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ENDORSED  
FILED  
Superior Court of California  
County of San Francisco

NOV 04 2014

CLERK OF THE COURT  
BY: VICTORIA GONZALEZ  
Deputy Clerk

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
17 COUNTY OF SAN FRANCISCO (UNLIMITED JURISDICTION)

18 JAY FINK, an individual; ) Case No.: **CGC-14-542524**  
19 STEPHEN FALLS, an individual; )  
20 DIANA HELLMAN, an individual; )  
21 WALTER HILL, an individual; and ) **COMPLAINT FOR DAMAGES**  
22 RICHARD WILLIS, an individual; )

23 Plaintiffs,  
24 v.

25 BYRON UDELL & ASSOCIATES INC., an )  
26 Illinois corporation; )  
27 TOPICA INC., a Delaware corporation; and )  
28 DOES 1-500; )  
29 Defendants. )

1. VIOLATIONS OF CALIFORNIA  
RESTRICTIONS ON UNSOLICITED  
COMMERCIAL E-MAIL (Cal. Bus. &  
Prof. Code § 17529.5)

**BY FAX**

30 COME NOW PLAINTIFFS JAY FINK *et al* and file this Complaint for one cause of action  
31 against Defendants BYRON UDELL & ASSOCIATES INC. *et al* and allege as follows:

1 **I. INTRODUCTION AND SUMMARY OF THE COMPLAINT**

2 1. Plaintiffs bring this Action against professional spammers BYRON UDELL &  
3 ASSOCIATES INC. (“ACCUQUOTE”) and its third party affiliates (aka “publishers”) and sub-  
4 affiliates, including TOPICA INC., for advertising in and sending at least 236 unlawful spams to  
5 Plaintiffs. A sample (*Figure 1*) appears on the next page.

6 2. No Plaintiff gave direct consent to, or had a preexisting or current business relationship  
7 with, ACCUQUOTE.

8 3. The spams all violated California Business & Professions Code § 17529.5 (“Section  
9 17529.5”) due to materially misrepresented or falsified information contained in or  
10 accompanying the email headers, and/or misleading Subject Lines.

11 4. ACCUQUOTE is strictly liable for advertising in spams sent by its third party affiliates.

12 5. Spam recipients are not required to allege or prove reliance or actual damages to have  
13 standing. *See* Bus. & Prof. Code § 17529(b)(1)(A)(iii). Nevertheless, Plaintiffs did suffer  
14 damages by receiving the spams. *See, e.g.*, Bus. & Prof. Code § 17529(d), (e), (g), (h).  
15 However, Plaintiffs elect to recover statutory damages only and forego recovery of any actual  
16 damages.

17 6. This Court should award liquidated damages of \$1,000 per email as provided by  
18 Section 17529.5(b)(1)(B)(ii), and not consider any reduction in damages, because  
19 ACCUQUOTE and TOPICA failed to implement reasonably effective systems designed to  
20 prevent the sending of unlawful spam in violation of the statute. The unlawful elements of these  
21 spams represent willful acts of falsity and deception, rather than clerical errors. Indeed,  
22 Plaintiffs are informed and believe and thereon allege that these spams were sent to a  
23 *suppression list* – i.e., a list of email addresses to *not* to send spams to.

24 7. This Court should award Plaintiffs their attorneys’ fees pursuant to Section  
25 17529.5(b)(1)(C). *See also* Code of Civil Procedure § 1021.5, providing for attorneys fees when  
26 private parties bear the costs of litigation that confers a benefit on a large class of persons; here,  
27 by reducing the amount of false and deceptive spam received by California residents.

28 //

29 //

30 //

31 //

1 Subject: Pending application processing-Missing information  
2 From: Veronica Davies (jen1001z@app.topica.com)  
3 To: (redacted);  
4 Date: Friday, November 8, 2013 2:15 AM



15 If you are counting on the small amount of life insurance you get free from work, or you don't have life insurance at all, I recommend that you at least review your options.

16 Did you know that you could be able to obtain **\$500,000.00 in coverage for less than \$1.00 each day?**

17 Here is a list of recently rated best-coverage-for-dollar coverage plans. Compare rates and get results in 8 minutes. **Protect your loved ones, it doesn't take much effort to ensure piece of mind.**



We all know financial times are tough, but skimping on Life Insurance is not a good way to save money. In fact, Life Insurance is considered the best investment you can make for your family's financial security.

I urge everyone to check and see if they are covered properly in case the unthinkable happens. With rates at historic lows, Life Insurance is more affordable than ever!

I originally had purchased **\$250,000.00 of coverage for only \$10.00 a month** to ensure my family was covered for the first 6 months or so. I later increased to **\$500,000.00 worth of coverage for less than \$1 a day.**  
**Coverage Starts Immediately & So Does Piece of Mind**

28  
29 Ins Solutions- 1827 W marten creek dr, Meridian ID 83646

30 [Unsubscribe](#) | [Update Profile](#) | [Confirm](#) | [Complain](#) | [Forward](#)

31 *Figure 1*

1 **II. PARTIES**

2 **A. Plaintiffs**

3 8. STEPHEN FALLS (“FALLS”) was domiciled in and a citizen of the State of California,  
4 when he received the spams at issue. The spams at issue were sent to FALLS’ email address that  
5 he ordinarily accesses from computer(s) located in California.

6 9. JAY FINK (“FINK”) was domiciled in and a citizen of the State of California, when he  
7 received the spams at issue. The spams at issue were sent to FINK’s email address that he  
8 ordinarily accesses from computer(s) located in California.

9 10. DIANA HELLMAN (“HELLMAN”) was domiciled in and a citizen of the State of  
10 California, when she received the spams at issue. The spams at issue were sent to HELLMAN’s  
11 email address that she ordinarily accesses from computer(s) located in California.

12 11. WALTER HILL (“HILL”) was domiciled in and a citizen of the State of California,  
13 when he received the spams at issue. The spams at issue were sent to HILL’s email address that  
14 he ordinarily accesses from computer(s) located in California.

15 12. RICHARD WILLIS (“WILLIS”) was domiciled in and a citizen of the State of  
16 California, when he received the spams at issue. The spams at issue were sent to WILLIS’ email  
17 address that he ordinarily accesses from computer(s) located in California.

18 13. Plaintiffs’ joinder in this Action is proper because Plaintiffs seek relief based on the same  
19 series of transactions or occurrences: all received similar spams in the same general time period  
20 advertising ACCUQUOTE’s websites, and all of those spams were sent by ACCUQUOTE or its  
21 marketing agents. The same questions of law (e.g., violations of Section 17529.5, strict liability)  
22 and fact (e.g., direct consent, practices and procedures to prevent advertising in unlawful spam)  
23 will arise in this Action. The fact that each Plaintiff does not sue for *exactly* the same spams  
24 does not bar joinder: “It is not necessary that each plaintiff be interested as to every cause of  
25 action or as to all relief prayed for. Judgment may be given for one or more of the plaintiffs  
26 according to their respective right to relief.” Code Civ. Proc. § 378(b).

27 **B. Defendants**

28 14. Plaintiffs are informed and believe and thereon allege that Defendant BYRON UDELL &  
29 ASSOCIATES INC. (“ACCUQUOTE”) is now, and was at all relevant times, an Illinois  
30 corporation with a primary place of business in Wheeling, Illinois, doing business as  
31 *Accuquote.com* and *Accuquotelife.com*, among other domain names/websites.

1 15. Plaintiffs are informed and believe and thereon allege that Defendant TOPICA INC.  
2 (“TOPICA”) is now, and was at all relevant times, a Delaware corporation with a primary place  
3 of business in San Francisco, California, doing business as *Topica.com*.

4 16. Plaintiffs do not know the true names or legal capacities of the Defendants designated  
5 herein as DOES 1 through 500, inclusive, and therefore sue said Defendants under the fictitious  
6 name of “DOE.” Plaintiffs are informed and believe and thereon allege that each of the  
7 Defendants designated herein as a DOE is legally responsible in some manner for the matters  
8 alleged in this complaint, and is legally responsible in some manner for causing the injuries and  
9 damages of which Plaintiffs complain. Plaintiffs are informed and believe and thereon allege  
10 that each of the Defendants designated herein as a DOE Defendant was, at all times relevant to  
11 the matters alleged within this complaint, acting in conjunction with the named Defendants,  
12 whether as a director, officer, employee, agent, affiliate, customer, participant, or co-conspirator.  
13 When the identities of DOE Defendants 1-500 are discovered, or otherwise made available,  
14 Plaintiffs will seek to amend this Complaint to allege their identity and involvement with  
15 particularity.

### 16 17 **III. JURISDICTION AND VENUE**

#### 18 **A. Jurisdiction is Proper in a California Superior Court**

19 17. This California Superior Court has jurisdiction over the Action for the following reasons:  
20 a) all Plaintiffs are domiciled in and citizens of the State of California; b) all Plaintiffs received  
21 the unlawful spams at their California email addresses; c) the amount in controversy is more than  
22 \$25,000; and d) TOPICA’s primary place of business is in California.

#### 23 **B. Venue is Proper in San Francisco County**

24 18. Venue is proper in San Francisco County (or indeed, *any* county in California of  
25 Plaintiffs’ choosing) because ACCUQUOTE is a foreign corporation that has not designated the  
26 location and address of a principal office in California or registered to do business in California  
27 with the California Secretary of State. *See Easton v. Superior Court of San Diego (Schneider*  
28 *Bros. Inc.)*, 12 Cal. App. 3d 243, 246 (4th Dist. 1970).

29 19. Venue is proper in San Francisco County because Defendant TOPICA’s primary place of  
30 business is in San Francisco County. *See Code Civ. Proc. § 395.*

1 **IV. AT LEAST 236 UNLAWFUL SPAMS**

2 20. Plaintiffs allege that Defendants engaged in tortious conduct: “wrongful act[s] other than  
3 a breach of contract for which relief may be obtained in the form of damages or an injunction.”  
4 *See* Merriam-Webster, [www.merriam-webster.com/dictionary/tort](http://www.merriam-webster.com/dictionary/tort) (last viewed Nov. 5, 2013).

5 21. California’s False Advertising Law, Business & Professions Code § 17500  
6 prohibits “not only advertising which is false, but also advertising which[,]  
7 although true, is either actually misleading or which has a capacity, likelihood or  
8 tendency to deceive or confuse the public.” . . . [T]he UCL and the false  
advertising law prohibit deceptive advertising even if it is not actually false.

9 *Chapman v. Skype Inc.*, 220 Cal. App. 4th 217, 226-27 (2d Dist. 2013) (citation omitted).

10 **A. The Emails at Issue are “Spams”; Recipients and Counts**

11 22. The emails at issue are “commercial email advertisements”<sup>1</sup> because they were initiated  
12 for the purpose of advertising and promoting the sale of ACCUQUOTE’s insurance products and  
13 services.

14 23. The emails are “unsolicited commercial email advertisements”<sup>2</sup> because no Plaintiff gave  
15 “direct consent”<sup>3</sup> to, or had a “preexisting or current business relationship”<sup>4</sup> with,  
16 ACCUQUOTE.

17 \_\_\_\_\_  
18  
19 <sup>1</sup> “‘Commercial e-mail advertisement’ means any electronic mail message initiated for the  
20 purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any  
21 property, goods, services, or extension of credit.” Bus. & Prof. Code § 17529.1(c).

22 <sup>2</sup> “‘Unsolicited commercial e-mail advertisement’ means a commercial e-mail advertisement sent  
23 to a recipient who meets both of the following criteria: (1) The recipient has not provided direct  
24 consent to receive advertisements from the advertiser. (2) The recipient does not have a  
25 preexisting or current business relationship, as defined in subdivision (l), with the advertiser  
promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services,  
or extension of credit.” Bus. & Prof. Code § 17529.1(o).

26 <sup>3</sup> “‘Direct consent’ means that the recipient has expressly consented to receive e-mail  
27 advertisements *from the advertiser*, either in response to a clear and conspicuous request for the  
28 consent or at the recipient’s own initiative.” Bus. & Prof. Code § 17529.1(d) (emphasis added).

29 <sup>4</sup> “‘Preexisting or current business relationship,’ as used in connection with the sending of a  
30 commercial e-mail advertisement, means that the recipient has made an inquiry and has provided  
31 his or her e-mail address, or has made an application, purchase, or transaction, with or without  
consideration, regarding products or services offered by the advertiser. [.]” Bus. & Prof. Code  
§ 17529.1(l).

1 24. ACCUQUOTE and TOPICA advertised in, sent, and/or conspired to send at least 236  
2 unlawful spams that Plaintiffs received at their “California email addresses”<sup>5</sup> within one year  
3 prior to the filing of this Action, as shown below:

PLAINTIFF	SPAMS RECEIVED
FALLS	20
FINK	62
HELLMAN	57
HILL	26
WILLIS	71

4  
5  
6  
7  
8  
9 25. Plaintiffs’ email addresses play no part in determining whether or not the emails have  
10 falsified, misrepresented, forged, misleading, or otherwise deceptive information contained in or  
11 accompanying the email headers.

12 26. The spams are all unlawful because the spams have materially falsified, misrepresented,  
13 and/or forged information contained in or accompanying the email headers, and/or Subject Lines  
14 that are misleading as to the contents or subject matter of the emails, as described in more detail  
15 below.

16 **B. Spams With False From Names Violate Business & Professions Code § 17529.5(a)(2)**

17 27. Section 17529.5(a)(2) prohibits falsified or misrepresented information contained in or  
18 accompanying email headers.

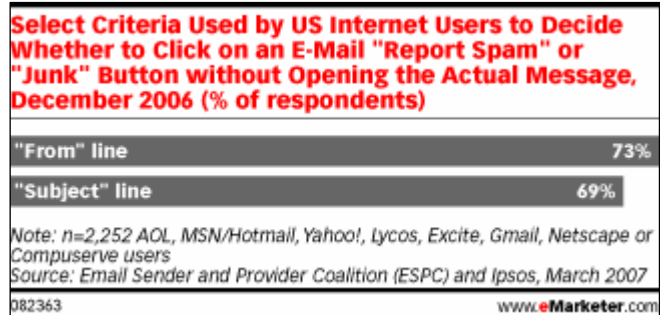
19 28. The From Name field is part of email headers. The From Name does *not* include the  
20 Sender Email Address.

21 29. Plaintiffs do not insist on any *particular* label (e.g., “Byron Udell & Associates Inc.,”  
22 “Byron Udell,” “Accuquote,” “Accuquote.com,” etc.) in the From Name field. Rather, Plaintiffs  
23 contend that the text, whatever it is, cannot misrepresent *who* the emails are from.

24 30. The From Name is important to an email user, because in almost all email programs, the  
25 inbox view only displays a list of emails, showing the From Name, Subject Line, and Send Date.  
26 Therefore, even *if* the body of the email identifies the advertiser, the recipient will not know that  
27 until s/he has already clicked to open the email.

28  
29  
30 <sup>5</sup> “‘California e-mail address’ means 1) An e-mail address furnished by an electronic mail service  
31 provider that sends bills for furnishing and maintaining that e-mail address to a mailing address  
in this state; 2) An e-mail address ordinarily accessed from a computer located in this state; 3)  
An e-mail address furnished to a resident of this state.” Bus. & Prof. Code § 17529.1(b).

1 31. Indeed, empirical evidence has  
2 demonstrated that the From Name is the  
3 *most* important factor email recipients use  
4 to determine whether or not an email is  
5 spam. See eMarketer, E-Mail Open Rates  
6 Hinge on ‘Subject’ Line, *available at*



7 <http://www.emarketer.com/Article/E-Mail-Open-Rates-Hinge-on-Subject-Line/1005550> (Oct.  
8 31, 2007). Thus, a From Name that misrepresents who a spam is from is *not* a mere technical  
9 error; rather, it is a material misrepresentation of the most important part of the email header.

10 32. Although Plaintiffs do *not* sue under the federal CAN-SPAM Act, Plaintiffs note that the  
11 Federal Trade Commission has also identified the From Name as the first item in misleading  
12 header information in its guide to CAN-SPAM compliance when it stated

13 1. Don't use false or misleading header information. Your "*From,*" "*To,*"  
14 "*Reply-To,*" and routing information – including the originating domain name  
15 and email address – *must be accurate and identify the person or business who*  
*initiated the message.*

16 Federal Trade Commission, CAN-SPAM ACT: A COMPLIANCE GUIDE FOR BUSINESS, *available*  
17 *at* <http://www.business.ftc.gov/documents/bus61-can-spam-act-compliance-guide-business>  
18 (emphasis added).

19 33. All of the spams that Plaintiffs received advertising ACCUQUOTE's websites showed  
20 purported names in the From Name field (e.g. "Tracy Lee," "Madisen Parker," "Jessica North,"  
21 "Yvonne Jensen," "Kate Jordan") but Plaintiffs are informed and believe and thereon allege that  
22 none of these "people" actually exist. The "From Names" are false and misrepresented who the  
23 spams were really from, and therefore violated Section 17529.5.

24 34. Plaintiffs are informed and believe and thereon allege that ACCUQUOTE and/or  
25 TOPICA deliberately chose to put these false names in the From Name field precisely so the  
26 recipients would *not* know who the emails were really from when viewing the spams in the inbox  
27 view, forcing recipients to open the emails to see if the emails might actually be from someone to  
28 whom recipients gave direct consent to send them commercial emails, or if – as is the case here –  
29 spams.

30 35. Moreover, 35 of the 236 spams (15%) did not identify ACCUQUOTE in the body of the  
31 spams.



1 **C. Spams Sent From Domain Names Registered So As To Not Be Readily Traceable to the**  
2 **Sender Violate Business & Professions Code § 17529.5(a)(2)**

3 36. Section 17529.5(a)(2) prohibits falsified, misrepresented, or forged information contained  
4 in or accompanying in email headers.

5 37. Registration information for the domain names used to send spams is information  
6 contained in or accompanying email headers.

7 38. “[H]eader information in a commercial e-mail is falsified or misrepresented for purposes  
8 of section 17529.5(a)(2) when it uses a sender domain name that *neither* identifies the actual  
9 sender on its face *nor* is readily traceable to the sender using a publicly available online database  
10 such as WHOIS.” *Balsam v. Trancos Inc.*, 203 Cal. App. 4th 1083, 1101 (1st Dist. 2012)  
11 (emphasis in original).

12 39. Prior to filing this lawsuit, Plaintiffs’ attorneys had conversations with an attorney who  
13 claimed to *not* represent TOPICA, but rather some *other* entity(ies) who sent the spams. If that  
14 is true, then the domain name from which all of the spams were sent (*Topica.com*) is not readily  
15 traceable to his clients – the sender(s).

16 **D. Spams With False Subject Lines Violate Business & Professions Code § 17529.5(a)(2);**  
17 **Spams With Misleading Subject Lines Violate Business & Professions Code**  
18 **§ 17529.5(a)(3)**

19 40. Section 17529.5(a)(2) prohibits falsified, misrepresented, or forged information in email  
20 headers.

21 41. The Subject Line is part of email headers.

22 42. Section 17529.5(a)(3) prohibits Subject Lines likely to mislead a reasonable recipient  
23 about the contents or subject matter or the email.

24 43. Most of the spams that Plaintiffs received contain Subject Lines with falsified and/or  
25 misrepresented information, and/or are misleading. To name but a few examples:

- 26 • FALLS received spams advertising ACCUQUOTE, sent by TOPICA, with the  
27 Subject Lines: “Your Request Has Been Approved,” “You Have Been Approved.  
28 Application Processed,” and “Missing Information on your Application.” These  
29 Subject Lines are false because FALLS never made any request to ACCUQUOTE  
30 that could have been approved, and never submitted any application to  
31 ACCUQUOTE. These Subject Lines are also misleading relative to the contents  
of the body because the bodies do *not* say that FALLS’ request has been

1 approved, his application was processed, or that his application was missing  
2 information.

- 3 • FINK received spams advertising ACCUQUOTE, sent by TOPICA, with the  
4 Subject Lines: “Here is the information you requested,” “In response to your  
5 recent Inquiry,” and “Pending application processing-Missing information.”  
6 These Subject Lines are false because FINK never made any request or inquiry to  
7 ACCUQUOTE, and never submitted any application to ACCUQUOTE.
- 8 • HELLMAN received spams advertising ACCUQUOTE, sent by TOPICA, with  
9 the Subject Lines: “Ready to get started?,” “Your results are in (Pending  
10 Review),” and “Hey! Sorry for not getting this back to you sooner.” These  
11 Subject Lines are likely to mislead a reasonable recipient about the contents and  
12 subject matter of the spams, namely, advertisements for ACCUQUOTE’s  
13 products and services.

14 **E. ACCUQUOTE is Strictly Liable for Spams Sent By its Affiliates (e.g. TOPICA)**

15 44. Plaintiffs are informed and believe and thereon allege that ACCUQUOTE contracted  
16 with third party advertising networks and affiliates (a/k/a “publishers”), like TOPICA, to  
17 advertise its websites for the purpose of selling services for a profit.

18 45. No one forced ACCUQUOTE to outsource any of its advertising to third party spammers.

19 46. Advertisers such as ACCUQUOTE are liable for advertising in spams, even if third  
20 parties hit the Send button.

21 There is a need to regulate the advertisers who use spam, as well as the actual  
22 spammers because the actual spammers can be difficult to track down due to  
23 some return addresses that show up on the display as “unknown” and many others  
being obvious fakes and they are often located offshore.

24 The true beneficiaries of spam are the advertisers who benefit from the marketing  
25 derived from the advertisements.

26 Bus. & Prof. Code § 17529(j)(k).

27 It is unlawful [ ] to advertise in a commercial email advertisement [ ] under any of  
28 the following circumstances...

29 Bus. & Prof. Code § 17529.5 (emphasis added). Of course, the affiliates, like TOPICA, are also  
30 liable for sending unlawful spams. See *Balsam*, generally.

1 47. In *Hypertouch Inc. v. ValueClick Inc. et al*, the court of appeal held that advertisers are  
2 *strictly liable* for advertising in false and deceptive spams, even if the spams were sent by third  
3 parties.

4 [S]ection 17529.5 makes it unlawful for a person or entity “to advertise in a  
5 commercial e-mail advertisement” that contains any of the deceptive statements  
6 described in *subdivisions (a)(1)-(3)*. Thus, by its plain terms, the statute is not  
7 limited to entities that actually send or initiate a deceptive commercial e-mail, but  
8 applies more broadly to any entity that advertises in those e-mails.

9 Thus, like other California statutes prohibiting false or misleading business  
10 practices, the statute makes an entity *strictly liable* for advertising in a  
11 commercial e-mail that violates the substantive provisions described in section  
12 17529.5, subdivision (a) *regardless of whether the entity knew that such e-mails*  
13 *had been sent* or had any intent to deceive the recipient.

14 192 Cal. App. 4th 805, 820-21 (2d Dist. 2011) (emphasis added). The court did not find that this  
15 was an arbitrary requirement; rather, the court identified sound policy reasons behind the  
16 Legislature’s decision to create a strict liability statute. *Id.* at 829.

17 **F. Plaintiffs Sue for Statutory Liquidated Damages; No Proof of Reliance or Actual**  
18 **Damages is Necessary**

19 48. The California Legislature defined liquidated damages to be \$1,000 per spam. Bus. &  
20 Prof. Code § 17529.5(b)(1)(B)(ii).

21 49. Plaintiffs are informed and believe and thereon allege that the \$1,000 per spam figure is  
22 comparable with damages in other areas of consumer protection law, e.g., \$500-\$1,500 statutory  
23 damages per junk fax, pursuant to Business & Professions Code § 17538.43(b).

24 50. Plaintiffs’ rightful and lawful demand for liquidated damages in the amount of \$1,000 per  
25 email is necessary to further the California Legislature’s objective of protecting California  
26 residents from unlawful spam.

27 51. Section 17529.5 does not require Plaintiffs to quantify their actual damages, allege or  
28 prove reliance on the advertisements contained in the spams, or purchase the goods and services  
29 advertised in the spams. *Recipients* of unlawful spam have standing to sue and recover  
30 liquidated damages. Bus. & Prof. Code § 17529.5(b)(1)(A)(iii); *Hypertouch*, 192 Cal. App. 4th  
31 at 820, 822-23, 828.

52. However, Plaintiffs did suffer damages by receiving the unlawful spams advertising  
ACCUQUOTE’s products and services in the state of California, at their California email

1 addresses. Bus. & Prof. Code § 17529(d), (e), (g), (h). Regardless, Plaintiffs do not seek actual  
2 damages in this Action, only liquidated damages.

3 **G. Defendants' Actions Were Willful and Preclude any Reduction in Statutory Damages**

4 53. Section 17529.5 authorizes this Court to reduce the statutory damages to \$100 per spam.  
5 Bus. & Prof. Code § 17529.5(b)(2). But, to secure the reduction, Defendants have the burden of  
6 proof to demonstrate not only that they have practices and procedures to prevent unlawful  
7 spamming, but also that those practices and procedures are *effective*.

8 54. Plaintiffs are informed and believe and thereon allege that Defendants have not  
9 established and implemented, with due care, practices and procedures reasonably designed to  
10 effectively prevent unsolicited commercial e-mail advertisements that are in violation of  
11 Section 17529.5.

12 55. Even if Defendants had any practices and procedures to prevent advertising in unlawful  
13 spam, such practices and procedures were not reasonably designed so as to be effective.

14 56. Even if Defendants reasonably designed practices and procedures to prevent advertising  
15 in unlawful spam, such practices and procedures were not implemented so as to be effective.

16 57. Moreover, Plaintiffs are informed and believe and thereon allege that Defendants  
17 intended to deceive recipients of their spam messages through the use of falsified and/or  
18 misrepresented information contained in or accompanying the email headers, and false and  
19 misleading Subject Lines, as described herein.

20 58. Subject Lines and From Names do not write themselves and domain names do not  
21 register themselves; the misrepresented information contained in and accompanying the email  
22 headers are not "clerical errors." Plaintiffs are informed and believe and thereon allege that  
23 Defendants went to great lengths to create falsified and misrepresented information contained in  
24 and accompanying the email headers in order to deceive recipients, Internet Service Providers,  
25 and spam filters.

26 59. Moreover, Plaintiffs are informed and believe and thereon allege that ACCUQUOTE's  
27 agent TOPICA sent these spams to a *suppression list* – i.e., a list of email addresses to *not* to  
28 send spams to.

29 60. Moreover, Plaintiffs are informed and believe and thereon allege that even *if* the emails  
30 were accidentally sent to a suppression list and were supposed to have been sent to people who  
31 supposedly opted in to receive commercial emails, unless the opt-ins were directly to

1 ACCUQUOTE, that would not constitute “direct consent” as required by Section 17529.5. And,  
2 direct consent aside, even if the emails had been sent to people who had opted in, Plaintiffs are  
3 informed and believe and thereon allege that the From Names are still false because the supposed  
4 people do not exist, and the Subject Lines are still false because not everyone who supposedly  
5 opted in to receive commercial email applied for ACCUQUOTE’s products and services, and not  
6 everyone who applied for ACCUQUOTE’s products and services was approved. In fact, the fact  
7 that the same Plaintiff received spams with Subject Lines claiming that the Plaintiff’s application  
8 *has* been approved, *and* spams with Subject Lines claiming that the Plaintiff’s application *has*  
9 *not* been approved because information was missing, demonstrates that at least some of the  
10 Subject Lines *must* be false.

11 61. Plaintiffs are informed and believe and thereon allege that Defendants intended to profit,  
12 actually profited, and continue to profit, and were unjustly enriched by, their wrongful conduct  
13 as described herein.

14 62. Punitive damages are appropriate to punish malicious, oppressive, and/or fraudulent  
15 conduct by Defendants, and to deter others from engaging in such conduct.

16  
17 **FIRST CAUSE OF ACTION**

18 **[Violations of California Restrictions on Unsolicited Commercial Email,**  
19 **California Business & Professions Code § 17529.5]**  
20 **(Against All Defendants)**

21 63. Plaintiffs hereby incorporate the foregoing paragraphs as though set forth in full herein.

22 64. Plaintiffs received the spams at issue within one year prior to filing this Complaint.

23 65. Defendants advertised in, sent, and/or caused to be sent at least 236 unsolicited  
24 commercial emails to Plaintiffs’ California electronic mail addresses containing or accompanied  
25 by falsified and/or misrepresented header information; and/or containing misleading Subject  
26 Lines, in violation of Section 17529.5.

27 66. The California Legislature set liquidated damages at One Thousand Dollars (\$1,000) per  
28 email.

29 67. Plaintiffs seek reimbursement of attorneys’ fees and costs as authorized by Section  
30 17529.5(b)(1)(C).

1 68. The attorneys' fees provision for a prevailing spam recipient is typical of consumer  
2 protection statutes and supported by Code of Civil Procedure § 1021.5. By prosecuting this  
3 action, Plaintiffs expect to enforce an important right affecting the public interest and thereby  
4 confer a significant benefit on the general public or a large class of persons. The necessity and  
5 financial burden of private enforcement is such as to make the award appropriate, and the  
6 attorneys' fees should not, in the interest of justice, be paid out of the recovery of damages.  
7

8 WHEREFORE, Plaintiffs pray for judgment against Defendants as hereinafter set forth.  
9

10 **PRAYER FOR RELIEF**

11 **(Against All Defendants)**

- 12 A. An Order from this Court declaring that Defendants violated California Business &  
13 Professions Code § 17529.5 by advertising in and sending unlawful spams.  
14 B. Liquidated damages against Defendants in the amount of \$1,000 for each of at least 236  
15 unlawful spams, as authorized by Section 17529.5(b)(1)(B)(ii), for a total of at least  
16 \$236,000, as set forth below:

17

<b>PLAINTIFF</b>	<b>LIQUIDATED DAMAGES</b>
FALLS	\$20,000
FINK	\$62,000
HELLMAN	\$57,000
HILL	\$26,000
WILLIS	\$71,000

18  
19  
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- 22 C. Attorneys' fees as authorized by Section 17529.5(b)(1)(C) and Code of Civil Procedure  
23 § 1021.5 for violations of Section 17529.5.  
24 D. Disgorgement of all profits derived from unlawful spams directed to California residents;  
25 monies to be turned over to the Unfair Competition Law Fund and used by the California  
26 Attorney General to support investigations and prosecutions of California's consumer  
27 protection laws.  
28 E. Punitive damages, in an amount to be determined by this Court.  
29 F. Costs of suit.  
30 G. Such other and further relief as the Court deems proper.  
31

THE LAW OFFICES OF DANIEL BALSAM



Date: November 4, 2014

BY: \_\_\_\_\_

DANIEL L. BALSAM  
Attorneys for Plaintiffs

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15 Attorneys for Plaintiffs

16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

17 **COUNTY OF SAN FRANCISCO (UNLIMITED JURISDICTION)**

18 JAY FINK *et al*, ) Case No.: CGC-14-542524  
19 )  
20 Plaintiffs, ) **AMENDMENT TO COMPLAINT TO**  
21 ) **SUBSTITUTE TRUE NAMES FOR**  
22 v. ) **FICTITIOUS NAMES**  
23 )  
24 BYRON UDELL & ASSOCIATES INC. *et al*, ) Code Civ. Proc. § 474, Cal. Rule of Court  
25 ) 3.1200 *et seq.*  
26 Defendants. )  
27 )  
28 )

29 **THE COMPLAINT IS AMENDED TO REFLECT THE FOLLOWING**  
30 **SUBSTITUTIONS OF TRUE NAMES FOR FICTITIOUS NAMES:**

- 31 1. DMI Partners Inc., a Florida corporation, is substituted for DOE 1.  
2. RTK Media Inc., a Colorado corporation, is substituted for DOE 2.  
3. Richard Nolan, an individual, is substituted for DOE 3.

Dated: October 6, 2015

LAW OFFICES OF JACOB HARKER  
By: /s/ Jacob Harker  
Jacob Harker, attorneys for Plaintiffs

**ELECTRONICALLY  
FILED**  
*Superior Court of California,  
County of San Francisco*  
**10/07/2015**  
**Clerk of the Court**  
BY:EDNALEEN JAVIER  
**Deputy Clerk**