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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

STATE OF WASHINGTON,

NO.

Plaintiff,

CONSENT DECREE

v.

FAX.COM, INC., a Delaware corporation;
and FAXID, INC., a California
corporation,

Defendants.

I. Judgment Summary

- 1.1 Judgment Creditor:** State of Washington
- 1.2 Judgment Debtor:** Fax.com, Inc. (“Fax.com”) and FaxID, Inc. (“FaxID”)
- 1.3 Judgment Amount:**
 - a. Injunction:** Permanent injunction
 - b. Civil Penalties:** \$30,000
 - c. Damages:** \$30,000
 - d. Costs & Attorneys Fees:** \$30,000
 - e. Total Judgment Amount:** \$90,000

- 1 **1.4 Post Judgment Interest Rate:** 12%
- 2 **1.5 Attorney for Judgment Creditor:** Robert A. Lipson, Assistant Attorney General
- 3 **1.6 Attorneys for Judgment Debtor:** Shari Odenheimer, Cozen & O'Connor
- 4 _____, Cozen & O'Connor

5 **II. Background**

6 **2.1** Plaintiff State of Washington (“State”), through the Consumer Protection Division of
7 the Washington State Attorney General’s Office, began receiving consumer complaints traceable to
8 Fax.com, and its predecessor FaxID, (collectively “Defendants”) beginning in January 1999. These
9 complaints related to the Washington citizens and businesses being sent unsolicited, commercial
10 faxes from Fax.com and FaxID. Most of the unsolicited, commercial junk faxes advertised the
11 products or services of businesses that had hired Fax.com or FaxID to transmit faxes *en masse* for
12 them.

13 **2.2** Faxing *en masse* using lists or databases of fax numbers is referred to as “fax
14 blasting” or “fax broadcasting.” Fax.com is a fax blaster or fax broadcaster and FaxID was a fax
15 blaster or fax broadcaster.

16 **2.3** Fax.com is a Delaware corporation. Its principal place of business and mailing
17 address is 120 Columbia, Suite 500, Aliso Viejo, California 92656. Kevin Katz is its president.

18 **2.4** Fax.com is also the successor-in-interest to FaxID. FaxID dissolved on October 1,
19 1999, and its operation and business was continued and assumed by Fax.com. Fax.com has also, at
20 various times, used the name of FaxID as its own to identify and promote its business. FaxID was a
21 California corporation. Kevin Katz was its president.

22 **2.5** Since January 1999, the Washington Attorney General’s Office has received over 70
23 complaints against Fax.com and FaxID relating to over 200 unsolicited, commercial faxes.

24 **2.6** In addition to fax blasting or fax broadcasting into Washington, Fax.com has also
25 engaged in activities designed to build its database of fax numbers. On at least two occasions,
26 Fax.com used a special piece of automated dialing equipment to dial thousands of telephone

1 numbers in Washington in order to determine and record if the connection was to a fax machine.
2 On the evening and early morning of April 28-29, 2000 and on May 3, 2000, Fax.com made over
3 one thousand telephone calls to the University of Washington Medical Center with its automated
4 dialing equipment, causing a nuisance to patients and staff and disrupting the hospital and medical
5 center.

6 **2.7** Since September, 2000 the State has been in communication with Fax.com, FaxId,
7 and Kevin Katz, through their attorneys, regarding Defendants' activities, all of which the State
8 contends is illegal. This Consent Decree represents the resolution of the matters in dispute between
9 the State and Defendants, is designed to effect Defendants' behavior through a permanent
10 injunction, and provides for a measure of civil penalties, damages, and recoupment of costs and
11 attorney's fees to the State.

12 **2.8** Contemporaneous with or just prior to the filing of this Consent Decree, the State
13 also filed its Complaint in this action. Named in the Complaint were Fax.com and FaxID. The
14 State's Complaint alleged violations of the federal Telephone Consumer Protection Act, 47 U.S.C.
15 § 227(b)(1)(c), which makes it illegal for anyone to send an unsolicited commercial advertisement
16 to a fax machine. The Complaint also alleged violations of 47 U.S.C. § 227(d)(1)(b) which makes
17 it illegal for anyone to send a fax without clearly indicating in the margins of the fax or on the
18 transmittal page various identifying information regarding who is sending the fax. The State also
19 alleged violations of 47 U.S. C. § 227(b)(1)(A) which makes it illegal for anyone to use an
20 automatic telephone dialing system to call a hospital patient room, or an emergency medical
21 telephone number. In addition, the State alleged violations of the Washington Telecommunications
22 Act, RCW 80.36.540, which prohibits junk faxing and prohibits faxing after being requested to
23 stop. Violations of RCW 80.36.540 also constitute *per se* violations of the Washington Consumer
24 Protection Act, RCW 19.86.020, which the State also alleged was violated. Finally, the State's
25 Complaint also contended that these activities constituted a civil nuisance and a civil conspiracy.
26

1 **2.9** Defendants have been personally served with the Summons and Complaint in this
2 case, accept service of process, and waive any legal issue with respect to the adequacy of service of
3 process.

4 **2.10** The State is represented in this case by Robert A. Lipson, Assistant Attorney
5 General, through Christine O. Gregoire, Attorney General of Washington, and through Sally Reed
6 Gustafson, Senior Assistant Attorney General.

7 **2.11** Defendants are represented by the law firm of Cozen & O'Connor. Primary counsel
8 for Defendants is Shari Odenheimer of Cozen & O'Connor's West Consohoken, Pennsylvania
9 office. Ms. Odenheimer is appearing *pro hac vice*. Defendants are also represented by _____ of
10 Cozen & O'Connor's Seattle office, who is a member of the Washington bar and of this district's
11 bar.

12 **2.12** The State and Defendants have agreed on a basis for settlement of the matters
13 alleged in the Complaint, and to the entry of this Consent Decree against Defendants without the
14 need for trial or adjudication of any issue of law or fact.

15 **2.13** Defendants deny the allegations in the Complaint. By entering into this Consent
16 Decree, Defendants neither admit nor deny the allegations of the Complaint.

17 **2.14** Defendants and Kevin Katz recognize and state that this Consent Decree is entered
18 into voluntarily and that no promises outside of this writing have been made by the Attorney
19 General's Office or by any member, officer, agent or representative thereof to induce them to enter
20 into this Consent Decree.

21 **2.15** Defendants and Kevin Katz waive any right that they may have to appeal from this
22 Consent Decree.

23 **2.16** Defendants and Kevin Katz agree that they will not oppose entry of this Consent
24 Decree on the grounds that it fails to comply with Rule 65(d) of the Federal Rules of Civil
25 Procedure, and hereby waive any objections.
26

1 Washington with the provisions of the federal Telephone Consumer Protection Act, 47 U.S.C. §227
2 *et seq.*, the Washington Telecommunications Act, RCW 80.36.540, and the Washington Consumer
3 Protection Act, RCW 19.86 *et seq.*, as they are currently written or as they may be amended in the
4 future. This permanent injunction includes but is not limited to the following:

5 a. Defendants shall not transmit on their own behalf or for others into
6 Washington any fax of a commercial, promotional or advertising nature, or
7 which offers, promotes, or advertises goods or services for purchase, except
8 when the recipient of the fax has given explicit, expressed permission to
9 receive the specific fax being sent or when there is a *bona fide* preexisting
10 contractual or business relationship between the recipient and the initiator of
11 the fax of a nature, type and duration sufficient to constitute implied
12 permission to be faxed. Notwithstanding the existence of prior explicit,
13 expressed permission to be faxed or the existence of a prior contractual or
14 business relationship between the recipient and the initiator of the fax
15 sufficient to constitute implied permission, Defendants may not fax to a
16 recipient after the recipient has indicated a desire either orally or in writing to
17 Defendants or their agents not to be faxed.

18 b. Defendants shall not sell their database of Washington fax numbers to others
19 to fax on behalf of Fax.com or its clients.

20 c. Defendants shall not use fax lists or databases furnished by their clients for
21 faxing into Washington. An exception to this provision shall exist where
22 Defendants' client certifies in writing under penalty of perjury of its respective state
23 how the list or database was compiled or acquired, who compiled or acquired it,
24 when it was compiled or acquired, if it was acquired who the client acquired it from,
25 and whether each fax number is from someone with whom the client has explicit
26 expressed permission to send the specific fax or with whom the client has a *bona fide*

1 preexisting contractual or business relationship of the nature, type, and duration
2 sufficient to constitute implied permission to fax. Defendants shall be responsible
3 for obtaining the necessary declarations from their clients, and shall be responsible
4 for maintaining custody of these declarations for three years after the event.
5 Defendants shall also insure that an electronic disc, or a hard copy printout, of the
6 client provided database, as well as a copy of the fax, is maintained with the
7 declaration. In addition to the above, if there is not a reasonable basis to conclude
8 that the fax list or database provided by the client is a genuine list of actual, current
9 clients or of people who have actually given explicit, expressed permission to be
10 faxed, Defendants shall not use the client provided list or database of fax numbers.

11 d. Defendants shall not fax into Washington any fax not containing the date and
12 time it was sent, identification of the sending entity, and the telephone number of the
13 sending machine.

14 e. Defendants shall not use automated dialing equipment to call any hospital
15 patient room or any emergency medical telephone number within Washington.
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17 **V. Civil Penalties**

18 **5.1** Defendants shall be liable for and shall pay to the State a civil penalty of \$30,000.

19 **5.2** Authority for this civil penalty exists pursuant to RCW 19.86.040.

20 **5.3** Defendants are jointly and severally liable for this civil penalty.
21

22 **VI. Damages**

23 **6.1** Defendants shall be liable for and shall pay to the State damages of \$30,000.

24 **6.2** Authority for the collection of damages by the State for Defendants' conduct exists
25 pursuant to 47 U.S.C. § 227(f)(1) and RCW 80.30.540(5).

26 **6.3** Defendants are jointly and severally liable for these damages.

1 General, 900 Fourth Ave., Suite 2000, Seattle, WA 98164, Attention: Robert A. Lipson. If, for any
2 reason, Defendants pay less than what is owed or not in accordance with the schedule set forth, the
3 State may at its sole discretion and option, proceed to enter the Consent Decree with the court and
4 collect on the amount still owed or it may declare the Consent Decree null and void and reinstitute
5 and proceed on the original, underlying Complaint and lawsuit.

6 **8.2** Interest on any unpaid balance of the judgment after it becomes due under the above
7 schedule shall accrue at the rate of 12% annually, or 4 percentage points above the equivalent
8 coupon yield as published by the Federal Reserve of the average bill rate for 26 week Treasury bills
9 as determined at the first bill market auction conducted during the calendar month immediately
10 preceding the entry of this Consent Decree, whichever is higher.

11 **IX. Enforcement**

13 **9.1** Violation of any of the terms of this Consent Decree shall constitute a violation of an
14 injunction for which civil penalties of up to \$25,000 per violation may be sought by the Attorney
15 General pursuant to RCW 19.86.140.

16 **9.2** Violation of any of the terms of this Consent Decree shall constitute a violation of
17 the Consumer Protection Act, RCW 19.86.020.

18 **9.3** Jurisdiction is retained for the purpose of enabling any party to this Consent Decree
19 with or without the prior consent of the other party, to apply to the court at any time for
20 enforcement of compliance with this Consent Decree, to punish violations thereof, or to modify or
21 clarify this Consent Decree.

22 **9.4** For the purpose of determining or securing compliance with this Consent Decree,
23 representatives of the Office of the Attorney General shall be permitted, upon ten (10) days' notice
24 to Defendants, access for inspection and copying during regular office hours of any documents
25 believed by the State to relate to any matters contained in this Consent Decree, provided that the
26

1 inspection and copying shall be done in such a way as to avoid disruption of Defendants' business
2 activities.

3 **9.5** For the purpose of determining or securing compliance with this Consent Decree,
4 representatives of the Office of the Attorney General shall be permitted to question Defendants or
5 any officer, director, agent, or employee or any Defendant to this Complaint by deposition, pursuant
6 to the provisions of FRCP 30.

7 **9.6** Nothing in this Consent Decree shall be construed as to limit or bar any consumer
8 from pursuing legal remedies, except as provided in paragraph 6.4.

9 **9.7** Under no circumstances shall this Consent Decree or the name of the State of
10 Washington, or the Office of the Attorney General, or any of its employees or representatives be
11 used by any Defendant, or their officers, agents, servants, employees, successors, assigns, attorneys,
12 or other persons or entities acting in concert or participation with them, in connection with any
13 selling, advertising, or promotion of products or services, or as an actual or implied endorsement or
14 approval of Defendants' acts, practices, or methods of conducting business.

15 **9.8** Defendants and Kevin Katz agree and promise to cooperate with the State in
16 identifying various entities who have used Defendants' faxing services, including but not limited to
17 those whose faxes were transmitted by Fax.com into Washington.

18 **9.9** This proceeding in all other respects is dismissed.

19
20 DATED this _____ day of _____, 2001.

21
22 _____
23 United States District Judge
24 for the Western District of Washington
25 at Seattle
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For Plaintiff State

Approved for Entry and presented by:

CHRISTINE O. GREGOIRE
Attorney General
SALLY R. GUSTAFSON
Senior Assistant Attorney General

ROBERT A. LIPSON, WSBA # 11889
Assistant Attorney General
Attorneys for Plaintiff
State of Washington

For Defendants Fax.com and FaxID

Approved for Entry and Notice of Presentation
Waived:

COZEN & O'CONNOR

SHARI ODENHEIMER
Pennsylvania Bar #54692
Cozen & O'Connor
Attorney for Defendants

_____, WSBA # _____
Cozen & O'Connor
Attorney for Defendants

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Certification of Defendants

I, _____, acting as a duly authorized corporate officer of defendant Fax.com agree and consent on behalf of Fax.com to all of the terms of this Consent Decree.

Name
_____, on behalf of Fax.com
Corporate Office

I, _____, on behalf of FaxID as a prior duly authorized officer of defendant FaxID, which dissolved on October 1, 1999, agree and consent on behalf of FaxID to all the terms of this Consent Decree.

Name
_____, on behalf of FaxID
Corporate Office

Certification of Kevin Katz

I, Kevin Katz, agree and consent to all the terms of this Consent Decree, and agree and consent to be bound by it even though I am not a named defendant.

Kevin Katz, individually

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