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15
16 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

17 FEDERAL TRADE COMMISSION, and)
18)
19 THE PEOPLE OF THE STATE)
OF CALIFORNIA,)
20) Plaintiffs,)
21) v.)
22)
23 OPTIN GLOBAL, INC., a Delaware)
Corporation, also doing business as)
24 Vision Media Limited Corp., USA Lenders)
Network, USA Lenders, and USA Debt)
Consolidation Service;)
25)
26 VISION MEDIA LIMITED CORP.,)
a Commonwealth of Dominica Corporation,)
also doing business as Optin Global, Inc.,)
USA Lenders Network, USA Lenders, and)

SC
C 05 1502

CV No.

COMPLAINT FOR
INJUNCTION, DAMAGES,
CIVIL PENALTIES AND OTHER
EQUITABLE RELIEF

1 USA Debt Consolidation Service;)
2 RICK YANG, also known as Qing)
3 Kuang Yang, individually, and as principal)
4 and owner of Vision Media Limited Corp.)
5 and Optin Global, Inc.; and)
6 PEONIE PUI TING CHEN, individually,)
7 and as president of Optin Global, Inc.;)
8 Defendants.)

8 Plaintiffs, the Federal Trade Commission (“FTC” or the “Commission”) and the People
9 of the State of California, for their complaint allege as follows:

- 10 1. The Commission brings this action under Sections 13(b) and 19 of the Federal Trade
11 Commission Act (“FTC Act”), 15 U.S.C. §§ 53(b) and 57b (2004), and Sections 7(a) and
12 (d) of the Controlling the Assault of Non-Solicited Pornography And Marketing Act of
13 2003 (“CAN-SPAM Act”), 15 U.S.C. § 7706(a) and (d) (2004), to obtain temporary,
14 preliminary, and permanent injunctive relief, rescission of contracts, restitution, redress,
15 disgorgement, and other equitable relief for Defendants’ violations of Section 5(a) of the
16 FTC Act, 15 U.S.C. § 45(a) (2004) and Section 5(a) of the CAN-SPAM Act, 15 U.S.C.
17 § 7704(a) (2004).
- 18 2. The People of the State of California bring this action under Section 7(f) of the CAN-
19 SPAM Act, 15 U.S.C. § 7706(f) (2004), and Sections 17200 *et seq.*, 17529.5, 17535, and
20 17536 of the California Business and Professions Code to obtain temporary, preliminary,
21 and permanent injunctive relief, rescission of contracts, restitution, redress, disgorgement,
22 statutory damages (including aggravated statutory damages), civil penalties, attorney fees,
23 and other equitable relief for Defendants’ violations of Section 5(a) of the CAN-SPAM
24 Act, 15 U.S.C. § 7704(a) (2004) and Sections 17529.5 and 17200 of the California
25 Business and Professions Code.

1 enforcement officer. An Attorney General of a state is authorized to initiate federal
2 district court proceedings to enjoin violations of Section 5 of the CAN-SPAM Act,
3 15 U.S.C. § 7704 (2004), and, in each such case, to obtain actual monetary loss or
4 damages on behalf of residents of California of up to \$250 per violation, and to obtain
5 such further and other relief as the Court deems appropriate, including treble damages
6 and attorney fees. 15 U.S.C. § 7706(f) (2004). The Attorney General of California is
7 also charged with the enforcement of section 17529.5 of the California Business and
8 Professions Code, which prohibits deceptive practices connected to unsolicited
9 commercial email. Cal. Bus. & Prof. Code § 17529.8 (West 1997 & Supp. 2004); *Id.*
10 § 17529.5(b)(1), as amended, Cal. Stats. 2004, c. 571 (S.B.1457), § 1. The Attorney
11 General, in the name of the People of the State of California, is authorized to seek
12 statutory damages of \$1,000 for each email sent in violation of section 17529.5, up to
13 \$1 million per incident (*id.* § 17529.5(b), as amended, Cal. Stats. 2004, c. 571
14 (S.B.1457), § 1), as well as injunctive relief and civil penalties of up to \$2,500 per
15 violation. Cal. Bus. & Prof. Code §§ 17535 & 17536 (West 1997). The Attorney
16 General of California also enforces section 17200 *et seq.* of the California Business and
17 Professions Code, which prohibits unfair competition, including unlawful, unfair or
18 fraudulent business acts or practices, and is empowered to seek injunctive relief and civil
19 penalties of up to \$2,500 per violation. Cal. Bus. & Prof. Code §§ 17204 & 17206
20 (West 1997).

21 DEFENDANTS

- 22 9. Defendant **Optin Global, Inc.**, also doing business as Vision Media Limited Corp., USA
23 Lenders Network, USA Lenders, and USA Debt Consolidation Service ("Optin Global"),
24 is a Delaware Corporation registered as a foreign corporation in California with its
25 principal place of business located at 6466 Livia Avenue, Temple City, California, 91780.
26 Since at least January 1, 2004, Optin Global has formulated, directed, controlled, or

1 participated in the acts or practices set forth in this complaint. Optin Global transacts or
2 has transacted business in the Northern District of California and elsewhere.

3 10. Defendant **Vision Media Limited Corp.**, also doing business as Optin Global, USA
4 Lenders Network, USA Lenders, and USA Debt Consolidation Service ("Vision Media"),
5 is a Commonwealth of Dominica corporation with its mailing address of
6 8 Cophall, P.O. Box 2331, Roseau, St. George, 00152, Commonwealth of Dominica.
7 Since at least January 1, 2004, Vision Media has formulated, directed, controlled, or
8 participated in the acts or practices set forth in this complaint. Vision Media transacts or
9 has transacted business in the Northern District of California and elsewhere.

10 11. Defendant **Rick Yang**, also known as Qing Kuang Yang, ("Yang"), is a principal and
11 owner of Optin Global and Vision Media. Since at least January 1, 2004, he has
12 formulated, directed, controlled, or participated in the acts or practices set forth in this
13 complaint. In connection with matters alleged herein, he has transacted business in the
14 Northern District of California and elsewhere.

15 12. Defendant **Peonie Pui Ting Chen** ("Chen") is the president of Optin Global. Since at
16 least January 1, 2004, she has formulated, directed, controlled, or participated in the acts
17 or practices set forth in this complaint. In connection with matters alleged herein, she has
18 transacted business in the Northern District of California and elsewhere.

19 13. Defendants Optin Global and Vision Media have operated as a common business
20 enterprise in commission of the violations of the FTC Act, the CAN-SPAM Act, and
21 sections 17529.5 and 17200 *et seq.* of the California Business and Professions Code.

22 14. Optin Global, Vision Media, Yang, and Chen are referred to jointly in this complaint as
23 the "Defendants."

24 15. Defendants' client, Abacus Enterprises, is located in this District.

25 16. Defendants have initiated commercial email to consumers located in this District.
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COMMERCE

17. At all times relevant to this complaint, Defendants have maintained a substantial course of trade in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44 (2004).

DEFINITIONS

18. “**Electronic mail message**” (or “**email**”) “means a message sent to a unique electronic mail address.” 15 U.S.C. § 7702(6) (2004).

19. “**Electronic mail address**” “means a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox (commonly referred to as the “local part”) and a reference to an Internet domain (commonly referred to as the “domain part”), whether or not displayed, to which an electronic mail message can be sent or delivered.” 15 U.S.C. § 7702(5) (2004).

20. “**Commercial electronic mail message**” (or “**commercial email**”) “means any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).” 15 U.S.C. § 7702(2) (A) (2004).

21. “**Header information**” “means the source, destination, and routing information attached to an electronic mail message, including the originating domain name and originating electronic mail address, and any other information that appears in the line identifying, or purporting to identify, a person initiating the message.” 15 U.S.C. § 7702(8) (2004).

22. “**Initiate**,” “when used with respect to a commercial email message, means to originate or transmit such message or to procure the origination or transmission of such message.” 15 U.S.C. § 7702(9) (2004).

23. “**Procure**,” “when used with respect to the initiation of a commercial email message, means intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one’s behalf.” 15 U.S.C. § 7702(12) (2004).

- 1 24. **“Protected computer”** means a computer which is used in interstate or foreign
2 commerce or communication, including a computer located outside the United States that
3 is used in a manner that affects interstate or foreign commerce or communication of the
4 United States. 15 U.S.C. § 7702(13) (2004); 18 U.S.C. § 1030(e)(2)(B) (2004).
- 5 25. **“Sender”** “when used with respect to a commercial electronic mail message, means a
6 person who initiates such a message and whose product, service, or Internet website is
7 advertised or promoted by the message.” 15 U.S.C. § 7702(16)(B) (2004).

8 DEFENDANTS’ COURSE OF CONDUCT

- 9 26. Since at least January 1, 2004, and continuing to the present, Defendants have initiated
10 the transmission of hundreds of thousands of commercial email messages. Defendants’
11 commercial email messages advertise a variety of products and services, including auto
12 warranties, pharmaceutical products, online college degree programs, and mortgage
13 services. The commercial email messages contain hyperlinks to websites operated by
14 Defendants that promote these various products and services.
- 15 27. In numerous instances, Defendants’ commercial email messages violate Section 5 of the
16 CAN-SPAM Act, 15 U.S.C. § 7704 (2004). The messages contain false header
17 information, fail to notify recipients of their opt-out rights, fail to include functioning opt-
18 out mechanisms, contain deceptive subject headings, fail to identify that they are
19 advertisements, and/or fail to include the sender’s valid postal address. In addition,
20 Defendants often continue to send commercial email to recipients even after the
21 recipients have requested not to receive any future commercial email messages from
22 Defendants.
- 23 28. Since March 2004, members of the public have forwarded to the FTC over 1,870,000
24 commercial email messages that advertise Defendants’ websites.
- 25 29. Since January 2004, California residents have forwarded to the California Attorney
26 General’s office over 1,000 commercial email messages that advertise Defendants’

1 websites.

2 30. Many of Defendants' commercial email messages promote mortgage services. These
3 messages contain hyperlinks to Defendants' websites, such as *www.myeasysavings.com*,
4 where consumers are asked to provide personal information to obtain information about
5 mortgage services. The websites state that consumers' personal information will then be
6 shared with multiple mortgage brokers and/or banks who will contact the consumers
7 regarding the mortgage services they offer.

8 31. Defendants in fact sell the information submitted by consumers on their mortgage
9 services websites to other companies, known as lead companies, including such lead
10 companies as Abacus Enterprises and Infinite Leads Marketing. The lead companies then
11 sell the information to other lead companies, such as The Loan Page, Inc., Huling, Inc.,
12 and others. In the end, these intermediary lead companies sell the information to
13 mortgage lenders and brokers, such as Indy Mac Bank, Ameriquest Mortgage Company,
14 BLS Funding, and Mortgage South, who then contact consumers to offer mortgage
15 services.

16 32. Abacus Enterprises, of El Cerrito, California, which is located in this District, purchased
17 approximately 69,000 leads from Defendants in 2004.

18 **Defendants Initiate Commercial Email Messages**

19 33. The primary purpose of Defendants' commercial email messages is the advertisement or
20 promotion of products or services, including content on Internet websites operated by
21 Defendants for commercial purposes.

22 34. Defendants are "initiators" with respect to an email message when they either originate or
23 transmit a message themselves or they procure the origination or transmission of a
24 message through payments or other consideration, or inducements, to their agents or
25 affiliates.

26 35. Defendants are "senders" with respect to an email message when they initiate a message

1 and it is Defendants' products, services, or websites that are being advertised or promoted
2 by such message.

3 **Defendants Use Deceptive Subject Headings**

4 36. In numerous instances, Defendants initiate commercial email messages that promote
5 mortgage services with subject headings that deceptively suggest that the recipients have
6 already submitted applications, have accounts, or have prior relationships with the sender.
7 Some examples of these subject headings include "About Your M[o]rtgage application,"
8 "Customer ID 54056," "Account info," or "Your Application Confirmation."

9 37. In numerous instances, recipients of Defendants' commercial email messages have not
10 already submitted applications, do not have accounts, and do not have prior relationships
11 with the sender.

12 **Defendants Fail to Identify Their Messages as Advertisements**

13 38. The text of numerous commercial email messages initiated by Defendants that promote
14 mortgage services fails to conspicuously identify the messages as advertisements or
15 solicitations. Rather, the content of many of these messages falsely suggests that the
16 recipients have already inquired about mortgage services, made some type of prior
17 contact, or have a prior relationship with the company.

18 39. For example, one of Defendants' email campaigns states in part:

19 Thank you for your m.ortgage [sic] application, which we received
20 yesterday. We are glad to confirm that your application was
21 accepted and you can get as low as a 3% fixed rate.

22 **Defendants Use False or Misleading Headers**

23 40. Commercial email messages initiated by Defendants contain header information,
24 including "from" and "reply-to" lines. The "from" line purports to identify who sent the
25 email message; the "reply-to" line identifies to whom a return email message will be sent
26 if the email recipient clicks on the "reply" button in the recipient's email software.

41. Defendants have initiated commercial email messages that contain false header

1 information. For example, in numerous instances, Defendants have initiated commercial
2 email messages which include false information as to the originating email address.

3 42. In numerous instances, the email addresses listed in the "from" lines or "reply-to" lines of
4 Defendants' email messages have not been valid email accounts at the time the messages
5 were sent.

6 43. Many recipients who attempt to reply to Defendants' commercial email messages find
7 that messages sent to the email addresses listed are rejected and returned as
8 "undeliverable."

9 44. The false or misleading header information has impaired law enforcement's ability to
10 identify, locate, or respond to the persons who initiated the electronic mail messages and
11 to investigate alleged violations.

12 45. In addition, in numerous instances Defendants' commercial email messages have come
13 from email accounts obtained under false or fraudulent pretenses or representations. For
14 example, some of Defendants' commercial email messages contain email addresses in the
15 "from" line that include domain names such as Hotmail.com, MSN.com, AOL.com, and
16 Yahoo.com. The access to these email accounts was obtained under false pretenses
17 because using these email accounts to send commercial email messages violates the terms
18 of use policies of these email account providers.

19 **Defendants Fail to Notify Recipients of Right to Opt-Out**

20 46. Many of Defendants' commercial email messages fail to include **any** notification to
21 recipients of their ability to decline receiving future email messages from Defendants, and
22 they fail to include a reply email address or other mechanism that recipients can use to
23 decline receiving future email messages from Defendants.

24 47. In other instances, Defendants' commercial email messages include only vague
25 indications of recipients' rights, with statements such as, "No thanks," "Not for you?,"
26 "Reference Options," "REM," and "Future Options."

1
2 **Defendants Fail to Provide Functioning Opt-Out Mechanisms
and Defendants Fail to Honor Opt-Out Requests**

3 48. Defendants' commercial email messages and their web pages sometimes include
4 hyperlinks that purport to provide recipients with mechanisms to request not to receive
5 future commercial email messages from Defendants at the recipients' email addresses. In
6 some instances the hyperlinks are not activated and do not lead to functioning web pages
7 or other mechanisms that could receive recipients' opt-out requests.

8 49. Even when the links lead to functioning web pages, recipients who use the links and
9 follow the steps to request that their email addresses be removed from Defendants' email
10 mailing list, continue to receive commercial email messages from Defendants more than
11 10 business days after making such requests. In numerous instances, recipients continue
12 to receive commercial email initiated by Defendants for weeks and months after
13 submitting their requests not to receive future commercial email messages from
14 Defendants.

15 **Defendants Fail to Include a Valid Postal Address**

16 50. In numerous instances, Defendants fail to provide a valid physical postal address in their
17 commercial email messages. Many of Defendants' commercial email messages fail to
18 include any postal address at all for the sender of the email messages.

19 51. When Defendants' commercial email messages include a postal address, it is often a fake
20 postal address. In many instances, Defendants' commercial email messages include a
21 postal address in Canada, Box 40937, Bedford, Nova Scotia, B4A 3Z2, that does not
22 exist. Recipients who try to contact Defendants by sending letters to this postal address
23 receive such letters back in the return mail marked "undeliverable as addressed" or they
24 receive no response at all.

1 **VIOLATIONS OF THE CAN-SPAM ACT**

2 52. The CAN-SPAM Act, 15 U.S.C. § 7701 *et seq.* (2004), became effective on January 1,
3 2004, and has since remained in full force and effect.

4 53. Section 5(a)(1) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(1) (2004), states:

5 It is unlawful for any person to initiate the transmission, to a
6 protected computer, of a commercial electronic mail message, or a
7 transactional or relationship message, that contains, or is
8 accompanied by, header information that is materially false or
9 materially misleading. For the purposes of this paragraph –

10 (A) header information that is technically accurate but includes an
11 originating electronic mail address, domain name, or Internet
12 Protocol address the access to which for purposes of initiating the
13 message was obtained by means of false or fraudulent pretenses or
14 representations shall be considered materially misleading

15 54. Section 5(a)(6) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(6) (2004), states:

16 For purposes of [section 5(a)(1)], the term “materially,” when used
17 with respect to false or misleading header information, includes the
18 alteration or concealment of header information in a manner that
19 would impair the ability of an Internet access service processing
20 the message on behalf of a recipient, a person alleging a violation
21 of this section, or a law enforcement agency to identify, locate, or
22 respond to a person who initiated the electronic mail message or to
23 investigate the alleged violation, or the ability of a recipient of the
24 message to respond to a person who initiated the electronic
25 message.

26 55. Section 5(a)(2) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(2) (2004), states:

It is unlawful for any person to initiate the transmission to a
protected computer of a commercial electronic mail message if
such person has actual knowledge, or knowledge fairly implied on
the basis of objective circumstances, that a subject heading of the
message would be likely to mislead a recipient, acting reasonable
under the circumstances, about a material fact regarding the
contents or subject matter of the message (consistent with the
criteria used in enforcement of section 5 of the Federal Trade
Commission Act (15 U.S.C. 45)).

56. Section 7(e) of the CAN-SPAM Act, 15 U.S.C. § 7706(e) (2004), states that in any action
to enforce compliance through an injunction with Section 5(a)(2) and other specified
sections of the CAN-SPAM Act, the FTC need not allege or prove the state of mind

1 required by such sections.

2 57. Section 7(f)(2) of the CAN-SPAM Act, 15 U.S.C. § 7706(f)(2) (2004), states that in a
3 civil action brought by a state attorney general to enjoin violations of Section 5 of the
4 CAN-SPAM Act, 15 U.S.C. § 7704 (2004), the attorney general shall not be required to
5 allege or prove the state of mind required by Section 5(a)(2) and other specified sections
6 of the CAN-SPAM Act.

7 58. Section 5(a)(3) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(3) (2004), states:

8 It is unlawful for any person to initiate the transmission to a
9 protected computer of a commercial electronic mail message that
10 does not contain a functioning return electronic mail address or
11 other Internet-based mechanism, clearly and conspicuously
12 displayed, that –

13 (i) a recipient may use to submit, in a manner specified in the
14 message, a reply electronic mail message or other form of Internet-
15 based communication requesting not to receive future commercial
16 electronic mail messages from that sender at the electronic mail
17 address where the message was received; and

18 (ii) remains capable of receiving such messages or communications
19 for no less than 30 days after the transmission of the original
20 message.

21 59. Section 5(a)(4)(A) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(4)(A) (2004), states:

22 If a recipient makes a request using a mechanism provided
23 pursuant to [Section 5(a)(3) of the CAN-SPAM Act, 15 U.S.C.
24 § 7704(a)(3),] not to receive some or any commercial electronic
25 mail messages from such sender, then it is unlawful --

26 (i) for the sender to initiate the transmission to the recipient, more
than 10 business days after the receipt of such request, of a
commercial electronic mail message that falls within the scope of
the request.

21 60. Section 5(a)(5)(A) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(5)(A) (2004), states:

22 (A) It is unlawful for any person to initiate the transmission of any
23 commercial electronic mail message to a protected computer unless
24 the message provides –

25 (i) clear and conspicuous identification that the message is an
26 advertisement or solicitation;

(ii) clear and conspicuous notice of the opportunity under [section
5(a)(3)] to decline to receive further commercial electronic mail
messages from the sender; and

(iii) a valid physical postal address of the sender.

- 1 a. a clear and conspicuous notice of the recipient's opportunity to decline to receive
2 further commercial electronic mail messages from Defendants at the recipient's
3 electronic mail address; and/or
4 b. a functioning return electronic mail address or other Internet-based mechanism,
5 clearly and conspicuously displayed, that a recipient could use to submit a reply
6 electronic mail message or other form of Internet-based communication
7 requesting not to receive future commercial electronic mail messages from
8 Defendants at the electronic mail address where the message was received, and
9 that remains capable of receiving such messages or communications for no less
10 than 30 days after the transmission of the original message.

11 66. Therefore, Defendants' acts or practices violate Section 5(a)(5)(A)(ii) and/or Section
12 5(a)(3) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(5)(A)(ii) and/or § 7704(a)(3) (2004).

13 **COUNT IV - Pattern or Practice of Failing to Notify Recipients of**
14 **or Include Opt-Out Mechanism**
15 **(By the People of the State of California)**

16 67. Defendants have engaged in a pattern or practice of initiating the transmission, to
17 protected computers, of commercial email messages that advertise or promote
18 Defendants' Internet websites, products or services, and do not include:

- 19 a. a clear and conspicuous notice of the recipient's opportunity to decline to receive
20 further commercial electronic mail messages from Defendants at the recipient's
21 electronic mail address; and/or
22 b. a functioning return electronic mail address or other Internet-based mechanism,
23 clearly and conspicuously displayed, that a recipient could use to submit a reply
24 electronic mail message or other form of Internet-based communication
25 requesting not to receive future commercial electronic mail messages from
26 Defendants at the electronic mail address where the message was received, and
that remains capable of receiving such messages or communications for no less

1 than 30 days after the transmission of the original message.

2 68. Therefore, Defendants' acts or practices violate Section 5(a)(5)(A)(ii) and/or Section
3 5(a)(3) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(5)(A)(ii) and/or § 7704(a)(3) (2004).

4
5 **COUNT V - Failure to Honor Opt-Out Requests**
(By Federal Trade Commission)

6 69. In numerous instances, Defendants have initiated the transmission of commercial email
7 messages, that advertise or promote Defendants' Internet websites, products or services,
8 to recipients' email addresses, more than 10 business days after receiving requests from
9 those recipients, that were submitted through reply email messages or through other
10 forms of Internet-based communication contained in Defendants' commercial email
11 messages, not to receive future commercial electronic mail messages from Defendants at
12 the recipients' electronic mail addresses.

13 70. Therefore, Defendants' acts or practices violate Section 5(a)(4)(A)(i) of the CAN-SPAM
14 Act, 15 U.S.C. § 7704(a)(4)(A)(i) (2004).

15
16 **COUNT VI - Pattern or Practice of Failing to Honor Opt-Out Requests**
(By the People of the State of California)

17 71. Defendants have engaged in a pattern or practice of initiating the transmission of
18 commercial email messages, that advertise or promote Defendants' Internet websites,
19 products or services, to recipients' email addresses, more than 10 business days after
20 receiving requests from those recipients, that were submitted through reply email
21 messages or through other forms of Internet-based communication contained in
22 Defendants' commercial email messages, not to receive future commercial electronic
23 mail messages from Defendants at the recipients' electronic mail addresses.

24 72. Therefore, Defendants' acts or practices violate Section 5(a)(4)(A)(i) of the CAN-SPAM
25 Act, 15 U.S.C. § 7704(a)(4)(A)(i) (2004).

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**COUNT VII - Failure to Identify Email as Advertisement or Solicitation
(By Federal Trade Commission)**

73. In numerous instances, Defendants have initiated the transmission, to protected computers, of commercial email messages that do not include clear and conspicuous identification that the messages are advertisements or solicitations.

74. Therefore, Defendants' acts or practices violate Section 5(a)(5)(A)(i) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(5)(A)(i) (2004).

**COUNT VIII - Pattern or Practice of Failing to Identify Email as
Advertisement or Solicitation (By the People of the State of California)**

75. Defendants have engaged in a pattern or practice of initiating the transmission, to protected computers, of commercial email messages that do not include clear and conspicuous identification that the messages are advertisements or solicitations.

76. Therefore, Defendants' acts or practices violate Section 5(a)(5)(A)(i) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(5)(A)(i) (2004).

**COUNT IX - Failure to Include Valid Physical Postal Address
(By Federal Trade Commission)**

77. In numerous instances, Defendants have initiated the transmission, to protected computers, of commercial email messages that advertise or promote Defendants' Internet websites, products, or services and do not include the senders' valid physical postal address.

78. Therefore, Defendants' acts or practices violate Section 5(a)(5)(A)(iii) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(5)(A)(iii) (2004).

**COUNT X - Pattern or Practice of Failing to Include Valid Physical Postal Address
(By the People of the State of California)**

79. Defendants have engaged in a pattern or practice of initiating the transmission, to protected computers, of commercial email messages that advertised or promoted

1 Defendants' Internet websites, products, or services and did not include the senders' valid
2 physical postal address.

3 80. Therefore, Defendants' acts or practices violate Section 5(a)(5)(A)(iii) of the CAN-
4 SPAM Act, 15 U.S.C. § 7704(a)(5)(A)(iii) (2004).

5 **VIOLATIONS OF CALIFORNIA LAW**

6 81. Section 17529.5 of the California Business and Professions Code became effective
7 January 1, 2004, providing:

8 It is unlawful for any person or entity to advertise using a
9 commercial e-mail advertisement either sent from California or
10 sent to a California electronic mail address under any of the
11 following circumstances:

12 (a) The commercial e-mail advertisement contains or is
13 accompanied by a third party's domain name without the
14 permission of the third party.

15 (b) The commercial e-mail advertisement contains or is
16 accompanied by falsified, misrepresented, obscured, or forged
17 header information. This paragraph does not apply to truthful
18 information used by a third party who has been lawfully authorized
19 by the advertiser to use that information.

20 (c) The commercial e-mail advertisement has a subject line that a
21 person knows would be likely to mislead a recipient, acting
22 reasonably under the circumstances, about a material fact regarding
23 the contents or subject matter of the message.

24 Cal. Bus. & Prof. Code § 17529.5 (West 1997 & Supp. 2004).

25 82. Section 17529.5 was amended effective January 1, 2005, to provide, in pertinent part:

26 (a) It is unlawful for any person or entity to advertise in a
commercial e-mail advertisement either sent from California or
sent to a California electronic mail address under any of the
following circumstances: . . .

(2) The e-mail advertisement contains or is accompanied by
falsified, misrepresented, or forged header information. This
paragraph does not apply to truthful information used by a third
party who has been lawfully authorized by the advertiser to use that
information.

(3) The e-mail advertisement has a subject line that a person knows
would be likely to mislead a recipient, acting reasonably under the
circumstances, about a material fact regarding the contents or

1 subject matter of the message.

2 (b) (1) (A) In addition to any other remedies provided by any other
3 provision of law, the following may bring an action against a
4 person or entity that violates any provision of this section:

5 (i) The Attorney General. . . .

6 (B) A person or entity bringing an action pursuant to subparagraph
7 (A) may recover either or both of the following:

8 (i) Actual damages.

9 (ii) Liquidated damages of one thousand dollars (\$1,000) for each
10 unsolicited commercial e-mail advertisement transmitted in
11 violation of this section, up to one million dollars (\$1,000,000) per
12 incident.

13 (C) The recipient, an electronic mail service provider, or the
14 Attorney General, if the prevailing plaintiff, may also recover
15 reasonable attorney's fees and costs. . . .

16 Cal. Stats. 2004, c. 571 (S.B.1457), § 1.

17 **COUNT XI – Falsified, Misrepresented, or Forged Header Information**
18 **(By the People of the State of California)**

19 83. Defendants advertised by means of commercial e-mail advertisements that were either
20 sent from California or sent to a California electronic mail address and that contained or
21 were accompanied by falsified, misrepresented or forged header information.

22 84. Therefore, Defendants' conduct during 2004 violated section 17529.5(b) of the California
23 Business and Professions Code. Cal. Bus. & Prof. Code § 17529.5(b) (West 1997 &
24 Supp. 2004). Defendants' conduct during 2005 violates section 17529.5(a)(2) of the
25 California Business and Professions Code. Cal. Bus. & Prof. Code § 17529.5(a)(2) as
26 amended, Cal. Stats. 2004, c. 571 (S.B.1457), § 1.

COUNT XII – Misleading Subject Line
(By the People of the State of California)

85. Defendants advertised by means of commercial email advertisements that were either sent
from California or sent to a California electronic mail address and that had subject lines

1 likely to mislead a recipient, acting reasonably under the circumstances, about a material
2 fact regarding the contents or subject matter of the message.

3 86. Therefore, Defendants' conduct during 2004 violated section 17529.5(c) of the California
4 Business and Professions Code. Cal. Bus. & Prof. Code § 17529.5(c) (West 1997 &
5 Supp. 2004). Defendants' conduct during 2005 violates section 17529.5(a)(3) of the
6 California Business and Professions Code. Cal. Bus. & Prof. Code § 17529.5(a)(3) as
7 amended, Cal. Stats. 2004, c. 571 (S.B.1457), § 1.

8
9 **COUNT XIII – Unfair Competition**
(By the People of the State of California)

10 87. Defendant have engaged in unfair competition as defined in section 17200 of the
11 California Business and Professions Code. Such acts of unfair competition include, but
12 are not limited to, violation of the CAN-SPAM Act and section 17529.5 of the California
13 Business and Professions Code, as alleged in paragraphs 61-86 of this complaint.

14 **CONSUMER INJURY**

15 88. Individuals and businesses throughout the United States, including throughout the State
16 of California have suffered, and continue to suffer, substantial injury as a result of
17 Defendants' unlawful acts or practices. In addition, Defendants have been unjustly
18 enriched as a result of their unlawful practices. Absent injunctive relief by this Court,
19 Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm
20 the public interest.

21 **THIS COURT'S POWER TO GRANT RELIEF**

22 89. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b) (2004), authorizes this Court to issue a
23 permanent injunction against Defendants' violations of the FTC Act, and, in the exercise
24 of its equitable jurisdiction, to order such ancillary relief as a temporary injunction,
25 preliminary injunction, consumer redress, rescission, restitution, and disgorgement of
26 profits resulting from Defendants' unlawful acts or practices, and other remedial

1 measures. A violation of the CAN-SPAM Act may be remedied in the same manner as a
2 violation of the FTC Act. 15 U.S.C. § 7706(a) and (d) (2004).

3 90. Section 19 of the FTC Act, 15 U.S.C. § 57b (2004), authorizes this Court to grant the
4 FTC such relief as the Court finds necessary to redress injury to consumers or others
5 resulting from Defendants' violations of the CAN-SPAM Act, including but not limited
6 to rescission and reformation of contracts and the refund of money.

7 91. Section 7(f) of the CAN-SPAM Act, 15 U.S.C. § 7706(f) (2004), authorizes this Court to
8 grant the People of the State of California injunctive relief, damages (including treble
9 damages for aggravated conduct), and attorneys fees.

10 92. Sections 17203 and 17204 of the California Business and Professions Code provides that
11 the Attorney General of California may seek and the Court may make such orders or
12 judgments permanently restraining and enjoining Defendant, its successors, agents,
13 representatives, employees, and all other persons who act under, by, through, or on behalf
14 of any of them, or any of them, from engaging in any acts of unfair competition in
15 violation of section 17200. Cal. Bus. & Prof. Code §§ 17203 & 17204 (West 1997).

16 93. Section 17535 of the California Business and Professions Code provides that the Attorney
17 General of California may seek and the Court may make such orders or judgments,
18 including the appointment of a receiver, as may be necessary to prevent the use or
19 employment by any person, corporation, firm, partnership, joint stock company, or any
20 other association or organization of any practices which violate section 17529.5. Cal.
21 Bus. & Prof. Code § 17535 (West 1997).

22 94. Section 17529.5, as applied to violations occurring on or after January 1, 2005, provides
23 that the Attorney General of California may seek and the Court may award liquidated
24 damages of one thousand dollars (\$1,000) for each commercial email advertisement
25 transmitted in violation of section 17529.5, up to one million dollars (\$1,000,000) per
26 incident. Cal. Bus. & Prof. Code § 17529.5(b) as amended, Cal. Stats. 2004, c. 571

1 (S.B.1457), § 1.

2 95. Section 17536 provides that the Attorney General of California may seek and the Court
3 may award a civil penalty of up to \$2,500 for each violation of section 17529.5. Cal. Bus.
4 & Prof. Code § 17536 (West 1997).

5 96. Section 17206 provides that the Attorney General of California may seek and the Court
6 may award a civil penalty of up to \$2,500 for each violation of section 17200. Cal. Bus.
7 & Prof. Code § 17206 (West 1997).

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiffs Federal Trade Commission and the People of the State of
10 California request that this Court, as authorized by Sections 13(b) and 19 of the FTC Act, 15
11 U.S.C. §§ 53(b) and 57b (2004), Section 7 of the CAN SPAM Act, 15 U.S.C. § 7706 (2004),
12 Sections 17203, 17204, 17206, 17529.6, 17535 & 17536 of the California Business and
13 Professions Code, and pursuant to its own equitable powers:

14 1. Award Plaintiffs such preliminary injunctive and ancillary relief as may be
15 necessary to avert the likelihood of injury during the pendency of this action and to preserve the
16 possibility of effective final relief, including by not limited to, temporary and preliminary
17 injunctions, and an order freezing Defendants' assets;

18 2. Permanently enjoin Defendants from violating Section 5 of the CAN SPAM Act,
19 15 U.S.C. § 7704 (2004), and Sections 17200 and 17529.5 of the California Business and
20 Professions Code as alleged in this complaint;

21 3. Enter judgment against Defendants and in favor of Plaintiffs for each violation
22 alleged in this complaint;

23 4. Award such relief as the Court finds necessary or appropriate to redress injury to
24 consumers or others resulting from Defendants' violations of law, including, but not limited to,
25 rescission or reformation of contracts, restitution, disgorgement of ill-gotten gains, the refund of
26 monies paid, and damages;

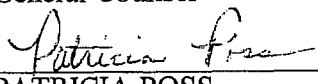
1 5. Award Plaintiff the People of the State of California civil penalties, attorneys fees
2 and statutory damages on behalf of its residents; and

3 6. Award Plaintiffs the costs of bringing this action, as well as such other additional
4 relief as the Court may determine to be just and proper.


5
6 Dated: 4/8/05

Respectfully Submitted,

7 WILLIAM BLUMENTHAL
8 General Counsel

9 
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26