

Complaint

IN THE MATTER OF

ZANGO, INC., ET AL.CONSENT ORDER, ETC. , IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4186; File No. 052 3130
Complaint, March 7, 2007 — Decision, March 7, 2007*

This consent order addresses the developing, marketing, and distributing via Internet downloads of advertising software programs (“adware”) that monitor consumers’ Internet use in order to display targeted pop-up ads. Respondents Zango, Inc., and Keith Smith and Daniel Todd, individually and as officers of Zango, through third-party affiliates, installed their adware on consumers’ computers without adequate notice or consent; and made their adware difficult for consumers to identify, locate, and remove. The order prohibits respondents from contacting any consumer’s computer, to display ads or otherwise, if their adware was installed on that computer before January 1, 2006. The order also prohibits respondents from, or assisting others in, installing software onto any computer by exploiting security vulnerabilities or failing to give adequate notice to consumers, or installing any software program or application without express consent. Respondents must require affiliates to obtain express consent before installing software, and must establish and maintain mechanisms through which consumers can report and respondents can address complaints, and consumers can locate and uninstall respondents’ adware. In addition, the order requires respondents to pay \$3 million to the Commission; these funds may be used to provide such relief as the Commission determines to be reasonably related to respondents’ practices, including the rescission of contracts, payment of damages, and/or public notification respecting such unfair or deceptive practices. Any funds not used shall be paid to the U.S. Treasury.

Participants

For the *Commission*: David K. Koehler and Carl H. Settlemyer.

For the *Respondents*: Christine A. Varney and Mary Ellen Callahan, Hogan & Hartson LLP.

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that Zango, Inc. f/k/a 180solutions, Inc., a corporation, Keith Smith, individually and as an officer of the corporation, and Daniel Todd, individually and as an officer of the corporation (collectively “Respondents”), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Zango, Inc. f/k/a 180solutions, Inc., is a Washington corporation with its principal place of business located at 3600 136th Place SE, Bellevue, Washington 98006. On June 7, 2006, 180solutions merged with New York-based Hotbar, Inc. and changed the combined company’s name to Zango, Inc.
2. Respondent Keith Smith is a founder and officer of the corporate respondent. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporation, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Zango, Inc.
3. Respondent Daniel Todd is a founder and officer of the corporate respondent. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporation, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Zango, Inc.
4. The acts and practices of Respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.
5. Since at least 2002, Respondents have developed advertising software programs (“adware”), including without limitation programs called n-CASE, 180Search Assistant, Zango, and

Complaint

Seekmo, and distributed such programs to consumers' computers via Internet downloads.

6. When installed on a consumer's computer, Respondents' adware monitors Internet use on the computer and displays pop-up advertisements based on that Internet use. Consumers have received over 6.9 billion pop-up advertisements as a result of Respondents' adware.

7. Respondents' adware has been installed on U.S. consumers' computers over 70 million times.

8. One of Respondents' primary methods of distributing their adware is or has been to pay third-party affiliates to install Respondents' adware on consumers' computers.

9. Respondents know or have known that their affiliates retained numerous third-party sub-affiliates to install Respondents' adware on consumers' computers.

10. In numerous instances, Respondents, through affiliates and sub-affiliates acting on behalf and for the benefit of Respondents, bundled Respondents' adware with purportedly free software programs (hereinafter "lureware"), including without limitation Internet browser upgrades, utilities, screen savers, games, peer-to-peer file sharing, and/or entertainment content. Respondents, through affiliates and sub-affiliates, generally represented the lureware as being free.

11. When installing the lureware, consumers often have been unaware that Respondents' adware would also be installed because that fact was not adequately disclosed to them. In some instances, no reference to Respondents' adware was made on the website offering the lureware or in the install windows. In other instances, information regarding Respondents' adware was available only by clicking on inconspicuous hyperlinks contained in the install windows or in lengthy terms and conditions regarding the lureware. Because the lureware often was bundled

Complaint

with several different programs, the existence and information about the effects of Respondents' adware could only be ascertained, if at all, by clicking through multiple inconspicuous hyperlinks.

12. In numerous other instances, Respondents, through affiliates and sub-affiliates acting on behalf and for the benefit of Respondents, have installed Respondents' adware on consumers' computers by exploiting security vulnerabilities in Internet web browsers. Installations by this process, also known as "drive-by" downloads or "stealth" installations, provided no notice to consumers that Respondents' adware was being installed on their computers.

13. Respondents knew or should have known that there was widespread failure by their affiliates and sub-affiliates to provide adequate notice of their adware and obtain consumer consent to its installation. Indeed, notwithstanding their own contractual provisions or codes of conduct to the contrary, Respondents continued to allow certain affiliates, who were providing a large volume of installations, to install Respondents' adware for as long as seventeen months after Respondents became aware of the unauthorized installations.

14. Until at least mid-2005, Respondents made identifying, locating, and removing their adware extremely difficult for consumers by, in numerous instances, among other practices:

- a. Failing to identify adequately the name or source of the adware in pop-up ads so as to enable consumers to locate the adware on their computers;
- b. Naming adware files or processes with names resembling core systems software or applications and placing files in a variety of locations;

Complaint

- c. Listing the adware in the Windows Add/Remove utility under names, including “Uninstall 180search Assistant,” intended and/or likely to confuse the consumer (*i.e.*, the consumer would not want to remove a program needed to uninstall the adware);
- d. Requiring consumers to follow a multiple-step procedure to uninstall the adware, including having a live connection to the Internet and downloading additional software from Respondents;
- e. Requiring consumers who sought to uninstall the adware to click through multiple warning messages;
- f. Representing to consumers that the adware did not show pop-up ads, that uninstalling the adware would not prevent the consumer from getting pop-up ads, and/or by exaggerating the consequences of uninstalling the adware;
- g. Failing to disclose adequately that, in some versions of the adware, disabling the display of Respondents’ pop-up advertisements would not disable the adware from monitoring and generating logs of the Internet browsing activities of consumers using that machine nor disable Respondents’ collection of such information;
- h. Providing an uninstall tool that failed to uninstall the adware in whole or part;
- i. Installing technology on consumers’ computers to silently reinstall the adware when consumers have attempted to remove it manually or to remove it using third-party anti-spyware or anti-adware programs; and/or
- j. Reinstalling the adware files on the consumer’s computer with randomly generated names to avoid further detection and removal.

Complaint

15. Respondents' practices forced consumers to invest significant time and effort, often including the expense of purchasing third party anti-spyware applications, to detect and rid their computers of Respondents' unwanted adware.

VIOLATIONS OF THE FTC ACT**Deceptive Failure Adequately to Disclose Adware**

16. In numerous instances, as described in Paragraphs 8 through 11, Respondents, through affiliates and sub-affiliates acting on behalf and for the benefit of Respondents, represented to consumers, expressly or by implication, that they would receive lureware (including without limitation Internet browser upgrades, utilities, screen savers, games, peer-to-peer file sharing, and/or entertainment content). In numerous instances, Respondents, through affiliates and sub-affiliates acting on behalf and for the benefit of Respondents, failed to disclose, or failed to disclose adequately, that the lureware was bundled with Respondents' adware that would monitor consumers' Internet use and cause consumers to receive numerous pop-up advertisements based on such use. The bundling of adware would be material to consumers in their decision whether to install the lureware. The failure adequately to disclose this fact, in light of the representations made, was, and is, a deceptive act or practice.

Unfair Installation of Adware

17. In numerous instances, as described in Paragraphs 8 through 15, Respondents, through affiliates and sub affiliates acting on behalf of and for the benefit of Respondents, installed on consumers' computers, without their knowledge or authorization, adware that could not be reasonably identified, located, or removed by consumers. Consumers thus have had to spend substantial time and/or money to locate and remove this adware from their computers. Respondents' practice has caused or is likely to cause substantial injury to consumers that cannot

Decision and Order

reasonably be avoided by the consumers themselves and is not outweighed by benefits to consumers or competition. These acts and practices were, and are, unfair.

Unfair Uninstall Practices

18. In numerous instances, as described in Paragraphs 14 through 15, Respondents failed to provide consumers with a reasonable and effective means to identify, locate, and remove Respondents' adware from their computers. Consumers thus have had to spend substantial time and/or money to locate and remove this adware from their computers. Respondents' practices have caused or are likely to cause substantial injury to consumers that cannot reasonably be avoided by consumers themselves and is not outweighed by benefits to consumers or competition. These acts and practices were, and are, unfair.

19. The acts and practices alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission, on this seventh day of March, 2007, issues this complaint against Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondents named in the caption hereof, and the Respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the

Decision and Order

Commission for its consideration and which, if issued by the Commission, would charge the Respondents with violation of the Federal Trade Commission Act; and

The Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the Respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the Respondents that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondents have violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Zango, Inc. f/k/a 180solutions Inc. is a Washington corporation with its principal place of business located at 3600 136th Place SE, Bellevue, Washington 98006.
2. Respondent Keith Smith is a founder and officer of the corporate Respondent. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporation, including the acts and practices

Decision and Order

alleged in the draft complaint. His principal office or place of business is the same as that of Zango, Inc. f/k/a 180solutions, Inc.

3. Respondent Daniel Todd is a founder and officer of the corporate Respondent. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporation, including the acts and practices alleged in the draft complaint. His principal office or place of business is the same as that of Zango, Inc. f/k/a 180solutions, Inc.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

For purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, “Respondents” means Zango, Inc. f/k/a 180solutions, Inc., its successors and assigns, and their officers; Keith Smith, individually and as an officer of the corporation; and Daniel Todd, individually and as an officer of the corporation; and each of the above’s agents, representatives, and employees.

2. “Affiliate program” means any program whereby any person or entity agrees to disseminate, distribute, or download any software program or application onto consumers’ computers, on behalf of Respondents.

3. “Affiliate” means any person or entity who participates in an affiliate program.

4. “Assist others” means knowingly providing any of the following services to any person or entity: (a) developing, supplying, distributing, or publishing any software program,

Decision and Order

product, or service; or (b) formulating, developing, or providing, or arranging for the formulation, development, or provision of, any Internet advertising or marketing content for any person or entity; or (c) performing advertising or marketing services of any kind for any person or entity.

5. “Clear(ly) and prominent(ly)” shall mean that, in an electronic medium, the disclosure shall be: (a) unavoidable; (b) of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it; (c) in understandable language and syntax; and (d) additionally, in connection with each advertisement or promotion for the download or installation of any software program or application, shall be presented on the principal screen or landing page of each advertisement or promotion, and prior to the consumer downloading or installing such software program or application. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

6. “Commerce” means as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

7. “Express consent” shall mean that, prior to downloading or installing any software program or application to consumers’ computers: (a) Respondents clearly and prominently disclose the material terms of such software program or application prior to the display of, and separate from, any final End User License Agreement; and (b) consumers indicate assent to download or install such software program or application by clicking on a button that is labeled to convey that it will activate the download or installation, or by taking a substantially similar action.

8. A “security vulnerability” is a weakness, flaw, or bug in a software program or application that can be used to increase access privileges to a computer system, compromise data stored on it, or control its operation.

Decision and Order

9. “Legacy program” shall mean any software program that: (a) is owned or controlled by Respondents; and (b) was installed on a consumer’s computer prior to January 1, 2006.

10. The “World Wide Web” or the “Web” is a system used on the Internet for cross-referencing and retrieving information. Documents (“webpages” or “websites”) 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.

11. A “website” 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.

12. A “web browser” is a software application used to view, download, upload, surf, or otherwise access documents (“webpage(s)” or “website(s)”) on the World Wide Web. Web browsers read coded documents that reside on servers, and interpret the coding into what users see rendered as a webpage or website. A user may retrieve and view a webpage or website by entering the Uniform Resource Locator (“URL”) or domain name of the webpage in the address bar of the web browser.

I.

IT IS ORDERED that Respondents, directly or through any person, corporation, subsidiary, division, affiliate, or other device, shall not use any legacy program to display any advertisement to, or otherwise communicate with, a consumer’s computer. The provisions of Part I do not apply to any software program or application that was owned or controlled by Hotbar, Inc.

II.

IT IS FURTHER ORDERED that Respondents, directly or through any person, corporation, subsidiary, division, affiliate, or

Decision and Order

other device, shall not publish, disseminate, or distribute or assist others in publishing, disseminating, or distributing, on or through the Internet, the World Wide Web, any bulletin board system, File Transfer Protocol (“FTP”), electronic-mail, instant message, webpage, or website in or affecting commerce, any software script, code, or other content in order to exploit a security vulnerability of any computer operating system, web browser, or other application to download or install onto any computer any software code, program, or content.

III.

IT IS FURTHER ORDERED that Respondents, directly or through any person, corporation, subsidiary, division, affiliate, or other device, in connection with the advertising, promotion, marketing, offering for sale, sale, or provision of any goods or services on or through the Internet, the World Wide Web, or any webpage or website in or affecting commerce, shall not install or download, or assist others in installing or downloading, any software program or application without express consent.

IV.

IT IS FURTHER ORDERED that Respondents, directly or through any person, corporation, subsidiary, division, affiliate, or other device, in connection with the advertising, promotion, marketing, offering for sale, sale, or provision of any goods or services on or through the Internet, the World Wide Web, or any webpage or website in or affecting commerce, shall: (1) establish, implement, and maintain a functioning email address or other Internet-based mechanism for consumers to report complaints regarding Respondents’ practices; (2) conspicuously disclose the existence of such reporting mechanism on Respondents’ websites; (3) use best efforts to associate each such complaint correctly with the software, application, website, or good or service that is the subject of the complaint; and (4) receive and respond to such

Decision and Order

complaints, whether received directly or indirectly, in a timely manner via email or other Internet-based mechanism.

V.

IT IS FURTHER ORDERED that Respondents, directly or through any person, corporation, subsidiary, division, affiliate, or other device, in connection with the advertising, promotion, marketing, offering for sale, sale, or provision of any goods or services on or through the Internet, the World Wide Web, or any webpage or website in or affecting commerce, shall establish, implement, and thereafter maintain, a comprehensive program that is reasonably designed to ensure that affiliates obtain express consent before installing Respondents' software program or application onto consumers' computers. Such measures shall include, at a minimum and without limitation, the following:

- A. Obtain contact information from any prospective participant in any affiliate program. In the case of a natural person, Respondents shall obtain the prospective participant's first and last name, physical address, country, telephone number, email address, and complete bank account information as to where payments are to be made. In the case of corporations, partnerships, proprietorships, limited liability companies, organizations, associations, cooperatives, agencies, or other legal entities, Respondents shall obtain the first and last name, physical address, country, telephone number, and email address for the natural person who owns, manages, or controls the prospective participant, and complete bank account information as to where payments are to be made;
- B. Prior to any such prospective participant's acceptance into any affiliate program, (1) provide each such person a copy of this order; (2) obtain from each such person a signed and dated statement acknowledging receipt of this order and expressly agreeing to comply with this order; and (3) provide written notice that engaging in acts or practices

Decision and Order

prohibited by this order will result in immediate termination of any affiliate program account and forfeiture of all monies earned or owed. Any electronic signature that Respondents obtain pursuant to this Part must comply with the signature requirements of the Electronic Signatures in Global and National Commerce Act (“E-Sign Act”), 15 U.S.C. § 7001 *et seq.*;

- C. Require each affiliate to: (1) provide identifying information to Respondents, including the same types of information as required by Subpart A of this Part, concerning that affiliate’s sub-affiliates, employees, agents, or sub-contractors who download or install any software program or application onto consumers’ computers on Respondents’ behalf; (2) provide each such person with a copy of this order; and (3) obtain from each such person a signed and dated statement acknowledging receipt of this order and expressly agreeing to comply with this order. The identifying information referred to herein shall be required prior to that affiliate’s participation in Respondents’ affiliate program or immediately after any change to that affiliate’s sub-affiliates, employees, agents or sub-contractors;
- D. In accord with Part IV above: (1) establish, implement, and maintain a functioning email address or other Internet-based mechanism for consumers to report complaints to Respondents regarding the practices of any affiliate; (2) clearly and prominently disclose the existence of such reporting mechanism on Respondents’ websites; (3) use best efforts to associate each such complaint correctly with the affiliate that is the subject of the complaint; and (4) receive and respond to such complaints, whether received directly or indirectly, in a timely manner via email or other Internet-based mechanism; and

Decision and Order

- E. Promptly and completely investigate any complaints that the Respondents receive through Subpart D of this Part or any other source to determine whether any such affiliate is engaging in acts or practices prohibited by this order;
- F. Following completion of the investigation required by Part V(E) above: (1) immediately terminate any affiliate that Respondents reasonably conclude has engaged or is engaging, directly or indirectly, in acts or practices prohibited by this order and cease payments to any such affiliate; and thereafter (2) immediately cease the display of any advertisements to, or otherwise using the software program or application to communicate with, any consumer's computer that received Respondents' software program or application through the prohibited acts or practices of such affiliate, except that Respondents may remove or assist consumers in the removal of Respondents' software program or application. Notwithstanding the foregoing, Respondents may send a notice to the affected consumers' computers that clearly and prominently states: (a) that the software program or application may have been installed on their computer without their consent; (b) that they will no longer receive any advertising or communication from Respondents; and (c) how they can remove all vestiges of the software program or application from their computers. The foregoing notice may not be served more than one (1) time to any computer on which a software program or application was installed and must be served within five (5) days after the termination of the affiliate.

Provided, however, that this Part does not authorize or require Respondents to take any action that violates any federal, state, or local law.

Decision and Order

VI.

IT IS FURTHER ORDERED that Respondents, directly or through any person, corporation, subsidiary, division, affiliate, or other device, in connection with the service of any advertisement served or caused by Respondents' software program or application installed on consumers' computers in or affecting commerce, shall in each such advertisement clearly and prominently: (1) identify the program causing the display of such advertisement, together with language specifying that the advertisement is served by such program; (2) provide a hyperlink or other similar technology directly linking to a webpage that provides clear and prominent instructions for (a) uninstalling Respondents' software or other application through which consumers received such advertisement; and (b) accessing Respondents' complaint mechanism as required by Part IV above. Such hyperlink shall be clearly named to indicate these functions.

VII.

IT IS FURTHER ORDERED that Respondents, directly or through any person, corporation, subsidiary, division, affiliate, or other device, shall not install or cause to be installed on consumers' computers any software program or application in connection with the advertising, promotion, marketing, offering for sale, sale, or provision of any goods or services on or through the Internet, the World Wide Web, or any webpage, or website, in or affecting commerce unless Respondents provide a reasonable and effective means for consumers to uninstall the software or application, either through the computers' operating system Add/Remove utility, or other uninstall tool that can be readily located on consumers' computers. Respondents shall not require consumers to: access any website or download or install any additional software program or application; close or deactivate third-party firewalls, operating system firewalls, anti-spyware or anti-adware software, or virus protection software; or provide

Decision and Order

personally identifiable information in order to complete the uninstall.

VIII.

IT IS FURTHER ORDERED that, for a period of five (5) years after the date of issuance of this order, Respondents shall maintain, and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of each document relating to compliance with the terms and provisions of this order, including but not limited to: all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, whether prepared by or on behalf of Respondents, relating to such compliance; and all documents, whether prepared by or on behalf of Respondents, that contradict, qualify, or call into question Respondents' compliance with this order.

IX.

IT IS FURTHER ORDERED that Respondents shall pay to the Federal Trade Commission the sum of three million dollars (\$3,000,000.00). This payment shall be made in the following manner:

- A. The payment shall be made by wire transfer or certified or cashier's check made payable to the Federal Trade Commission in three installments as follows:
 - 1. One million dollars (\$1,000,000.00) no later than ten (10) days after the date of issuance of this order;
 - 2. One million dollars (\$1,000,000.00) no later than six (6) months after the date of issuance of this order; and
 - 3. One million dollars (\$1,000,000.00) no later than twelve (12) months after the date of issuance of this order.

Decision and Order

- B. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the amount due, together with interest, as computed pursuant to 28 U.S.C. § 1961 from the date of default to the date of payment, shall immediately become due and payable to the Commission. Respondents agree that, in such event, the facts as alleged in the complaint shall be taken as true in any subsequent litigation filed by the Commission to enforce its rights pursuant to this order, including but not limited to a nondischargeability complaint in any subsequent bankruptcy proceeding.
- C. All funds paid pursuant to this Part, together with any accrued interest, shall be used by the Commission in its sole discretion to provide such relief as it determines to be reasonably related to Respondents' practices alleged in the complaint, and to pay any attendant costs of administration. Such relief may include, but shall not be limited to, the rescission of contracts, payment of damages, and/or public notification respecting such unfair or deceptive practices. If the Commission determines, in its sole discretion, that such relief is wholly or partially impractical, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are distributed but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty, or punitive assessment.
- D. Respondents shall make no claim to or demand for the return of the funds, directly or indirectly, through counsel or otherwise; and in the event of Respondents' bankruptcy, Respondents acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

Decision and Order

X.

IT IS FURTHER ORDERED that Respondents shall, in connection with this action or any subsequent investigations related to or associated with the transactions or occurrences that are the subject of the Complaint, cooperate in good faith with the Commission and appear, or cause their officers, employees, representatives, or agents to appear, at such places and times as the Commission shall reasonably request, after written notice, for interviews, conferences, pretrial discovery, review of documents, and for such other matters as may be reasonably requested by the Commission. If requested in writing by the Commission, Respondents shall appear, or cause their officers, employees, representatives, or agents to appear, and provide truthful testimony in any trial, deposition, or other proceeding related to or associated with the transactions or occurrences that are the subject of the Complaint, without the service of a subpoena.

XI.

IT IS FURTHER ORDERED that Respondent Zango, Inc. f/k/a 180solutions, Inc., its successors and assigns, and Respondents Keith Smith, and Daniel Todd shall delivery a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of the order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

XII.

IT IS FURTHER ORDERED that Respondent Zango, Inc. f/k/a 180solutions, Inc., its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under

Decision and Order

this order, including but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580.

XIII.

IT IS FURTHER ORDERED that Respondents Keith Smith and Daniel Todd, for a period of ten (10) years after the date of issuance of this order, each shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include Respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580.

Decision and Order

XIV.

IT IS FURTHER ORDERED that Respondent Zango, Inc. f/k/a 180solutions, Inc., its successors and assigns, and Respondents Keith Smith and Daniel Todd shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth the manner and form in which they have complied with this order.

XV.

This order will terminate on March 7, 2027, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any Respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that this order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis to Aid Public Comment

**ANALYSIS OF PROPOSED CONSENT ORDER TO AID
PUBLIC COMMENT**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from proposed respondents Zango, Inc., formerly known as 180solutions, Inc. and Keith Smith and Daniel Todd, individually and as officers of Zango, Inc. (together “Respondents”). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

General Allegations

Respondents develop, market, and distribute via Internet downloads advertising software programs (“adware”) — including programs with the names n-CASE, 180search Assistant, Seekmo, and Zango — that monitor consumers’ Internet use in order to display targeted pop-up ads. This matter concerns allegations that Respondents: (1) via a network of numerous affiliates and sub-affiliates installed their adware on consumers’ computers without adequate notice or consent; and (2) made their adware difficult for consumers to identify, locate, and remove.

The Commission’s complaint alleges that from at least 2002 through 2005, the primary way Respondents distributed their adware was through a network of affiliates. These affiliates often recruited large numbers of third-party sub-affiliates who purported to offer, generally for free, some content to the public, such as Internet browser upgrades, utilities, games, screensavers,

Analysis to Aid Public Comment

peer-to-peer file sharing software and/or entertainment content (hereinafter “lureware”) and bundled the adware with that content.

The Commission’s complaint further alleges that consumers often have been unaware that Respondents’ adware would be installed on their computers because it was not adequately disclosed to them that downloading the lureware would result in installation of Respondents’ adware. In some instances, no reference to the adware was made on websites offering the lureware or in the install windows. In others, information regarding the adware was available only by clicking on inconspicuous hyperlinks contained in the install windows or in lengthy terms and conditions regarding the lureware. Often the existence and information about the effects of Respondents’ adware could only be ascertained, if at all, by clicking through multiple inconspicuous hyperlinks. Other affiliates and sub-affiliates used security exploits and drive-by downloads to bypass consumer notice and consent completely. The complaint alleges that Respondents knew or should have known of their affiliates’ and sub-affiliates’ widespread failure to provide adequate notice of their adware and obtain consumer consent to its installation.

The Commission’s complaint further alleges that Respondents, until at least mid-2005, made identifying, locating, and removing their adware extremely difficult for consumers. Among other things, Respondents: installed code on consumers’ computers that would enable their adware to be reinstalled silently after consumers attempted to uninstall or remove it; failed to identify adequately the name or source of the adware in pop-up ads so as to enable consumers to locate the adware on their computers; named adware files or processes with names resembling core systems software or applications and placing files in a variety of locations; listed the adware in the Windows Add/Remove utility under names intended and/or likely to confuse consumers; required consumers to have a live Internet connection and download additional software from Respondents to uninstall the adware; represented to consumers that the adware did not show pop-up ads and/or exaggerated the consequences of

Analysis to Aid Public Comment

uninstalling the adware; provided uninstall tools that failed to uninstall the adware in whole or part; and/or reinstalled the adware files on consumers' computers with randomly generated names to avoid further detection and removal.

Deception Allegation

The Commission's complaint alleges that by offering content over the Internet such as browser upgrades, utilities, games, screensavers, peer-to-peer file sharing software and/or entertainment content, without disclosing adequately that this content was bundled with Respondents' adware, Respondents committed a deceptive practice. The bundling of Respondents' adware, which monitors their Internet use and causes them to receive pop-up advertisements, would be material to consumers in their decision whether to download the other software programs and/or content.

Unfairness Allegations

The Commission's complaint also alleges that it was an unfair practice for Respondents to install on consumers' computers, without their knowledge or authorization, adware that could not be reasonably identified, located, or removed by consumers. In addition, the complaint alleges that it was an unfair practice, in and of itself, for Respondents not to provide consumers with a reasonable means to identify, locate, and remove Respondents' adware from their computers. The complaint further alleges that these practices have caused or are likely to cause substantial consumer injury by requiring consumers to spend substantial time and/or money to locate and remove this adware from their computers. The injury to consumers was neither reasonably avoided by the consumers themselves, nor outweighed by countervailing benefits to consumers or competition.

Analysis to Aid Public Comment

The Proposed Consent Order

The proposed consent order contains provisions designed to prevent Respondents from engaging in similar acts and practices in the future and to halt continuing harm caused by Respondents' prior unlawful practices. Part I of the proposed order prohibits Respondents from contacting any consumer's computer, to display ads or otherwise, if their adware was installed on that computer before January 1, 2006.

Parts II and III prohibit Respondents from, or assisting others in, installing software onto any computer by exploiting security vulnerabilities or failing to give adequate notice to consumers, or installing any software program or application without express consent. "Express consent" is defined in the proposed order to require clear and prominent disclosure of material terms prior to and separate from any end user license agreement, and consumer activation of the download or installation via clicking a button or a substantially similar action.

Part IV requires Respondents to establish, implement, and maintain a clearly disclosed, user-friendly mechanism through which consumers can report and Respondents can timely address complaints regarding Respondents' practices.

Part V requires Respondents to establish, implement, and maintain a comprehensive program that is reasonably designed to require affiliates to obtain express consent before installing Respondents' software onto consumers' computers. Part V also contains sub-parts mandating certain measures Respondents must take to monitor their distribution network.

Part VI requires Respondents to identify advertisements served via Respondents' adware in order for consumers to easily locate the source of the advertisement, easily access Respondents' complaint mechanism, and access directions on how to uninstall such adware.

Analysis to Aid Public Comment

Part VII requires Respondents to provide reasonable and effective means for consumers to uninstall Respondents' adware.

Part IX requires Respondents to pay \$3 million to the Commission over the course of a year. In the discretion of the Commission, these funds may be used to provide such relief as it determines to be reasonably related to Respondents' practices alleged in the complaint, and to pay any attendant administrative costs. Such relief may include the rescission of contracts, payment of damages, and/or public notification respecting such unfair or deceptive practices. If the Commission determines, in its sole discretion, that such relief is wholly or partially impractical, any funds not used shall be paid to the U.S. Treasury.

Part X requires Respondents to cooperate with the Commission in this action or any subsequent investigations related to or associated with the transactions or the occurrences that are the subject of the Complaint.

The remaining order provisions govern record retention (Part VIII), order distribution (Part XI), ongoing reporting requirements (Parts XII and XIII), and filing a compliance report (Part XIV). Part XV provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

TC GROUP, L.L.C., ET AL.CONSENT ORDER, ETC. , IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT*Docket C-4183; File No. 061 0197**Complaint, January 24, 2007 — Decision, March 14, 2007*

This consent order addresses the acquisition of Kinder Morgan, Inc., by a group of investors. Kinder Morgan is a midstream energy firm whose business includes the terminaling of gasoline and other light petroleum products. Among the investors are TC Group, L.L.C. (The Carlyle Group), and Riverstone Holdings LLC, who together operate several private equity funds that focus on energy-related investments. Two of their funds, Carlyle/Riverstone Global Energy and Power Fund III, L.P. and Carlyle Partners IV, L.P., will each acquire approximately 11.3% of the equity in Kinder Morgan. Another fund, Carlyle/Riverstone Global Energy and Power Fund II, L.P., holds interests in various energy firms, including a 50% interest in the general partner that controls Magellan Midstream Partners, L.P., a midstream terminal and pipeline company that competes with Kinder Morgan. Kinder Morgan and Magellan are two of only three significant “independent” (*i.e.* not owned by a refiner) terminaling companies in the southeastern United States. A reduction in competition, through partial common ownership of the two companies, may result in higher prices of gasoline and other light petroleum products, reduced supply, or other anticompetitive effects in these markets. The order effectively remedies these possible effects by, among other things, prohibiting representatives of Carlyle or Riverstone from serving on any of the Magellan boards, prohibiting Carlyle and Riverstone from exerting control or influence over Magellan as long as they hold an interest in or can influence Kinder Morgan, and requiring respondents to set firewalls to prevent the exchange of competitively sensitive non-public information. The Commission also issued an order to maintain assets, which required the respondents to adhere to the terms of the proposed consent order during the time leading up to their acquisition of equity interests in Kinder Morgan.