The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON, Plaintiff, v. SECURE COMPUTER, LLC., et al., Defendants.	NO. C06-0126RSM STIPULATED JUDGMENT AND PROPOSED ORDER AS TO ZHIJIAN CHEN

I. JUDGMENT SUMMARY

1.1	Judgment Creditor:		State of Washington
1.2	Judgment Debtor:		Zhijan Chen
1.3	Principal Judgment Amount:		
	a.	Costs and Fees:	$43,917.00
	b.	Restitution:	$16,000.32
	c.	Civil Penalties:	$24,000.00
	d.	Total Judgment:	$83,917.00
1.4	Post-Judgment Interest Rate:		12 percent per annum

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1.5 Attorneys for Judgment Creditor: Paula Selis, Senior Counsel
Katherine Tassi, Assistant Attorney General

1.6 Attorney for Defendant: Pro Se

Plaintiff, State of Washington, having commenced this action on January 24, 2006, pursuant to the Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM Act"), 15 U.S.C. § 7701, et seq.; RCW 19.86, the Unfair Business Practices – Consumer Protection Act ("CPA"); RCW 19.190, the Unsolicited Commercial Electronic Mail Act ("UCE"), and RCW 19.270, the Computer Spyware Act, and Defendant Zhijian Chen having been personally served with copies of the Summons and Complaint on January 25,. 2006;

Plaintiff having appeared by and through its attorneys, Rob McKenna, Attorney General; Paula Selis, Senior Counsel; and Katherine M. Tassi, Assistant Attorney General; and Defendant having appeared *pro se*;

Plaintiff and Defendant having agreed upon a basis for adjudication of the matters alleged in the Complaint, and to the entry of this Stipulated Judgment, Findings of Fact, Conclusions of Law, Judgment and Decree (hereinafter referred to as "Stipulated Judgment" or "Decree") pursuant to FRCP 54; and

The Court having determined there is no just reason for delay in the entry of final judgment against Defendant, and being fully advised, the Court hereby makes and enters the following:

II. FINDINGS OF FACT

2.1. This action was commenced by the State of Washington pursuant to the Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM Act"), 15 U.S.C. § 7701, et seq.; Chapter 19.86 RCW, the Unfair Business Practices – Consumer Protection Act;

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Chapter 19.270, the Computer Spyware Act, and Chapter 19.190, the Unsolicited Commercial Electronic Mail Act on January 24, 2006.

2.2. Unless otherwise specified, the term "Defendant" as used in this document shall mean Zhijian Chen individually.

2.3. Defendant was served with a copy of the Summons and Complaint on January 25, 2006.

2.4. Defendant recognizes and states that this Stipulated Judgment is entered into voluntarily and that no promises or threats have been made by the Attorney General's Office or any member, official, agent, or representative thereof to induce Defendant to enter into this Stipulated Judgment except as provided herein.

2.5. Defendant further agrees that he will not oppose the entry of this Stipulated Judgment on the grounds that it fails to comply with Rule 65(d) of the Rules of Civil Procedure and hereby waives any objections based thereon.

2.6. The violations alleged herein at all time material to this lawsuit, have been carried out by Defendant wholly or in part in King County, State of Washington, and in the Western District of Washington, and may have occurred elsewhere in the State of Washington.

2.7 Plaintiff, State of Washington, is authorized by RCW 19.86.080 to enjoin violations of the Consumer Protection Act, to obtain restitution on behalf of persons harmed by such violations, and to obtain such further and other relief as the court may deem appropriate, including civil penalties up to the amount of $2000 per violation and attorneys' fees. Pursuant to RCW 19.270.060, the Spyware Act, Plaintiff is authorized to seek recovery for actual monetary loss or damages of up to $100,000.00 per violation of RCW 19.270 on behalf of the residents of the State of Washington, and to obtain such further and other relief as the Court may deem appropriate, including damages, costs and attorneys' fees.

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2.8 Defendant Zhijian Chen ("Chen") is an advertiser of the software product Spyware Cleaner. Defendant resides at 8642 SE Rhone St., Portland, OR 97266. Defendant contracted with Shanghai Pudong Information Port, a web advertising agency in Shanghai, China, to promote, market, and advertise Spyware Cleaner. Shanghai Pudong Information Port created and sent Mr. Chen's Net Send messages to the computers of residents across the United States, including residents in Washington State and in the Western District of Washington. Net Send is a Windows operating system command that is used to send messages to a computer system or to a group of computer systems where Windows Messenger service is running. The Net Send command will send a message to users' computers and a pop-up dialogue box will appear on their screen. In the past, the Net Send command was often used for broadcast messages by network administrators such as "email server down." However, Net Send messages can also be used as a way to send unsolicited messages to unsuspecting users. A Net Send command can send a dialogue box with an advertisement to millions of computers.

2.9 Since around September 2005, Defendant Chen has promoted, marketed, advertised and sold Spyware Cleaner through Net Send messages. Chen's Net Send message pops up onto a user's computer when the user is connected to the Internet, running the messenger program without a firewall running, and alarms the user by claiming that his or her computer has a virus or spyware on it. One message states: "Message from SYSTEM to ALERT... Warning! We detected a virus on your computer! We were unable to remove it automatically so please visit http://www.fixscan.com and download our software to remove Adware, Spyware and Viruses from your computer!" The message tells the user that the virus allows companies to spy on their Internet use and then recommends that the user go to www.fixscan.com to install software to remove the virus. When the user goes to www.fixscan.com, the user is taken to www.myspywarecleaner.com, where he or she is encouraged to perform a "free" scan of the user's computer, is informed that the computer is infected with a virus, and is encouraged to purchase the Spyware Cleaner software which will

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purportedly fix the problem. In fact, the user's computer may not be infected with a virus. Defendant Chen's Net Send message thereby induces the user to install the Spyware Cleaner software onto his or her computer by claiming that their computer is infected with spyware or viruses. Chen is an affiliate advertiser and promoter of Spyware Cleaner with the affiliate network Click Bank. Defendant Chen has been paid 75% of the purchase price for each sale of Spyware Cleaner generated by his advertisements, amounting to thousands of dollars in commissions for the advertisement and sale of Spyware Cleaner, of which 50% was paid by Defendant to Shanghai Pudong Information Port.

2.10 Deceptive means were intentionally and knowingly used to alarm users that their computers might be infected with dangerous spyware and thereby induced them to download software by claiming the software was necessary to secure the user's computer.

2.11 Defendant Chen terminated the contract with Shanghai Pudong Information Port voluntarily prior to being informed of the violations alleged in this lawsuit.

Based on the foregoing Findings of Fact, the Court hereby makes the following:

III. CONCLUSIONS OF LAW

3.1 The Court has jurisdiction of the subject matter of this action and of the parties hereto pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367, and Plaintiff's Complaint states claims upon which relief may be granted under the provisions of Chapter 19.270 RCW, the Computer Spyware Act and Chapter 19.86 RCW, the Unfair Business Practices-Consumer Protection Act. Venue in this district is proper under 28 U.S.C. § 1391. A substantial portion of the acts complained of herein have occurred in King County and elsewhere in the Western District of Washington.

3.2 Defendant's conduct as described in Findings of Fact numbers 2.8 through 2.10 constitutes violations of RCW 19.270.040(1).

3.3 Defendant's conduct as described in Findings of Fact numbers 2.8 through 2.10 constitutes violations of RCW 19.86.020.

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3.4 Plaintiff is entitled to a Decree enjoining and restraining Defendant and any and all persons in active concert or participation with Defendant from engaging in the future in the acts or practices described in Findings of Fact 2.8 through 2.10.

3.5 Plaintiff is entitled to a Decree ordering Defendant to pay Plaintiff's costs and fees of $43,917.00 incurred by Plaintiff in pursuing this action. Said payment shall be in addition to and exclusive of any costs or fees which may be incurred by Plaintiff in enforcing the provisions of this Decree, including the costs of any collection actions. Plaintiff's request for costs and fees of $43,917.00 is reasonable, and Plaintiff is entitled to a Decree ordering Defendant to pay the requested amount.

3.6 Plaintiff is entitled to a Decree ordering Defendant to comply with the injunctive provisions described below.

3.7 Plaintiff is entitled to a Decree ordering Defendant to pay civil penalties as described below.

3.8 Plaintiff is entitled to a Decree ordering Defendant to pay restitution as described below.

Based on the foregoing Findings of Fact and Conclusions of Law, the Court hereby makes the following:

IV. JUDGMENT AND DECREE

It is hereby ADJUDGED, ORDERED, and DECREED as follows:

4.1 Defendant shall immediately inform all successors, assigns, transferees, officers, agents, servants, employees, representatives, and all other persons or entities in active concert or participation with Defendant of the terms and conditions of this Judgment and Decree.

4.2 Defendant and all successors, assigns, transferees, officers, agents, servants, employees, representatives, and all other persons or entities in active concert or participation

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with Defendant are hereby enjoined and permanently restrained in the State of Washington from directly or indirectly engaging in any of the following conduct:

1. Engaging in any conduct which violates the Computer Spyware Act, RCW 19.270 et. seq.

2. Making any misrepresentations in the context of any advertising of products or services.

3. Sending Net Send messages for the purpose of advertising any product or service.

4. Creating a false sense of urgency, exclusivity, or need for available products or services in the context of any advertising of services or products.

5. Engaging in any conduct which violates RCW 19.86, the Unfair Business Practices – Consumer Protection Act.

6. Prior to advertising any product or service, failing to review the proposed advertising and proposed manner of transmission with a licensed attorney to determine whether it violates the provisions of this Stipulated Judgment, and obtaining a written affirmation from the attorney that it does not. This injunction shall apply regardless of whether Defendant is himself responsible for the content or manner of sending of such advertising, and specifically includes third parties who design or send advertising on Defendant's behalf, or who contract with Defendant for such services. Defendant shall provide to the reviewing attorney an accurate copy of the advertisement, an explanation of the process by which it will be sent, and a complete description of the computer user's experience when viewing the advertisement, if the advertisement will be received on users' computers. Defendant shall keep a record of the attorney's written affirmation that the proposed advertisement does not violate the terms of this Stipulated Judgment.

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7. Engaging in the practices described in 2.8 through 2.10 of the Findings of Fact herein.

4.3 Pursuant to RCW 19.86.140, Plaintiff shall recover and Defendant shall pay civil penalties in the amount of $24,000.00.

4.4 Pursuant to RCW 19.86.080, Plaintiff shall recover and Defendant shall pay consumer restitution in the amount of $16,000.00. All money recovered for restitution shall be held by the Attorney General's Office (AGO) and distributed to the consumers of the state of Washington who are determined by the AGO to be entitled to such funds, provided that for a three-month period following the filing of this Stipulated Judgment, the AGO shall also provide restitution to non-Washington consumers who contact the AGO and who are determined by the AGO to be entitled to such funds. After the conclusion of the three-month period, any remaining unclaimed restitution shall be deposited in a dedicated cy pres account with the Consumer Protection Division of the AGO. These funds may be used by the Consumer Protection Division to promote and or support consumer education or awareness on technology, privacy, identity theft or other general consumer protection issues.

4.5 Pursuant to RCW 19.86.090, Plaintiff shall recover and Defendant shall pay costs and attorney's fees incurred in pursuing this matter in the amount of $43,917.00. Interest on any unpaid balance of this amount shall accrue in the amount of 12% per annum.

4.6 Defendant shall bear Plaintiff's reasonable costs, including reasonable attorneys' fees, for enforcing this Judgment in any successful action to enforce any of its provisions.

4.7 All payments shall be made by cashier's check, made payable to the Attorney General—State of Washington, and shall be delivered to the Office of the Attorney General, 900 Fourth Avenue, Suite 2000, Seattle, Washington 98164, to the attention of Cynthia Lockridge.

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V. ENFORCEMENT

5.1 Pursuant to RCW 19.86.140, any violation of the terms of this Judgment may form the basis for further enforcement proceedings.

5.2 The violation of any of the terms of this Judgment shall constitute a violation of the Consumer Protection Act, RCW 19.86 et seq.

5.3 Jurisdiction is retained for the purpose of enabling any party to this Judgment, with or without the prior consent or approval of the other party, to apply to the Court at any time for the enforcement of compliance therewith, the punishment of violations thereof, or the modification or clarification thereof.

5.4 Nothing in this Judgment shall be construed as to limit or to bar any other governmental entity or any other consumer in the pursuit of additional remedies against Defendant.

5.5 Representatives of the Office of Attorney General shall be permitted, upon 10 days' notice to Defendant, to access, inspect, and/or copy all business records or documents under the control of Defendant, in order to monitor compliance with the injunctive provisions of this Judgment.

5.6 Under no circumstances shall this Judgment or the names of the State of Washington or the Office of the Attorney General, Consumer Protection Division, or any of its employees or representatives be used by Defendant's agents or employees in connection with the promotion of any product or service or an endorsement or approval of Defendant's practices.

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5.7 The Court finding no just reason for delay, hereby expressly directs entry of this Judgment.

SO ORDERED this _____ day of _____, 2006.

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JUDGE RICARDO S. MARTINEZ

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Agreed to, Approved for Entry
Notice of Presentation Waived:

ZHIJIAN CHEN
Defendant