

Motions, Pleadings and Filings

United States District Court, E.D. Pennsylvania.

FEDERAL TRADE COMMISSION, Plaintiff

v.

John ZUCCARINI, individually and d/b/a Cupcake

Party, Cupcake-Party, Cupcake

Parties, Cupcake-Parties, Cupcake City, Cupcake

Patrol, Cupcake-Patrol, Cupcake

First-Patrol, Cupcake Show, Cupcake-Show, Cup-

cake Shows, Cupcake-Shows, Cupcake

Parade, Cupcake-Parade, Cupcakes, Cupcake Confid-

ential, Cupcake-Movies, Cupcake

Real Video, The Cupcake Incident, The Cupcake

Secret, Cupcake Message, Cupcake

Messenger, The County Walk, JZ Design and Rave-

Club Berlin, Defendant.

No. CIV.A. 01-CV-4854.

April 9, 2002.

For plaintiff: [Marc M. Groman](#), Federal Trade Commission, Washington, D.C.

For defendant: [Glenn A. Weiner](#) of Klehr, Harrison, Harvey, Branzburg & Ellers, Philadelphia.

JUDGMENT AND PERMANENT INJUNCTION [SCHILLER](#), D.J.

*1 Plaintiff, the Federal Trade Commission ("Commission"), commenced this action on September 25, 2001, by filing its Complaint against Defendant John Zuccarini, doing business as Cupcake Party, Cupcake-Party, Cupcake Parties, Cupcake-Parties, Cupcake City, Cupcake Patrol, Cupcake-Patrol, Cupcake First-Patrol, Cupcake Show, Cupcake-Show, Cupcake Shows, Cupcake-Shows, Cupcake Parade, Cupcake-Parade, Cupcakes, Cupcake Confidential, Cupcake-Movies, Cupcake Real Video, The Cupcake Incident, The Cupcake Secret, Cupcake Message, Cupcake Messenger, The Country Walk, JZ Design, and RaveClub Berlin ("Defendant"). The Complaint alleges that Defendant engaged in unfair and deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), [15 U.S.C. § 45](#), and seeks a permanent injunction and

monetary relief pursuant to Section 13(b) of the FTC Act. On September 25, 2001, the Commission moved for, and the Court entered, a temporary restraining order against Defendant. On October 19, 2001, after a hearing and finding that Defendant had been duly served with process, the Court entered a preliminary injunction order.

Pursuant to [Rule 55\(a\) of the Federal Rules of Civil Procedure](#), the Clerk of Court entered default against Defendant on January 14, 2002. The Commission now has moved this Court for entry of a judgment by default and permanent injunction, pursuant to [Rules 54\(b\) and 55\(b\)\(2\) of the Federal Rules of Civil Procedure](#). Having considered the memorandum, declarations and exhibits filed in support of said motion, and all other pleadings and files in this action, the Court finds:

1. This is an action by the Commission instituted under Sections 5 and 13(b) of the Federal Trade Commission Act, [15 U.S.C. §§ 45](#) and [53\(b\)](#). The Complaint seeks both permanent injunctive relief and monetary relief for alleged unfair and deceptive acts or practices by the Defendant in connection with Defendant's concerted course of activity involving the redirecting of consumers from their intended destinations on the World Wide Web to his own Web pages, where he then obstructs consumers from those pages through a series of Web pages that display advertisements for goods and services, for his financial gain.

2. Defendant's practice of redirecting consumers to his Web sites in combination with his practice of obstructing consumers from exiting his Web sites is likely to cause substantial injury that cannot be reasonably avoided, and is not outweighed by countervailing benefits to consumers or competition and is therefore unfair and in violation of Section 5(a) of the FTC Act, [15 U.S.C. § 45\(a\)](#).

3. Defendant's practice of obstructing consumers from exiting his Web sites is likely to cause substantial injury that cannot be reasonably avoided, is not outweighed by countervailing benefits to consumers or competition and is therefore unfair and in violation

of Section 5(a) of the FTC Act, [15 U.S.C. § 45\(a\)](#).

4. Defendant's practice of launching multiple browser windows displaying not only Defendant's Web pages, but also the Web site Defendant's domain name mimics, constitutes false and misleading representations and practices and therefore constitutes deceptive acts or practices in violation of Section 5(a) of the FTC Act, [15 U.S.C. § 45\(a\)](#).

*2 5. The Commission has the authority under Section 13(b) of the FTC Act to seek the relief it has requested.

6. This Court has jurisdiction over the subject matter of this case and has jurisdiction over Defendant. Venue in the Eastern District of Pennsylvania is proper, and the Complaint states a claim upon which relief may be granted against Defendant under Sections 5 and 13(b) of the FTC Act.

7. The activities of Defendant are in or affecting commerce, as defined in [15 U.S.C. § 44](#).

8. The Defendant has been served with the Summons and Complaint pursuant to the Federal Rules of Civil Procedure, the Pennsylvania Rules of Civil Procedure, and this Court's Order Authorizing Alternative Means of Service of Process.

9. The Defendant has been notified of the Preliminary Injunction Order and Entry of Default.

10. Defendant has failed to answer or otherwise defend as to the Complaint. Accordingly, Defendant is in default for failure to plead or otherwise defend in this action.

11. To the best of this Court's information and knowledge, Defendant is not an infant, he has not been declared incompetent, and he is not currently in the military or otherwise exempted from default judgment under the Soldiers' and Sailors' Civil Relief Act of 1940.

12. It is proper in this case to issue a permanent injunction prohibiting Defendant from redirecting or obstructing consumers on the Internet, from participating in online affiliate marketing programs, and to

provide for monitoring by the Commission of Defendant's compliance with such a permanent injunction.

13. It is proper in this case to enter a monetary judgment against Defendant to disgorge the unjust enrichment which resulted from Defendant's violations of the FTC Act.

14. Defendant's unjust enrichment from his unfair and deceptive practices totals at least one million eight hundred ninety-seven thousand one hundred sixty-six dollars (\$1,897,166) and therefore this amount is a reasonable approximation of Defendant's ill-gotten gains.

15. This action and the relief awarded herein are in addition to, and not in lieu of, other remedies as may be provided by law, including both civil and criminal remedies.

16. Entry of this Order is in the public interest.

Definitions

For the purpose of this Order, the following definitions shall apply:

A. "Defendant" means John Zuccarini, individually and d/b/a Cupcake Party, Cupcake-Party, Cupcake Parties, Cupcake-Parties, Cupcake City, Cupcake Patrol, Cupcake-Patrol, Cupcake First-Patrol, Cupcake Show, Cupcake-Show, Cupcake Shows, Cupcake-Shows, Cupcake Parade, Cupcake-Parade, Cupcakes, Cupcake Confidential, Cupcake-Movies, Cupcake Real Video, The Cupcake Incident, The Cupcake Secret, Cupcake Message, Cupcake Messenger, The Country Walk, JZ Design, RaveClub Berlin and any other unincorporated entity through which he does business.

B. "Internet" is an umbrella term used to describe the decentralized system that links computers around the world using a standardized set of communication protocols. The Internet includes, among other systems, the World Wide Web, electronic mail, newsgroups, telnet, file transfer protocol ("FTP"), Internet Relay Chat, and instant messaging.

*3 C. A "browser" is a software application used to

view, download, upload, surf or otherwise access documents ("pages" or "sites") on the World Wide Web. Browsers read coded documents that reside on servers, and interpret the coding into what users see rendered as a Web page or Web site. A user may retrieve and view a Web page or site by entering the URL or domain name of the Web page in the address bar of the browser.

D. The "World Wide Web" or the "Web" is a system used on the Internet for cross-referencing and retrieving information. Documents ("pages" or "sites") on the World Wide Web are most frequently formatted in a language called HTML, or HyperText Markup Language, that supports links to other documents on the World Wide Web.

E. A "Web site" is a set of electronic files or documents, usually a home page and subordinate pages, readily viewable on a computer by anyone with access to the Web and standard Internet browser software.

F. A "Web page" is a single electronic document on the World Wide Web, readily viewable on a computer by anyone with access to the Internet and standard Internet browser software. Every Web page on the World Wide Web is identified by a globally unique address.

G. Uniform Resource Locator, or "URL," is the globally unique address of a resource, file, or page on the World Wide Web. Each Web page has a distinct URL, such as *www.mp3123.com* or *www.cupcakeparty.com/celebrities-gone-wild.htm*, that serves as a unique Internet address for that Web page.

H. A "domain name" is a unique alphanumeric name used to locate a particular organization or other entity on the Internet. Domain names allow users connected to the Internet to find Web sites with familiar names without having to memorize the complex numerical addresses that computers read. In the URL *www.cupcakeparty.com/celebrities-gone-wild.htm*, "cupcakeparty.com" is the domain name. Simply registering a domain name does not link the domain name with a Web site, particular location, or com-

puter on the Internet. The registrant must find a host (or "Web server") for the Web site and have the domain name indexed to the server so that a user can locate the Web site.

I. A "Host" or "Hosting Company" is the party that provides the infrastructure for a computer service. With respect to Web pages and Web sites, a Host or Hosting Company maintains "Web servers"--the computers on which Web sites and pages reside. The Host or Hosting Company also maintains the communication lines required to link the server to the Internet. Often, the content on the servers (i.e. the content of the Web pages) is controlled by someone other than the Host or Hosting Company.

J. A "window" is an enclosed area on a computer's display screen, usually rectangular in shape. Most computers allow a user to divide a screen into several windows. Within each window, a user can run a different program or different copies of the same program. A user can minimize a window by replacing the entire window with an icon, a small picture that represents the program running in the window. Separate functions within a given program can also use windows, e.g. multiple documents within WordPerfect.

*4 K. A "Domain Name Registrar" is a business that interacts with customers ("registrants"), processes registration orders, and places registration information into the domain name registry.

L. "Redirecting" is the practice of diverting consumers to Web sites or Web pages that consumers did not intend to visit or access, using tactics including but not limited to:

- (1) operating, publishing, or disseminating Web sites or pages with domain names that are misspellings of other domain names;
- (2) operating, publishing, or disseminating Web sites or pages with domain names that transpose or invert words, terms, or phrases in other domain names; or
- (3) operating, publishing, or disseminating Web sites or pages with domain names that are confusingly similar to famous trademarks, service marks, or names.

M. "Obstructing" is the practice of impeding or preventing consumers from exiting Web sites or Web pages by means of disseminating to the public on the Internet or World Wide Web, Web sites, or Web pages that include code, programs, commands or directions of any kind, executed on or through consumers' computers or the Web server's computer, that impede or block consumers' ability to exit those pages or sites, including but not limited to:

(1) directing, instructing, or causing multiple browser windows, pop-up windows, Web pages, Web sites, or multiple copies of consumers' browser software to launch or open when a consumer types a domain name or URL in the address bar of a browser, or functional equivalent thereof;

(2) directing, instructing, or causing windows, Web pages, or Web sites to open, pop up, launch or otherwise appear on consumers' screen as a result of consumers' selection of the "Close," "Exit," "X," or "Back" button(s), or any functional equivalent thereof;

(3) directing, instructing, or causing windows, Web sites or Web pages to open that cannot be viewed by consumers using standard browser software functions, including, but not limited to, the "right click" function of maximizing a window; or

(4) directing, instructing or causing consumers' browser software to open or launch new windows, Web pages or Web sites or additional copies of consumers' browser software without any action on the part of consumers.

N. "Affiliate Marketing Program" is a revenue sharing arrangement between online merchants and "affiliates,"--online content providers who market and/or advertise goods or services for merchants through, *inter alia*, the use of banners, ads and text links posted on Web sites or Web pages. Compensation is paid to the affiliate by the merchant on performance measures, typically in the form of sales, clicks, registrations or a hybrid model. The affiliate is paid a commission by the merchant when a visitor takes a specific action, such as filling out a form or making a purchase.

I. PROHIBITED BUSINESS ACTIVITIES

IT IS THEREFORE ORDERED that, in connection

with the advertising, promotion, offering for sale, sale, or provision of any goods or services on the Internet, the World Wide Web. and/or any Web page or Web site, the Defendant, and his assigns, agents, servants, employees, and all persons or entities directly or indirectly under his control, and all other persons or entities in active concert or participation with him who receive actual notice of this Order by personal service or otherwise, and each such person, whether acting directly or through any corporation, limited liability company, subsidiary, division, or other device, are hereby permanently restrained and enjoined from:

*5 (A) Redirecting consumers on the Internet or World Wide Web;

(B) Obstructing consumers on the Internet or World Wide Web;

(C) Representing that any Web page(s), Web site(s), domain name(s), good(s) or service(s), are endorsed by, or affiliated or associated with, any third party or any entity, including but not limited to any Web site, Web page, product, trademark or service mark, or celebrity, when in fact they are not. Such representation shall not be made expressly or by implication, including but not limited to launching the Web site or Web page belonging to an unrelated party in combination or association with any of Defendant's Web sites, Web pages or domain names without the express verifiable authorization of the third party or entity; and

(D) Participating in any Affiliate Marketing Program.

II. EQUITABLE MONETARY RELIEF

IT IS FURTHER ORDERED that judgment is hereby entered against Defendant in the amount of one million eight hundred ninety-seven thousand one hundred sixty-six dollars (\$1,897,166) for equitable monetary relief. All amounts that the Commission collects toward this sum shall be deposited into a fund administered by the Commission or its agent to be used for equitable relief, including but not limited to consumer redress and any attendant expenses for the administration of any redress fund. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after redress is completed, the Commission may apply any remaining funds for such other equitable relief (including con-

sumer information remedies) as it determines to be reasonably related to the Defendant's practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited into the United States Treasury as disgorgement. Defendant shall have no right to challenge the Commission's choice of remedies under this Section.

III. RECORD KEEPING AND DOCUMENT RETENTION

IT IS FURTHER ORDERED that Defendant, for a period of eight (8) years from the date of service of this Order on Defendant, when acting in an individual capacity, or in connection with any entity in which Defendant has an ownership interest or is a director, officer (or comparable position with a non-corporate entity), or is a person who formulates policies or procedures, is hereby restrained and enjoined from failing to create, maintain and make available to representatives of the Commission, upon reasonable notice:

(A) Books, records and accounts that, in reasonable detail, accurately and fairly reflect the cost of goods or services sold, revenues generated, and the disbursement of such revenues;

(B) Records accurately reflecting: the name, address, and telephone number of each person that Defendant employs in any capacity, including as an independent contractor; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable. The Defendant shall retain such records for any terminated employee for a period of two years following the date of termination; and

*6 (C) Records accurately listing all domain names registered by or on behalf of Defendant, or used by or on behalf of Defendant; the name and address of the Domain Name Registrar; and the name and address of the Host for each domain name; and

(D) Records relating to all ventures undertaken by Defendant that involve the sale of goods or services over the Internet or World Wide Web, including, but not limited to, group or individual meetings, telemarketing, Web sites, Web pages, commercial electronic mail, infomercials or other television or radio

advertising, or direct mail, including but not limited to copies of all contracts or agreements between Defendant and any sales company, mailhouse, printer, Internet service provider, information provider, telephone company, television or radio station, or other person through whom Defendant advertises or promotes goods or services, as well as copies of all advertisements, Web pages, Web sites, commercial electronic mail, or promotional materials utilized in such ventures.

IV. ORDER DISTRIBUTION

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of service of this Order, Defendant shall:

(A) Provide a copy of this Order to, and obtain a signed and dated acknowledgment of receipt of same from each officer, director, each individual serving in a management capacity, employee, independent contractor, consultant, Host or Hosting company, Domain Name Registrar, employed or retained by Defendant;

(B) Should Defendant become affiliated in any way with a commercial entity engaged in online commerce or business, Defendant shall provide a copy of this Order to, and obtain a signed and dated acknowledgment of receipt of same from, an owner, principal, officer, or director of the commercial entity within fifteen (15) business days of the affiliation; and

(C) Maintain for a period of five (5) years after creation, and upon reasonable notice make available to representatives of the Commission, the original signed and dated acknowledgments of the receipt of copies of this Order, as required in this Section.

V. NOTIFICATION OF RESIDENCE, EMPLOYMENT AND DOMAIN NAME REGISTRATIONS

IT IS FURTHER ORDERED that, in order that compliance with the provisions of this Order may be monitored:

(A) Defendant shall notify the Commission in writing, within ten (10) days of the date of entry of this Order, of his current residence address, mailing address, business and home telephone numbers, and employment status, including the names, telephone

numbers, and business addresses of any current employers;

(B) For a period of five (5) years from the date of service of this Order, Defendant shall notify the Commission in writing within thirty (30) days of any changes in his residence and/or mailing addresses;

(C) For a period of five (5) years from the date of service of this Order, Defendant shall notify the Commission in writing within thirty (30) days of any changes in employment status, including the name and business address of any new employer(s);

*7 (D) For a period of five (5) years from the date of service of this Order, Defendant shall notify the Commission in writing within thirty (30) days of registering or re-registering a domain name with any Domain Name Registrar. Such notification shall include:

1. the true identity of the domain name registrant;
2. his or her true and accurate mailing address, email address, and telephone number;
3. all registration information, including name(s), address(es), and email address(es) of the purported registrant, administrative contact, and billing contact listed on each registration; and
4. the name and address of the Domain Name Registrar.

(E) For the purposes of this Section, "employment" includes the performance of services as an employee, consultant, or independent contractor; and "employers" include any individual or entity for whom Defendant performs services as an employee, consultant, or independent contractor.

(F) For the purposes of this Order, all written notifications to the Commission shall be mailed to:

Associate Director for Marketing Practices
Room H-238
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
Re: *FTC v. John Zuccarini*

VI. ACCESS AND MONITORING

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Order, for

the purpose of further determining compliance with this Order, Defendant shall permit representatives of the Commission, within seven (7) business days of receipt of written notice from the Commission:

(A) Access during normal business hours to his offices, or facility storing documents, and to any offices of any business entity or person under Defendant's control, to inspect and copy all documents reasonably relating to compliance with the terms of this Order; and

(B) To interview or depose the officers, directors, and employees, and all sales personnel, whether designated as employees, consultants, independent contractors or otherwise, concerning matters reasonably relating to compliance with the terms of this Order. The person interviewed or deposed may have counsel present. *Provided* that the Commission may otherwise monitor Defendant's compliance with this Order by all lawful means available, including:

1. the use of investigators or other representatives of the Commission posing as consumers, Hosts or Hosting companies, without the necessity of prior identification or notice;
2. without further leave of Court, to obtain discovery as provided by [Rules 26-37 of the Federal Rules of Civil Procedure](#), including the use of compulsory process pursuant to [Federal Rule of Civil Procedure 45](#); and
3. the use of compulsory process pursuant to Sections 9 and 20 of the FTC Act, [15 U.S.C. § § 49 and 57b-1](#), to investigate whether Defendant has violated any provision of this Order or Section 5 of the FTC Act, [15 U.S.C. § 45](#).

VII. RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of construction, modification and enforcement of this Order for six months from this date.

VIII. ENTRY OF THIS JUDGMENT

*8 IT IS FURTHER ORDERED that there is no just reason for delay of entry of this judgment, and, pursuant to [Fed.R.Civ.P. 55](#), the Clerk shall enter this Order immediately.

Not Reported in F.Supp.2d, 2002 WL 1378421 (E.D.Pa.), 2002-1 Trade Cases P 73,690
(Cite as: **2002 WL 1378421 (E.D.Pa.)**)

IX.

Case is closed for statistical purposes.

SO ORDERED.

Not Reported in F.Supp.2d, 2002 WL 1378421
(E.D.Pa.), 2002-1 Trade Cases P 73,690

Motions, Pleadings and Filings ([Back to top](#))

- [2001 WL 34131412](#) (Trial Pleading) Complaint for Permanent Injunction and Other Equitable Relief (Oct. 04, 2001)
- [2:01CV04854](#) (Docket) (Sep. 25, 2001)

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