” *Skybiz.com*, 2001 WL 1673645, at *9 (quoting *Goodman v. FTC*, 244 F.2d 584, 591-92 (9th Cir. 1957)).

Here, Westby is reaping the benefit of the spam at issue. As explained in Section II above, the spam invites consumers to visit one of Westby's Web sites. The Web sites invite consumers to pay a fee to join a third party adult verification service to gain full access to his sites and other adult sites. Westby earns commissions – for example, he was paid \$844,000 the first two months of 2003 alone – from the adult verification services by referring paying consumers who receive the spam at issue here. (PX 34 ¶¶ 7, 12; PX 31 ¶ 4, Att. A pp. 1-19.) Moreover, considerable evidence demonstrates that Westby knew or should have known of the particular spam practices used to advertise his Web sites. Westby was notified on multiple occasions about those spamming practices by consumers who sent complaints directly to his e-mail address. (PX 6 ¶ 4, Att. A; PX 9 ¶ 5; PX 12 ¶ 4; PX 23 ¶ 7.) Indeed, one of the adult verification companies who paid Westby requested that he cease and desist from engaging in spamming activities in July 2002. (PX 34 ¶ 9, Att. B.) Thus, it is inappropriate for Defendant to reap the fruits from any agent's acts and doings without incurring liability for those acts.

2. Provisional Relief is in the Public Interest.

In addition to demonstrating a likelihood of success on the merits, the balance of equities tips strongly in the FTC's favor here. In balancing the equities, the Court must assign greater weight to the public interest advanced by the FTC than to any of Defendant's private concerns. *World Travel*, 861 F.2d at 1029. In this case, immediate injunctive relief is necessary to protect the public from the future harm that will inevitably result from Defendant's deceptive and unfair practices. In contrast, Defendant has no legitimate interest to balance against the need for an injunction. The FTC's proposed temporary restraining order only restrains Defendant from violating the FTC Act and requires that he preserve records. Such a restriction does not work an

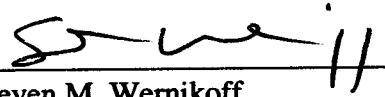
undue hardship on Defendant, for Defendant has no legitimate interest in persisting with conduct that violates federal law. *See, e.g., FTC v. World Wide Factors*, 882 F.2d 344, 347 (7th Cir. 1989) (upholding finding of “no oppressive hardship to defendants in requiring them to comply with the FTC Act, refrain from fraudulent representation or preserve their assets from dissipation or concealment”); *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1009 (N.D. Ill. 1998) (same).

VI. CONCLUSION

Defendant has caused and is likely to continue to cause consumer injury because of the FTC Act violations. This Court should issue the requested injunctive relief to prevent ongoing consumer harm and to help assure the possibility of effective final relief.

Respectfully submitted,

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