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1 Daniel L. Balsam (State Bar No. 260423)
2 THE LAW OFFICES OF DANIEL BALSAM
3 2912 Diamond Street #218
4 San Francisco, CA 94131
5 Tel: (415) 869-2873
6 Fax: (415) 869-2873
7 Email: legal@danbalsam.com

8 Jacob Harker (State Bar No. 261262)
9 LAW OFFICES OF JACOB HARKER
10 582 Market Street, Suite 1007
11 San Francisco, CA 94104
12 Tel: (415) 624-7602
13 Fax: (415) 684-7757
14 Email: jacob@harkercounsel.com

15 Attorneys for Plaintiffs

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

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

18 JASON BISHOP, an individual,)
19 SHELLY CARPER, an individual,)
20 STEVEN CARPER, an individual,)
21 JULIE CHENDES, an individual,)
22 STEPHEN FALLS, an individual,)
23 DIANA HELLMAN, an individual,)
24 WALTER HILL, an individual,)
25 JERRY MIHAIC, an individual,)
26 TIM MYERS, an individual,)
27 JAMES PATTERSON, an individual,)
28 DEBRA RUIZ, an individual,)
29 RICHARD WILLIS, an individual,)
30 MUSTAFA YOUSOFI, an individual,)

31 Plaintiffs,)

v.)

CONSUMERTRACK INC., a California)
corporation, and)
DOES 1-500,)

Defendants.)

Case No.: CGC-13-535320

COMPLAINT FOR DAMAGES

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

1 COME NOW PLAINTIFFS Jason Bishop *et al* and file this Complaint for one cause of action
2 against Defendants CONSUMERTRACK INC. *et al* and allege as follows:

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

5 1. Plaintiffs bring this Action against professional spammers CONSUMERTRACK INC.
6 and its third party affiliates (aka “publishers”) for advertising in and sending at least 114
7 unlawful spams to Plaintiffs.

8 2. No Plaintiff ever gave any Defendant “direct consent” (as required by law) to advertise in
9 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. CONSUMERTRACK 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).

18 6. Nevertheless, Plaintiffs did suffer damages by receiving the spams. *See, e.g.*, Bus. &
19 Prof. Code § 17529(d), (e), (g), (h).

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

24 8. 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.

1 **II. PARTIES**

2 **A. Plaintiffs**

3 9. JASON BISHOP (“BISHOP”) was domiciled in and a citizen of the State of California,
4 County of Marin, when he received the CONSUMERTRACK spams at issue. BISHOP
5 ordinarily accesses his email address from California.

6 10. SHELLY CARPER and STEPHEN CARPER (collectively, “CARPERS”) were
7 domiciled in and citizens of the State of California, County of Riverside, when they received the
8 CONSUMERTRACK spams at issue. CARPERS ordinarily access their shared email address
9 from California.

10 11. JULIE CHENDES (“CHENDES”) was domiciled in and a citizen of the State of
11 California, County of San Francisco, when she received the CONSUMERTRACK spams at
12 issue. CHENDES ordinarily accesses her email address from California.

13 12. STEPHEN FALLS (“FALLS”) was domiciled in and a citizen of the State of California,
14 County of Contra Costa, when he received the CONSUMERTRACK spams at issue. FALLS
15 ordinarily accesses his email address from California.

16 13. DIANA HELLMAN (“HELLMAN”) was domiciled in and a citizen of the State of
17 California, County of Sacramento, when she received the CONSUMERTRACK spams at issue.
18 HELLMAN ordinarily accesses her email address from California.

19 14. WALTER HILL (“HILL”) was domiciled in and a citizen of the State of California,
20 County of Solano, when he received the CONSUMERTRACK spams at issue. HILL ordinarily
21 accesses his email address from California.

22 15. JERRY MIHAIC (“MIHAIC”) was domiciled in and a citizen of the State of California,
23 County of San Luis Obispo, when he received the CONSUMERTRACK spams at issue.
24 MIHAIC ordinarily accesses his email address from California.

25 16. TIM MYERS (“MYERS”) was domiciled in and a citizen of the State of California,
26 County of Marin, when he received the CONSUMERTRACK spams at issue. MYERS
27 ordinarily accesses his email address from California.

28 17. JAMES PATTERSON (“PATTERSON”) was domiciled in and a citizen of the State of
29 California, County of Alameda, when he received the CONSUMERTRACK spams at issue.
30 PATTERSON ordinarily accesses his email address from California.

1 18. DEBRA RUIZ (“RUIZ”) was domiciled in and a citizen of the State of California,
2 County of Alameda, when she received the CONSUMERTRACK spams at issue. RUIZ
3 ordinarily accesses her email address from California.

4 19. RICHARD WILLIS (“WILLIS”) was domiciled in and a citizen of the State of
5 California, County of Contra Costa, when he received the CONSUMERTRACK spams at issue.
6 WILLIS ordinarily accesses his email address from California.

7 20. MUSTAFA YOUSOFI (“YOUSOFI”) was domiciled in and a citizen of the State of
8 California, County of Alameda, when he received the CONSUMERTRACK spams at issue.
9 YOUSOFI ordinarily accesses his email address from California.

10 **B. Defendants**

11 21. Plaintiffs are informed and believe and thereon allege that Defendant
12 CONSUMERTRACK INC. (“CONSUMERTRACK”) is now, and was at all relevant times, a
13 California corporation headquartered in El Segundo, California, doing business as
14 *GoFreeCredit.com*, *GoLookOnline.com*, and *ImportantScore.com*, among other domain names.

15 22. Plaintiffs do not know the true names or legal capacities of the Defendants designated
16 herein as DOES 1 through 500, inclusive, and therefore sue said Defendants under the fictitious
17 name of “DOE.” Plaintiffs are informed and believe and thereon allege that each of the
18 Defendants designated herein as a DOE is legally responsible in some manner for the matters
19 alleged in this complaint, and is legally responsible in some manner for causing the injuries and
20 damages of which Plaintiffs complain. Plaintiffs are informed and believe and thereon allege
21 that each of the Defendants designated herein as a DOE Defendant was, at all times relevant to
22 the matters alleged within this complaint, acting in conjunction with the named Defendants,
23 whether as a director, officer, employee, agent, affiliate, customer, participant, or co-conspirator.
24 When the identities of DOE Defendants 1-500 are discovered, or otherwise made available,
25 Plaintiffs will seek to amend this Complaint to allege their identity and involvement with
26 particularity. Plaintiffs allege that all Defendants are jointly and severally liable for all injuries
27 and damages of which Plaintiffs complain.

1 **III. JURISDICTION AND VENUE**

2 **A. Jurisdiction is Proper in a California Court**

3 23. This Court has jurisdiction over the Action because: a) all Plaintiffs are domiciled in and
4 citizens of the State of California and received the unlawful spams at their California email
5 addresses, b) CONSUMERTRACK is headquartered in and a citizen of the State of California,
6 and c) the amount in controversy is more than \$25,000.

7 **B. Venue is Proper in San Francisco County**

8 24. Venue is proper in San Francisco County because CHENDES received some of the
9 spams at issue in San Francisco County, and a company can be sued where the cause of action
10 arises. *See* Code Civ. Proc. § 395.5.

11
12 **IV. AT LEAST 114 UNLAWFUL SPAMS**

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

14 25. The emails at issue are “commercial email advertisements”¹ because they were initiated
15 for the purpose of advertising and promoting the sale of CONSUMERTRACK’s services.

16 26. The emails are “unsolicited commercial email advertisements”² because no Plaintiff ever
17 gave any Defendant “direct consent”³ to send him or her commercial emails, nor did any Plaintiff
18 have a “preexisting or current business relationship”⁴ with any Defendant.

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

23 ² “‘Unsolicited commercial e-mail advertisement’ means a commercial e-mail advertisement sent
24 to a recipient who meets both of the following criteria: (1) The recipient has not provided direct
25 consent to receive advertisements from the advertiser. (2) The recipient does not have a
26 preexisting or current business relationship, as defined in subdivision (l), with the advertiser
27 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).

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

31 ⁴ “‘Preexisting or current business relationship,’ as used in connection with the sending of a
commercial e-mail advertisement, means that the recipient has made an inquiry and has provided

1 27. Defendants sent and/or advertised in at least 114 unlawful spams that Plaintiffs received
2 at their “California email addresses”⁵ within one year prior to the filing of this Action, as set
3 forth below:

- 4 • BISHOP: at least fourteen (14)
- 5 • CARPERS: at least twenty six (26)
- 6 • CHENDES: at least one (1)
- 7 • FALLS: at least two (2)
- 8 • HELLMAN: at least four (4)
- 9 • HILL: at least seven (7)
- MIHAIC: at least thirty two (32)
- MYERS: at least sixteen (16)
- PATTERSON: at least three (3)
- RUIZ: at least one (1)
- WILLIS: at least five (5)
- YOUSOFI: at least three (3)

9 28. Plaintiffs are informed and believe and thereon allege that Defendants sent and/or
10 advertised in thousands or even millions of similar spams received by other California residents.

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

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

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

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

22 32. The From Name field is part of email headers.

23 33. The From Name field in an email’s headers is, not surprisingly, supposed to identify who
24 the email is *from*; it is not supposed to be an advertising message. Because computers must use

25
26
27 his or her e-mail address, or has made an application, purchase, or transaction, with or without
28 consideration, regarding products or services offered by the advertiser. []” Bus. & Prof. Code
29 § 17529.1(l).

30 ⁵ “‘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 standard protocols in order to communicate, the Internet Engineering Task Force created a
2 collection of “Requests for Comment” (“RFCs”) that define the rules that enable email to work.
3 According to RFC 5322 at ¶ 3.6.2 (emphasis in original):

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

8 34. Plaintiffs do not insist on any *particular* label (e.g., “ConsumerTrack Inc.,”
9 “ConsumerTrack,” “GoFreeCredit,” “GoFreeCredit Partner,” etc. in the From Name field.
10 Rather, Plaintiffs contend that the text, whatever it is, cannot misrepresent *who* is advertising in
11 the email.

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

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

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

24 203 Cal. App. 4th 1083, 1088, 1090-91, 1093 (1st Dist. 2012), *petition for review denied*, 2012
25 Cal. LEXIS 4979 (Cal. May 23, 2012), *petition for certiori denied*, 2012 U.S. LEXIS 8423 (U.S.
26 Oct. 29, 2012), *petition for rehearing denied*, 2013 U.S. LEXIS 243 (U.S. Jan. 7, 2013). More
27 specifically, *Trancos* confirmed that generic From Names that “do not exist or are otherwise
28 misrepresented when they do not represent any real company and cannot be readily traced back
29 to the true owner/sender” violate the statute. *Id.* at 1093. The Court affirmed the award of
30 \$1,000 liquidated damages for the seven emails with misrepresented information in the From
31 Name field, even though most of the spams identified the advertiser in the body. *Id.* at 1091,
1093.

1 37. The From Names of the instant spams are all similarly generic terms such as “Credit
2 Score Time,” “Credit Advisor,” “See Your Score Online, “ “See Your Free Score,” “Go Triple
3 Score,” “Three Score Tracker,” “My Instant Score,” “Your Score Online,” etc. All of these
4 generic From Names, like those in *Trancos*, misrepresent *who* was advertising in the spams, and
5 therefore violate Section 17529.5(a)(2).

6 38. These From Names could just as easily refer to CONSUMERTRACK’s competitors,
7 such as One Technologies LP dba *FreeScore360.com*, Experian Inc. dba *CreditReport.com*, or
8 Credentia Solutions Inc. dba *ThinkCreditReports.com*.

9 39. Plaintiffs are informed and believed and thereon allege that CONSUMERTRACK may
10 have registered some of the generic phrases in the From Names as fictitious business names
11 (FBNs) with the Los Angeles County Registrar-Recorder/County Clerk.

12 40. However, even if CONSUMERTRACK registered generic phrases as FBNs, generic
13 From Names still misrepresent *who* the spams are from.

14 41. Looking at a list of emails in the inbox, the recipient still cannot identify
15 CONSUMERTRACK from the generic From Names.

16 42. A recipient has no way of knowing what state/county records to search to discover who
17 registered the FBNs.

18 43. Even if the recipient knew to research the FBNs in Los Angeles County, the Los Angeles
19 County Registrar-Recorder/County Clerk’s website *www.lavote.net* only enables a person to
20 determine *if* a FBN is registered; it does not actually show *who* registered the FBN.

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

23 44. Section 17529.5(a)(2) prohibits falsified, misrepresented, or forged information in email
24 headers.

25 45. Registration information for the domain names used to send spams is information
26 contained in or accompanying email headers.

27 46. In *Balsam v. Trancos Inc.*, the Court of Appeal held:

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

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

6 Allowing commercial e-mailers like Trancos to conceal themselves behind
7 untraceable domain names amplifies the likelihood of Internet fraud and abuse--
8 the very evils for which the Legislature found it necessary to regulate such e-
9 mails when it passed the Anti-spam Law.

10 We therefore hold, consistent with the trial court’s ruling, that header information
11 in a commercial e-mail is falsified or misrepresented for purposes of section
12 17529.5(a)(2) when it uses a sender domain name that *neither* identifies the actual
13 sender on its face *nor* is readily traceable to the sender using a publicly available
14 online database such as WHOIS.

15 *Trancos*, 203 Cal. App. 4th at 1097-1101 (emphasis in original).

16 47. Plaintiffs received unlawful spams advertising CONSUMERTRACK and other
17 Defendants, sent from domain names that:

- 18 • Did not identify CONSUMERTRACK or the sender on their face, and
- 19 • Were sent from domain names deliberately registered so as to not be readily
20 traceable to the sender by querying the Whois database,

21 in violation of Section 17529.5. For example:

22 48. Some of the spams at issue were sent from domain names that were proxy registered to
23 prevent the recipient from tracing the domain name to the actual sender using a Whois query. To
24 name but two examples:

- 25 • BISHOP received a spam advertising CONSUMERTRACK sent from the domain
26 name *cdsavingsalert.com*, which was proxy-registered using WhoisGuard Inc. in
27 Panama.
- 28 • PATTERSON received a spam advertising CONSUMERTRACK sent from the
29 domain name *rwkrlaw.com*, which was proxy-registered using Domains By Proxy
30 in Scottsdale, Arizona.

31 49. Some of the spams at issue were sent from domain names that were deceptively
registered to generic terms, often claiming boxes at the U.S. Postal Service or commercial mail
receiving agencies, to prevent the recipient from tracing the domain name to the actual sender
using a Whois query. To name but two examples:

- 1 • CARPERS received a spam advertising CONSUMERTRACK sent from the
2 domain name *logistinct.com*, which was deceptively registered to the generic term
3 “Support Team” at a Post Office Box in Las Vegas, Nevada.
- 4 • HELLMAN received a spam advertising CONSUMERTRACK sent from the
5 domain name *donaken.com*, which was deceptively registered to the generic term
6 “Customer Helpdesk” at an address in Bucharest, Romania.

7 50. Many of the spams at issue were sent from domain names that were falsely registered to
8 nonexistent entities, often claiming boxes at the U.S. Postal Service or commercial mail
9 receiving agencies, to prevent the recipient from tracing the domain name to the actual sender
10 using a Whois query. To name but two examples:

- 11 • MYERS received a spam advertising CONSUMERTRACK sent from the domain
12 name *gassession.net*, which was registered to “Original Markets,” claiming its
13 address to be a box at a branch of The UPS Store in Pataskala, Ohio. No such
14 entity is registered with the Ohio Secretary of State.
- 15 • YOUSOFI received a spam advertising CONSUMERTRACK sent from the
16 domain name *abovethegym.com*, which was registered to “Looks Like LLC,”
17 claiming its address to be a box at a branch of The UPS Store in Houston, Texas.
18 No such entity is registered with the Texas Secretary of State.

19 51. Many of the spams at issue *purport* to have been sent from certain domain names
20 registered to real entities; however, the headers were falsified and/or forged because the spams
21 were *not* in fact sent from those domain names. To name but two examples:

- 22 • HILL received two spams advertising CONSUMERTRACK that claim to have
23 been sent from email addresses *@jcpennyem.com*, which is registered to J.C.
24 Penney Corporation Inc. of Plano, Texas. Plaintiffs are informed and believe and
25 thereon allege that these spams were not sent from anyone at J.C. Penney
26 Corporation, and that the spams’ headers were falsified and/or forged to indicate
27 that they were.
- 28 • MIHAIC received a spam advertising CONSUMERTRACK that claims to have
29 been sent from an email addresses *@redbox.com*, which is registered to Redbox
30 (Automated Retail LLC) of Oakbrook Terrace, Illinois. Plaintiffs are informed
31 and believe and thereon allege that this spam was not sent from anyone at

1 Redbox, and that the spam’s headers were falsified and/or forged to indicate that
2 it was.

3 52. Plaintiffs could not identify CONSUMERTRACK or its spamming affiliates who sent the
4 spams at issue by querying the Whois database for the domain names used to send the spams.

5 **D. Spams With False Subject Lines Violate Business & Professions Code § 17529.5(a)(2);**
6 **Spams With Misleading Subject Lines Violate Business & Professions Code**
7 **§ 17529.5(a)(3)**

8 53. Section 17529.5(a)(2) prohibits falsified, misrepresented, or forged information in email
9 headers.

10 54. The Subject Line is part of email headers.

11 55. Many of the spams at issue contain Subject Lines with falsified and/or misrepresented
12 information. To name but two examples:

- 13 • CARPERS received a spam advertising CONSUMERTRACK with the Subject
14 Line: “WARNING: Your credit score may have changed.”
- 15 • HILL received spams advertising CONSUMERTRACK with the Subject Line:
16 “[email address redacted], your credit score may have updated as of April 1.”

17 56. Although these Subject Lines include the word “may,” the fact that these advertisements
18 were sent *directly* to Plaintiffs, as opposed to inclusion in a mass-media television advertisement,
19 misrepresents the status of the recipients’ credit scores and CONSUMERTRACK’s and its
20 affiliates’ knowledge of the recipients’ credit scores at the time the spams were sent. In
21 particular, the capitalized “WARNING” misrepresents that there is likely an immediate problem
22 with the recipients’ credit scores.

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

25 58. Although the Subject Lines referenced above relate to the *subject matter* of the emails –
26 the recipients’ credit scores – they are misleading as to the *contents*, because the Subject Lines
27 refer to WARNINGS and are likely to mislead reasonable recipients into believing that the
28 bodies of the emails would contain specific information about recent changes to their credit
29 scores, when in fact the bodies merely contain generic advertisements for
30 CONSUMERTRACK’s services.
31

1 **E. Spams With Falsified or Forged Send Dates Violate Business & Professions Code**
2 **§ 17529.5(a)(2)**

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

5 60. The Send Date field is part of email headers.

6 61. Many of the spams at issue have falsified or forged Send Date information. To name but
7 two examples:

8 62. MIHAIC received spams claiming that they were sent from the year 1969. However,
9 CONSUMERTRACK did not exist in 1969 and there was no publicly accessible Internet or
10 commercial email, as we know it, in 1969.

11 63. HELLMAN received spams claiming that they were sent from the year 2038. Unless
12 Defendants have access to a time machine, the emails could not have been sent from 2038.

13 **F. CONSUMERTRACK is Strictly Liable for Spams Sent By Its Affiliates**

14 64. Plaintiffs are informed and believe and thereon allege that CONSUMERTRACK
15 contracted with third party advertising networks and affiliates (a/k/a “publishers”) to advertise its
16 websites for the purpose of selling goods and services for a profit.

17 65. No one forced CONSUMERTRACK to outsource any of its advertising to third party
18 spammers.

19 66. Advertisers such as CONSUMERTRACK are liable for advertising in spams, even if
20 third 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 are also liable for
30 sending unlawful spams. *See Trancos*, generally.

1 67. 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. 192 Cal. App. 4th 805, 820-21 (2d Dist. 2011) (emphasis added). The court did not find
4 that this was an arbitrary requirement; rather, the court identified sound policy reasons behind
5 the Legislature’s decision to create a strict liability statute. *Id.* at 829.

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

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

10 69. Plaintiffs’ rightful and lawful assertion of the California Legislature’s liquidated damages
11 amount of \$1,000 per email is necessary to further the Legislature’s objective of protecting
12 California residents from unlawful spam.

13 70. Section 17529.5 does not require Plaintiffs to quantify their actual damages, allege or
14 prove reliance on the advertisements contained in the spams, or purchase the goods and services
15 advertised in the spams. *Recipients* of unlawful spam have standing to sue and recover
16 liquidated damages. *See* Bus. & Prof. Code § 17529.5(b)(1)(A)(iii); *Hypertouch*, 192 Cal. App.
17 4th at 820, 822-23, 828.

18 71. However, Plaintiffs did suffer damages by receiving the unlawful spams advertising
19 Defendants’ products in the state of California, at their California email addresses. *See* Bus. &
20 Prof. Code § 17529(d), (e), (g), (h).

21 72. Plaintiffs, who cannot refuse to accept such mail, incur costs for the time spent accessing,
22 reviewing, and discarding such mail.

23 73. A recent study found that spam sent to end users in the United States costs about \$20
24 *billion* annually. These spams generated revenues of approximately \$200 million, meaning that
25 the ratio of the cost of spam (to email users) to the benefits of spam (to the spammers) is about
26 100:1. Justin Rao and David Reiley, *The Economics of Spam*, JOURNAL OF ECONOMIC
27 PERSPECTIVES 17 (Summer 2012). Put another way, spammers’ profits come at a relatively
28 enormous expense to society at large.

29 **H. Defendants’ Actions Were Willful and Preclude any Reduction in Statutory Damages**

30 74. Section 17529.5 authorizes this Court to reduce the statutory damages to \$100 per spam.
31 Bus. & Prof. Code § 17529.5(b)(2). But, to secure the reduction, Defendants have the burden of

1 proof to demonstrate not only that they have practices and procedures to prevent unlawful
2 spamming, but also that the practices and procedures are *effective*.

3 75. Plaintiffs are informed and believe and thereon allege that Defendants have not
4 established and implemented, with due care, practices and procedures reasonably designed to
5 effectively prevent unsolicited commercial e-mail advertisements that are in violation of
6 Business & Professions Code § 17529.5.

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

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

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

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

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

24 81. 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 82. Plaintiffs hereby incorporate the foregoing paragraphs as though set forth in full herein.

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

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

5 85. Plaintiffs suffered damages as a result of Defendants' wrongful conduct.

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

8 87. Plaintiffs seek reimbursement of attorneys' fees and costs as authorized by Section
9 17529.5(b)(1)(C).

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

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

18
19 **PRAYER FOR RELIEF**

20 **(Against All Defendants)**

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

23 B. Liquidated damages against Defendants in the amount of \$1,000 per unlawful spam, as
24 authorized by Section 17529.5(b)(1)(B)(ii), as detailed below, for a total of at least
25 \$114,000:

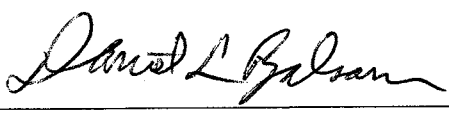
- | | | |
|----|----------------------------------|----------------------------------|
| 26 | • BISHOP: \$14,000 for 14 spams | • MIHAIC: \$32,000 for 32 spams |
| 27 | • CARPERS: \$26,000 for 26 spams | • MYERS: \$16,000 for 16 spams |
| 28 | • CHENDES: \$1,000 for 1 spam | • PATTERSON: \$3,000 for 3 spams |
| 29 | • FALLS: \$2,000 for 2 spams | • RUIZ: \$1,000 for 1 spam |
| 30 | • HELLMAN: \$4,000 for 4 spams | • WILLIS: \$5,000 for 5 spams |
| 31 | • HILL: \$7,000 for 7 spams | • YOUSOFI: \$3,000 for 3 spams |

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- 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 DANIEL BALSAM

Date: November 7, 2013

BY: 

DANIEL L. BALSAM
Attorneys for Plaintiffs