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SAN FRANCISCO COUNTY  
SUPERIOR COURT

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16 Margie Barr *et al*

17 **SUPERIOR COURT OF CALIFORNIA**  
18 **COUNTY OF SAN FRANCISCO (UNLIMITED JURISDICTION)**

19 MARGIE BARR, an individual,  
20 JOHN BRENNAN, an individual,  
21 ELLI COOPER, an individual,  
22 STEPHEN FALLS, an individual,  
23 DIANA HELLMAN, an individual,  
24 NICOLE MORTON, an individual,  
25 TIMOTHY MYERS, an individual,  
26 MARY O'SHEA, an individual,  
27 JAMES PATTERSON, an individual,  
28 RITA KAE RESTREPO, an individual,  
29 PHILIP SMITH, an individual, and  
30 MUSTAFA YOUSOFI,  
31 Plaintiffs.

v.

ASCENTIVE, LLC, a Delaware limited  
liability company, and  
DOES 1-250.  
Defendants

) Case No.: **CGC-14-53778A**

) **COMPLAINT FOR DAMAGES**

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

1 COME NOW PLAINTIFFS MARGIE BARR *et al* and file this Complaint for one cause of  
2 action against Defendants ASCENTIVE, LLC *et al* and allege as follows:

3  
4 **I. INTRODUCTION AND SUMMARY OF THE COMPLAINT**

5 1. Plaintiffs bring this Action against professional spammers ASCENTIVE, LLC and its  
6 third party affiliates (aka “publishers”) for advertising in and sending at least 100 unlawful  
7 spams to Plaintiffs.

8 2. No Plaintiff ever gave any Defendant “direct consent” (as required by law) to advertise  
9 in commercial email sent to him or her.

10 3. The spams all had materially misrepresented or falsified information contained in or  
11 accompanying the email headers, and/or misleading Subject Lines, in violation of California  
12 Business & Professions Code § 17529.5 (“Section 17529.5”). The unlawful elements of these  
13 spams represent willful acts of falsity and deception, rather than clerical errors.

14 4. ASCENTIVE, LLC is strictly liable for advertising in spams sent by its third party  
15 affiliates.

16 5. Spam recipients are not required to allege or prove reliance or actual damages to have  
17 standing. *See* Bus. & Prof. Code § 17529(b)(1)(A)(iii). Plaintiffs elect to recover statutory  
18 damages only and forego recovery of any actual damages.

19 6. This Court should award liquidated damages of \$1,000 per email as provided by  
20 Section 17529.5(b)(1)(B)(ii), and not consider any reduction in damages, because Defendants  
21 failed to implement reasonably effective systems designed to prevent the sending of unlawful  
22 spam in violation of the statute.

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

27 //

28 //

29 //

30 //

31

1 **II. PARTIES**

2 **A. Plaintiffs**

3 8. MARGIE BARR ("BARR") is now, and at all times relevant has been, an individual  
4 domiciled in and a citizen of the State of California. BARR ordinarily accesses her email  
5 address from California.

6 9. JOHN BRENNAN ("BRENNAN") is now, and at all times relevant has been, an  
7 individual domiciled in and a citizen of the State of California. BRENNAN ordinarily accesses  
8 his email address from California.

9 10. ELLI COOPER ("COOPER") is now, and at all times relevant has been, an individual  
10 domiciled in and a citizen of the State of California. COOPER ordinarily accesses her email  
11 address from California.

12 11. STEPHEN FALLS ("FALLS") is now, and at all times relevant has been, an individual  
13 domiciled in and a citizen of the State of California. FALLS ordinarily accesses his email  
14 address from California.

15 12. DIANA HELLMAN ("HELLMAN") is now, and at all times relevant has been, an  
16 individual domiciled in and a citizen of the State of California. HELLMAN ordinarily accesses  
17 her email address from California.

18 13. NICOLE MORTON ("MORTON") is now, and at all times relevant has been, an  
19 individual domiciled in and a citizen of the State of California. MORTON ordinarily accesses  
20 her email address from California.

21 14. TIMOTHY MYERS ("MYERS") is now, and at all times relevant has been, an  
22 individual domiciled in and a citizen of the State of California. MYERS ordinarily accesses his  
23 email address from California.

24 15. MARY O'SHEA ("O'SHEA") is now, and at all times relevant has been, an individual  
25 domiciled in and a citizen of the State of California. O'SHEA ordinarily accesses her email  
26 address from California.

27 16. JAMES PATTERSON ("PATTERSON") is now, and at all times relevant has been, an  
28 individual domiciled in and a citizen of the State of California. PATTERSON ordinarily  
29 accesses his email address from California.

1 17. RITA KAE RESTREPO (“RESTREPO”) is now, and at all times relevant has been, an  
2 individual domiciled in and a citizen of the State of California. RESTREPO ordinarily accesses  
3 her email address from California.

4 18. PHILIP SMITH (“SMITH”) is now, and at all times relevant has been, an individual  
5 domiciled in and a citizen of the State of California. SMITH ordinarily accesses his email  
6 address from California.

7 19. MUSTAFA YOUSOFI (“YOUSOFI”) is now, and at all times relevant has been, an  
8 individual domiciled in and a citizen of the State of California. YOUSOFI ordinarily accesses  
9 his email address from California.

10 20. Plaintiffs’ joinder in this Action is proper because Plaintiffs seek relief based on the  
11 same series of transactions or occurrences: all received similar spams in the same general time  
12 period advertising ASCENTIVE, LLC’s websites, and all of those spams were sent by  
13 Defendants or their marketing agents. The same questions of law (e.g., violations of  
14 Section 17529.5, strict liability) and fact (e.g., direct consent, practices and procedures to prevent  
15 advertising in unlawful spam) will arise. The fact that each Plaintiff does not sue for *exactly* the  
16 same spams does not bar joinder: “It is not necessary that each plaintiff be interested as to every  
17 cause of action or as to all relief prayed for. Judgment may be given for one or more of the  
18 plaintiffs according to their respective right to relief.” Code Civ. Proc. § 378(b).<sup>1</sup>

19 **B. Defendants**

20 21. Plaintiffs are informed and believe and thereon allege that Defendant ASCENTIVE,  
21 LLC (“ASCENTIVE”) is now, and was at all relevant times, a Delaware corporation  
22 headquartered in Philadelphia, Pennsylvania, doing business as *ascentive.com*, among other  
23 domain names.

24  
25  
26 <sup>1</sup> See also *Coleman v. Twin Coast Newspaper Inc.*, 175 Cal. App. 2d 650, 653 (2d Dist. 1959)  
27 (“The purpose of section 378 is to permit the joinder in one action of several causes arising out  
28 of identical or related transactions and involving common issues. The statute should be liberally  
29 construed so as to permit joinder whenever possible in furtherance of this purpose. The rules  
30 laid down by section 378 have been held to apply to actions in tort as well as in contract. There  
31 may be permissive joinder of parties plaintiff under section 378 in two situations: (1) Where  
there exists both a common interest in the subject of the action and any question of law or fact  
common to all the plaintiffs, and (2) where there exists both a right to relief arising out of the  
same transaction or series of transactions and any common question of law or fact”) (citations  
omitted).

1 22. Plaintiffs do not know the true names or legal capacities of the Defendants designated  
2 herein as DOES 1 through 250, inclusive, and therefore sue said Defendants under the fictitious  
3 name of "DOE." Plaintiffs are informed and believe and thereon allege that each of the  
4 Defendants designated herein as a DOE is legally responsible in some manner for the matters  
5 alleged in this complaint, and is legally responsible in some manner for causing the injuries and  
6 damages of which Plaintiffs complain. Plaintiffs are informed and believe and thereon allege  
7 that each of the Defendants designated herein as a DOE Defendant was, at all times relevant to  
8 the matters alleged within this complaint, acting in conjunction with the named Defendants,  
9 whether as a director, officer, employee, agent, affiliate, customer, participant, or co-conspirator.  
10 When the identities of DOE Defendants 1-250 are discovered, or otherwise made available,  
11 Plaintiffs will seek to amend this Complaint to allege their identity and involvement with  
12 particularity. Plaintiffs allege that all Defendants are jointly and severally liable for all injuries  
13 and damages of which Plaintiffs complain.  
14

### 15 **III. JURISDICTION AND VENUE**

#### 16 **A. Jurisdiction is Proper in a California Court**

17 23. This Court has jurisdiction over the Action because: a) all Plaintiffs are domiciled in  
18 and citizens of the State of California and received the unlawful spams at their California email  
19 addresses, and b) the amount in controversy is more than \$25,000.

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

21 24. Venue is proper in San Francisco County because ASCENTIVE is a foreign company  
22 that has not designated the location and address of a principal office in California or registered to  
23 do business in California with the California Secretary of State, and Plaintiffs may designate any  
24 county in California for the action to be tried. *See* Code Civ. Proc. § 395(a); *Easton v. Superior*  
25 *Court of San Diego (Schneider Bros. Inc.)*, 12 Cal. App. 3d 243, 246 (4th Dist. 1970).  
26

### 27 **IV. AT LEAST 100 UNLAWFUL SPAMS**

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

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

2 26. The emails at issue are “commercial email advertisements”<sup>2</sup> because they were initiated  
3 for the purpose of advertising and promoting the sale of ASCENTIVE’s goods or services.

4 27. The emails are “unsolicited commercial email advertisements”<sup>3</sup> because no Plaintiff  
5 ever gave any Defendant “direct consent”<sup>4</sup> to send him or her commercial emails, nor did any  
6 Plaintiff have a “preexisting or current business relationship”<sup>5</sup> with any Defendant.

7 28. Defendants sent and/or advertised in at least 100 unlawful spams that Plaintiffs received  
8 at their “California email addresses”<sup>6</sup> within one year prior to the filing of this Action, as set  
9 forth below:

- 10 • BARR at least nineteen (19)
- 11 • BRENNAN at least four (4)
- 12 • BRIDGES at least seven (7)
- 13 • COOPER at least nine (9)
- 14 • FALLS at least two (2)

15 \_\_\_\_\_  
16 <sup>2</sup> “‘Commercial e-mail advertisement’ means any electronic mail message initiated for the  
17 purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any  
18 property, goods, services, or extension of credit.” Bus. & Prof. Code § 17529.1(c).

19 <sup>3</sup> “‘Unsolicited commercial e-mail advertisement’ means a commercial e-mail advertisement sent  
20 to a recipient who meets both of the following criteria: (1) The recipient has not provided direct  
21 consent to receive advertisements from the advertiser. (2) The recipient does not have a  
22 preexisting or current business relationship, as defined in subdivision (I), with the advertiser  
23 promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services,  
24 or extension of credit.” Bus. & Prof. Code § 17529.1(o).

25 <sup>4</sup> “‘Direct consent’ means that the recipient has expressly consented to receive e-mail  
26 advertisements *from the advertiser*, either in response to a clear and conspicuous request for the  
27 consent or at the recipient's own initiative.” Bus. & Prof. Code § 17529.1(d) (emphasis added).

28 <sup>5</sup> “‘Preexisting or current business relationship,’ as used in connection with the sending of a  
29 commercial e-mail advertisement, means that the recipient has made an inquiry and has provided  
30 his or her e-mail address, or has made an application, purchase, or transaction, with or without  
31 consideration, regarding products or services offered by the advertiser. [.]” Bus. & Prof. Code  
§ 17529.1(I).

<sup>6</sup> “‘California e-mail address’ means 1) An e-mail address furnished by an electronic mail service  
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).

- HELLMAN at least six (6)
- MORTON at least one (1)
- MYERS at least seven (7)
- O'SHEA at least eight (8)
- PATTERSON at least four (4)
- RESTREPO at least one (1)
- SMITH at least thirty (30)
- YOUSOFI at least two (2)

29. Plaintiffs' email addresses play no part in determining whether or not the emails have falsified, misrepresented, forged, misleading, or otherwise deceptive information contained in or accompanying the email headers.

30. Plaintiffs' email addresses are confidential for numerous reasons, including, but not limited to, avoiding the risk of retaliation by "mail bombing" (sending massive amounts of email to Plaintiffs' email addresses), "joe jobbing" (sending unlawful email using Plaintiffs' email addresses in the Sender Email Address field as a means of harassment), or sharing of Plaintiffs' email addresses with other unknown parties who might in turn send spam or mail bombs to Plaintiffs or as if from Plaintiffs.

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

**B. Spams With Generic From Names Misrepresent Who is Advertising in the Spams and Violate Business & Professions Code § 17529.5(a)(2)**

32. Section 17529.5(a)(2) prohibits misrepresented information contained in or accompanying email headers.

33. The From Name field is part of email headers.

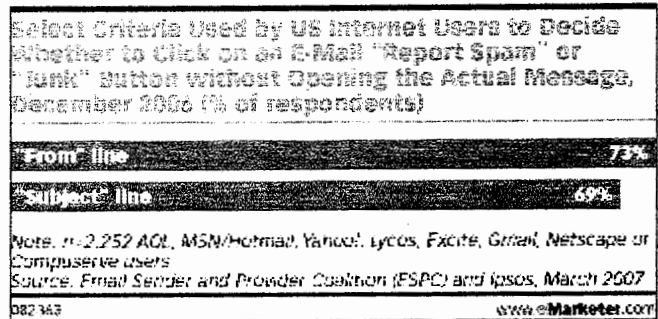
34. The From Name field in an e-mail's headers is, not surprisingly, supposed to identify who the email is *from*; it is not supposed to be an advertising message. Because computers must use standard protocols in order to communicate, the Internet Engineering Task Force created a collection of "Requests for Comment" ("RFCs") that define the rules that enable email to work. According to RFC 5322 at ¶ 3.6.2 (emphasis in original):

1 The "From:" field specifies the author(s) of the message, that is, the mailbox(es)  
2 of the person(s) or system(s) responsible for the writing of the message. . . . In all  
3 cases, the "From:" field SHOULD NOT contain any mailbox that does not belong  
4 to the author(s) of the message.

5 35. Plaintiffs do not insist on any *particular* label (e.g., "Ascentive, LLC," "Ascentive,"  
6 "Ascentive.com," etc. in the From Name field. Rather, Plaintiffs contend that the text, whatever  
7 it is, cannot misrepresent *who* is advertising in the email.

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

13 37. Indeed, empirical evidence has  
14 demonstrated that the From Name is the  
15 *most* important factor email recipients  
16 use to determine whether or not an email  
17 is spam. See eMarketer, E-Mail Open



18 Rates Hinge on 'Subject' Line, *available at* <http://www.emarketer.com/Article/E-Mail-Open-Rates-Hinge-on-Subject-Line/1005550> (Oct. 31, 2007).

19 38. In *Balsam v. Trancos Inc.*, the unlawful spams were sent from generic From Names that  
20 did not *identify* anyone. The trial court ruled, and the court of appeal affirmed in all respects,  
21 that generic From Names violate the statute because they misrepresent *who* the emails are from:

22 ... The seven [ ] emails do not truly reveal who sent the email . . . . The [ ]  
23 "senders" identified in the headers of the [ ] seven emails do not exist or are  
24 otherwise misrepresented, namely Paid Survey, Your Business, Christian Dating,  
25 Your Promotion, Bank Wire Transfer Available, Dating Generic, and Join Elite. .  
... Thus the sender information ("from") is misrepresented.

26 203 Cal. App. 4th 1083, 1088, 1090-91, 1093 (1st Dist. 2012), *petition for review denied*, 2012  
27 Cal. LEXIS 4979 (Cal. May 23, 2012), *petition for certiori denied*, 2012 U.S. LEXIS 8423 (U.S.  
28 Oct. 29, 2012), *petition for rehearing denied*, 2013 U.S. LEXIS 243 (U.S. Jan. 7, 2013). More  
29 specifically, *Trancos* confirmed that generic From Names that "do not exist or are otherwise  
30 misrepresented when they do not represent any real company and cannot be readily traced back  
31 to the true owner/sender" violate the statute. *Id.* at 1093. The Court affirmed the award of



1 \$1,000 liquidated damages for the seven emails with misrepresented information in the From  
2 Name field, even though most of the spams identified the advertiser in the body. *Id.* at 1091,  
3 1093.

4 39. The From Names of the instant spams are all similarly generic terms such as “PC  
5 SCAN,” “FINALLY FAST SOFTWARE,” “PC PROBLEM SOLVERS,” etc. All of these  
6 generic From Names, like those in *Trancos*, misrepresent *who* was advertising in the spams, and  
7 therefore violate Section 17529.5(a)(2).

8 40. These From Names could just as easily refer to ASCENTIVE’s competitors, such as  
9 Kaspersky Lab, McAfee, Inc., or mycleanpc.com.

10 41. Plaintiffs are informed and believed and thereon allege that ASCENTIVE may have  
11 registered some of the generic phrases in the From Names as fictitious business names (FBNs).  
12 However, even if this is true, the generic From Names still misrepresent *who* the spams are from.  
13 Looking at a list of emails in the inbox, the recipient still cannot identify ASCENTIVE from the  
14 From Name. Nor is there any means for the recipient to know the state/county in which the  
15 FBNs were registered.

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

18 42. Section 17529.5(a)(2) prohibits falsified, misrepresented, or forged information  
19 contained in or accompanying email headers.

20 43. Registration information for the domain names used to send spams is information  
21 contained in or accompanying email headers.

22 44. In *Balsam v. Trancos Inc.*, the Court of Appeal held:

23 [W]here, as in this case, the commercial e-mailer intentionally uses . . . domain  
24 names in its headers that neither disclose the true sender’s identity on their face  
25 nor permit the recipient to readily identify the sender, . . . such header information  
26 *is* deceptive and *does* constitute a falsification or misrepresentation of the sender's  
27 identity. . . .

28 Here, the domain names were *not* traceable to the actual sender. The header  
29 information is “falsified” or “misrepresented” because *Trancos* deliberately  
30 created it to prevent the recipient from identifying who actually sent the message.  
31 . . . an e-mail with a made-up *and untraceable* domain name affirmatively *and*  
*falsely* represents the sender has no connection to *Trancos*.

Allowing commercial e-mailers like *Trancos* to conceal themselves behind  
untraceable domain names amplifies the likelihood of Internet fraud and abuse--

1 the very evils for which the Legislature found it necessary to regulate such e-  
2 mails when it passed the Anti-spam Law.

3 We therefore hold, consistent with the trial court's ruling, that header information  
4 in a commercial e-mail is falsified or misrepresented for purposes of section  
5 17529.5(a)(2) when it uses a sender domain name that *neither* identifies the actual  
6 sender on its face *nor* is readily traceable to the sender using a publicly available  
7 online database such as WHOIS.

8 203 Cal. App. 4th at 1097-1101 (emphasis in original).

9 45. Plaintiffs received unlawful spams advertising ASCENTIVE and other Defendants, sent  
10 from domain names that: in violation of Section 17529.5. For example:

- 11 • Did not identify ASCENTIVE or the sender on their face, and
- 12 • Were deliberately registered so as to not be readily traceable to the sender by  
13 querying the Whois databse,

14 in violation of Section 17529.5. For example:

15 46. Many of the spams at issue were sent from domain names that were proxy registered to  
16 prevent the recipient from tracing the domain name to the actual sender using a Whois query. To  
17 name but two examples:

- 18 • SMITH received a spam advertising ASCENTIVE sent from the domain name  
19 *specialrise.com*, which was proxy-registered using WhoisGuard Inc. in Panama.
- 20 • BARR received a spam advertising ASCENTIVE sent from the domain name  
21 *safetictoc.com*, which was proxy-registered using WhoisGuard Inc. in Panama.

22 47. Some of the spams at issue were sent from domain names that were deceptively  
23 registered to generic terms, often claiming boxes at the U.S. Postal Service or commercial mail  
24 receiving agencies to prevent the recipient from tracing the domain name to the actual sender  
25 using a Whois query<sup>7</sup>. To name two examples:

- 26 • OLIVERES received a spam advertising ASCENTIVE sent from the domain  
27 name *peoplelovethese.com*, which was deceptively registered to an entity called  
28 Netwide Promos using a Post Office Box in Sacramento, California. A search of  
29 the California Secretary of State's website demonstrates that Newtwide Promos is  
30 not an entity registered in California.

31 <sup>7</sup> "... a domain name is 'traceable' to the sender if the recipient of an email could ascertain the sender's identity and physical address through the use of a publicly available database such as WHOIS." *Trancos*, 203 Cal. App. 4th at 1098.

- 1           • PATTERSON received a spam advertising ASCENTIVE sent from the domain  
2           name *fivebuzzgroomings.com*, which was deceptively registered to an entity  
3           called Qu Ya Internet using an address in Texas. A search of the Texas  
4           Comptroller's website demonstrates that Qu Ya Internet is not an entity registered  
5           in Texas.

6 48.       Many of the spams at issue were purportedly sent from domain names that were  
7 nonexistent or unregistered to prevent the recipient from tracing the domain name to the actual  
8 sender using a Whois query. To name an example:

- 9           • MYERS received a spam advertising ASCENTIVE purportedly sent from the  
10          domain name *mancavetiles.com*, but that domain name is not actually registered.

11 49.       Plaintiffs could not identify ASCENTIVE or its spamming affiliates who sent the spams  
12 at issue by querying the Whois database for the domain names used to send the spams.

13 **D. Spams With False Subject Lines Violate Business & Professions Code § 17529.5(a)(2);**  
14 **Spams With Misleading Subject Lines Violate Business & Professions Code**  
15 **§ 17529.5(a)(3)**

16 50.       Section 17529.5(a)(2) prohibits falsified, misrepresented, or forged information in email  
17 headers.

18 51.       The Subject Line is part of email headers.

19 52.       Many of the spams at issue contain Subject Lines with falsified and/or misrepresented  
20 information. To name but two examples:

- 21           • COOPER received a spam advertising ASCENTIVE with the Subject Line:  
22           “SLOW PC DETECTED :: Scan your PC for FREE today.”  
23           • BRIDGES received a spam advertising ASCENTIVE with the Subject Line:  
24           “[email address redacted], you have files that may be harmful to your PC.”

25 53.       Although the second Subject Line above included the word “may,” the fact that these  
26 advertisements were sent *directly* to Plaintiffs, as opposed to inclusion in a mass-media  
27 television advertisement, misrepresents the status of the recipients' PCs and ASCENTIVE and  
28 its affiliates' knowledge of the recipients' PCs at the time the spams were sent.

29 54.       Section 17529.5(a)(3) prohibits Subject Lines likely to mislead a reasonable recipient  
30 about the contents or subject matter or the email.

31 55.       Although the Subject Lines referenced above relate to the *subject matter* of the emails –  
the recipients' PC performance – they are misleading as to the *contents*, because the Subject

1 Lines refer to WARNINGS and are likely to mislead reasonable recipients into believing that the  
2 bodies of the emails would contain specific information about their actual PC performance, when  
3 in fact, the bodies merely contain generic advertisements for ASCENTIVE's services.

4 **E. ASCENTIVE is Strictly Liable for Spams Sent By Its Affiliates**

5 56. Plaintiffs are informed and believe and thereon allege that ASCENTIVE contracted  
6 with third party advertising networks and affiliates (a/k/a "publishers") to advertise its websites  
7 for the purpose of selling goods and services for a profit.

8 57. No one forced ASCENTIVE to outsource any of its advertising to third party spammers.

9 58. Advertisers such as ASCENTIVE are liable for advertising in spams, even if third  
10 parties hit the Send button.

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

15 The true beneficiaries of spam are the advertisers who benefit from the marketing  
16 derived from the advertisements.

17 Bus. & Prof. Code § 17529(j)(k).

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

20 Bus. & Prof. Code § 17529.5 (emphasis added). Of course, the affiliates are also liable for  
21 sending unlawful spams. See *Trancos*, generally.

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

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

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

1 192 Cal. App. 4th 805, 820-21 (2d Dist. 2011) (emphasis added). The court did not find that this  
2 was an arbitrary requirement; rather, the court identified sound policy reasons behind the  
3 Legislature's decision to create a strict liability statute:

4 [I]mposing strict liability on the advertisers who benefit from (and are the  
5 ultimate cause of) deceptive e-mails, forces those entities to take a more active  
6 role in supervising the complex web of affiliates who are promoting their  
7 products.

8 *Id.* at 829. Nor was *Hypertouch* an anomaly; it confirmed the general trend in anti-spam  
9 litigation in California and federal courts.

10 **G. Plaintiffs Sue for Statutory Liquidated Damages; No Proof of Reliance or Actual  
11 Damages is Necessary**

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

14 61. Plaintiffs are informed and believe and thereon allege that the \$1,000 per spam figure is  
15 comparable with damages in other areas of consumer protection law, e.g., \$500-\$1,500 statutory  
16 damages per junk fax, pursuant to Bus. & Prof. Code § 17538.43(b).

17 62. Plaintiffs' rightful and lawful assertion of the California Legislature's liquidated damages  
18 amount of \$1,000 per email is necessary to further the Legislature's objective of protecting  
19 California residents from unlawful spam.

20 63. Section 17529.5 does not require Plaintiffs to quantify their actual damages, allege or  
21 prove reliance on the advertisements contained in the spams, or purchase the goods and services  
22 advertised in the spams. *Recipients* of unlawful spam have standing to sue and recover  
23 liquidated damages. *See* Bus. & Prof. Code § 17529.5(b)(1)(A)(iii); *Hypertouch*, 192 Cal. App.  
24 4th at 820, 822-23, 828.

25 **H. Defendants' Actions Were Willful and Preclude any Reduction in Statutory Damages**

26 64. Section 17529.5 authorizes this Court to award reduced statutory damages:

27 If the court finds that the defendant established and implemented, with due care,  
28 practices and procedures reasonably designed to effectively prevent unsolicited  
29 commercial e-mail advertisements that are in violation of this section, the court  
30 shall reduce the liquidated damages recoverable under paragraph (1) to a  
31 maximum of one hundred dollars (\$100) for each unsolicited commercial e-mail  
advertisement, or a maximum of one hundred thousand dollars (\$100,000) per  
incident.

1 Bus. & Prof. Code § 17529.5(b)(2). But, to secure the reduction, Defendants have the burden of  
2 proof to demonstrate not only that they have practices and procedures to prevent unlawful  
3 spamming, but also that the practices and procedures are *effective*.

4 65. Plaintiffs are informed and believe and thereon allege that Defendants have not  
5 established and implemented, with due care, practices and procedures reasonably designed to  
6 effectively prevent unsolicited commercial e-mail advertisements that are in violation of Section  
7 17529.5.

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

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

12 68. Moreover, Plaintiffs are informed and believe and thereon allege that Defendants  
13 intended to deceive recipients of their spam messages through the use of falsified and/or  
14 misrepresented information contained in or accompanying the email headers, as described  
15 herein.

16 69. Subject Lines and From Names do not write themselves and domain names do not  
17 register themselves; the misrepresented information in the email headers are not “clerical errors.”  
18 Plaintiffs are informed and believe and thereon allege that Defendants went to great lengths to  
19 create misrepresented information contained in and accompanying the email headers in order to  
20 deceive recipients, Internet Service Providers, and spam filters.

21 70. Plaintiffs are informed and believe and thereon allege that Defendants intended to  
22 profit, actually profited, and continue to profit, and were unjustly enriched by, their wrongful  
23 conduct as described herein.

24 71. Punitive damages are appropriate to punish malicious, oppressive, and/or fraudulent  
25 conduct by Defendants, and to deter others from engaging in such conduct.

26  
27 **FIRST CAUSE OF ACTION**

28 **[Violations of California Restrictions on Unsolicited Commercial Email,**  
29 **California Business & Professions Code § 17529.5]**  
30 **(Against All Defendants)**

31 72. Plaintiffs hereby incorporate the foregoing paragraphs as though set forth in full herein.

1 73. Plaintiffs received the spams at issue within one year prior to filing this Complaint.

2 74. Defendants advertised in, sent, and/or caused to be sent unsolicited commercial emails  
3 to Plaintiffs' California electronic mail addresses: a) containing or accompanied by falsified  
4 and/or misrepresented header information, and/or b) containing misleading Subject Lines.

5 75. The California Legislature set liquidated damages at One Thousand Dollars (\$1,000) per  
6 email.

7 76. Plaintiffs seek reimbursement of attorneys' fees and costs as authorized by Section  
8 17529.5(b)(1)(C).

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

15  
16 WHEREFORE, Plaintiffs pray for judgment against Defendants as hereinafter set forth.

17  
18 **PRAYER FOR RELIEF**

19 **(Against All Defendants)**

20 A. An Order from this Court declaring that Defendants violated California Business &  
21 Professions Code § 17529.5 by advertising in and sending unlawful spams.

22 B. Liquidated damages against Defendants in the amount of \$1,000 per unlawful spam, as  
23 authorized by Section 17529.5(b)(1)(B)(ii), as detailed below, for a total of at least  
24 \$100,000:

- 25 • BARR: at least \$19,000 for nineteen (19) unlawful spams.
- 26 • BRENNAN: at least \$4,000 for four (4) unlawful spams.
- 27 • BRIDGES; at least \$7,000 for seven (7) unlawful spams.
- 28 • COOPER: at least \$9,000 for nine (9) unlawful spams.
- 29 • FALLS: at least \$2,000 for two (2) unlawful spams.
- 30 • HELLMAN: at least \$6,000 for six (6) unlawful spams.
- 31 • MORTON: at least \$1,000 for one (1) unlawful spam.

- MYERS: at least \$7,000 for seven (7) unlawful spams.
- O'SHEA: at least \$8,000 for eight (8) unlawful spams.
- PATTERSON: at least \$4,000 for four (4) unlawful spams.
- RESTREPO: at least \$1,000 for one (1) unlawful spam.
- SMITH: at least \$30,000 for thirty (30) unlawful spams.
- YOUSOFI: at least \$2,000 for two (2) unlawful spams.

C. Attorneys' fees as authorized by Section 17529.5(b)(1)(C) and Code of Civil Procedure § 1021.5 for violations of Section 17529.5.

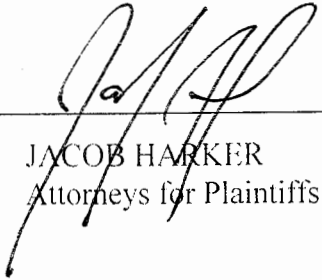
D. Disgorgement of all profits derived from unlawful spams directed to California residents; monies to be turned over to the Unfair Competition Law Fund and used by the California Attorney General to support investigations and prosecutions of California's consumer protection laws.

E. Costs of suit.

F. Such other and further relief as the Court deems proper.

THE LAW OFFICES OF JACOB HARKER

Date: March 4, 2014

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

JACOB HARKER  
Attorneys for Plaintiffs