

By Fax

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Attorneys for Plaintiffs

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
14 COUNTY OF SAN FRANCISCO (LIMITED JURISDICTION)

16 DEBRA KOTTONG, an individual; and  
17 MARIA MARQUEZ, an individual;

18 Plaintiffs,

19 v.

20 THE J.G. WENTWORTH COMPANY, a  
21 Delaware corporation;  
22 DIVERSIFIED MERCURY  
23 COMMUNICATIONS LLC, a Delaware  
24 limited liability company;  
25 MATOMY USA INC., a Delaware  
26 corporation;  
27 CABLE AUDIO/TIMEOUT PUBLISHING, a  
28 business entity of unknown organization; and  
29 DOES 1-1,000;

Defendants.

) Case No.: **CGC-17-556316**

) **COMPLAINT FOR DAMAGES**

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

**F I L E D**  
Superior Court of California  
County of San Francisco

JAN 09 2017

CLERK OF THE COURT

BY: *Arlene Ramon*  
Deputy Clerk

29 COME NOW PLAINTIFFS DEBRA KOTTONG and MARIA MARQUEZ and file this  
30 Complaint for one cause of action against Defendants THE J.G. WENTWORTH COMPANY *et*  
31 *al* and allege as follows:

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

2 1. Plaintiffs DEBRA KOTTONG and MARIA MARQUEZ bring this Action against  
3 professional spammers THE J.G. WENTWORTH COMPANY (“JGW”) and its third party  
4 advertising networks and affiliates (aka “publishers”), including but not limited to  
5 DIVERSIFIED MERCURY COMMUNICATIONS LLC, MATOMY USA INC., and CABLE  
6 AUDIO/TIMEOUT PUBLISHING, for advertising in and sending at least 13 unlawful  
7 unsolicited commercial emails (“spams”) to them. A representative sample appears on the next  
8 page (*Figure 1*).

9 2. Neither Plaintiff gave direct consent to receive commercial email advertisements from, or  
10 had a preexisting or current business relationship with, JGW – the entity advertised in the spams.

11 3. The spams all materially violated California Business & Professions Code § 17529.5  
12 (“Section 17529.5”) due to the use of third parties’ domain names without permission and forged  
13 information contained in the email headers.

14 4. JGW is strictly liable for advertising in spams sent by its third party marketing agents.

15 5. Spam recipients are not required to allege or prove reliance or actual damages to have  
16 standing. *See* Bus. & Prof. Code § 17529.5(b)(1)(A)(iii). Nevertheless, Plaintiffs did suffer  
17 damages by receiving the spams. *See, e.g.*, Bus. & Prof. Code § 17529(d), (e), (g), (h).  
18 However, Plaintiffs elect to recover statutory damages only and forego recovery of any actual  
19 damages. *See* Bus. & Prof. Code § 17529.5(b)(1)(B).

20 6. 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 JGW and its  
22 marketing agents failed to implement reasonably effective systems to prevent advertising in  
23 unlawful spams. The unlawful elements of these spams represent willful acts of falsity and  
24 deception, rather than clerical errors.

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

29 //

30 //

31 //

**Subject:** fadedjeens..Get money for your structured settlement payments

**From:** Peachtree Financial Solutions (rewardsrus@email.toysrus.com)

**To:** fadedjeens@yahoo.com;

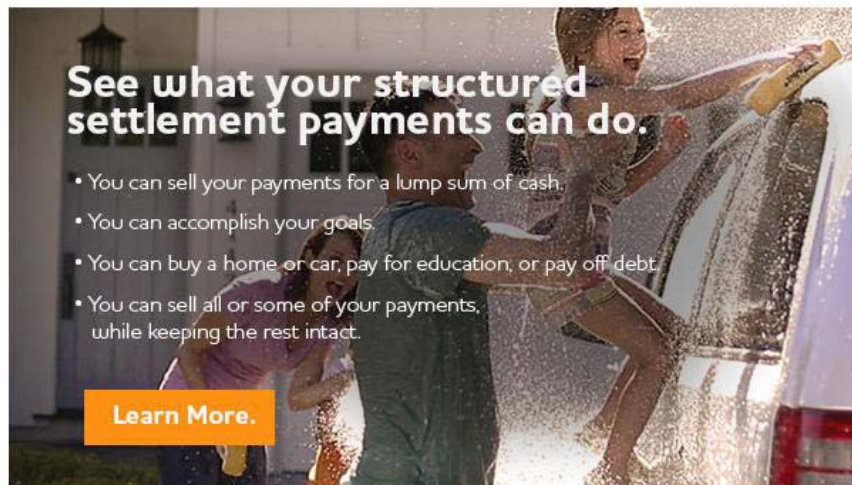
**Date:** Saturday, January 9, 2016 4:00 AM

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-Anna O.

*"You guys did a good job and I enjoy u guys working hard with me..."*

-Samantha C

*"YOU guys are the best!"*

-Kwana S.

\*All purchase transactions are subject to our approval and underwriting guidelines. Call for more details.

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Peachtree Financial Solutions  
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**Figure 1**

1 **II. PARTIES**

2 **A. Plaintiffs**

3 8. DEBRA KOTTONG (“KOTTONG”) was domiciled in and a citizen of the State of  
4 California when she received the spams at issue. Ten of the spams at issue were sent to  
5 KOTTONG’s email address *fadedjeens@yahoo.com* that she ordinarily accessed from California  
6 when she received the spams at issue.

7 9. MARIA MARQUEZ (“MARQUEZ”) was domiciled in and a citizen of the State of  
8 California when she received the spams at issue. Three of the spams at issue were sent to  
9 MARQUEZ’s email address *maria.marquez@mail.com* that she ordinarily accessed from  
10 California when she received the spams at issue.

11 **B. Defendants**

12 10. Plaintiffs are informed and believes and thereon alleges that Defendant THE J.G.  
13 WENTWORTH COMPANY (“JGW”) is now, and was at all relevant times, a Delaware  
14 corporation with a primary place of business in Radnor, Pennsylvania. Plaintiffs are informed  
15 and believe and thereon allege that JGW does business as *peachtreefinancial.com* and  
16 *myjgwentworth.com* – the websites advertised in the 13 spams at issue.

17 11. Plaintiffs are informed and believe and thereon allege that Defendant DIVERSIFIED  
18 MERCURY COMMUNICATIONS LLC (“MERCURY”) is now, and was at all relevant times,  
19 a Delaware limited liability company with a primary place of business in New York, New York.  
20 Plaintiffs are informed and believe and thereon allege that MERCURY does business as  
21 “Mercury Media” and *roia.biz*, and sent, conspired to send, assisted in the sending, and/or  
22 contracted with others to send, all 13 spams at issue in this Action.

23 12. Plaintiffs are informed and believe and thereon allege that Defendant MATOMY USA  
24 INC. (“MATOMY”) is now, and was at all relevant times, a Delaware corporation with four  
25 offices in the United States, one of which is located in San Francisco, California. Plaintiffs are  
26 informed and believe and thereon allege that MATOMY sent, conspired to send, assisted in the  
27 sending, and/or contracted with others to send, 10 of the spams at issue in this Action to  
28 KOTTONG. More specifically, Plaintiffs are informed and believe and thereon allege that  
29 MATOMY or its agents fabricated numerous nonexistent entities and claimed that these entities  
30 actually sent the spams. For example, the spam in *Figure 1* states at the bottom that it was sent  
31 by “Corpnr Restudygroup, 2807 Allen Street, 354, Dallas, TX 75204.” No such entity exists, and

1 the address is a box at a branch of The UPS Store. Nine other spams were supposedly sent by  
2 “Diasegmentation Jobs” in Natick, Massachusetts; “Know Autoworld” in Universal City, Texas;  
3 “Pixosite Lacorp” in Rio Rancho, New Mexico; and “Susauto Freshor” in Council Bluffs, Iowa.  
4 All of these nonexistent entities claim their addresses to be boxes at branches of The UPS Store  
5 or other commercial mail receiving agencies. Plaintiffs are informed and believe and thereon  
6 allege that an ordinary consumer cannot readily ascertain the identity of the true sender of the  
7 spams based on “Corpn Restudygroup” and the other nonsensical entities referenced in the  
8 spams.

9 13. Plaintiffs are informed and believe and thereon allege that Defendant CABLE  
10 AUDIO/TIMEOUT PUBLISHING (“CABLE”) is now, and was at all relevant times, a business  
11 entity of unknown organization with an unknown primary place of business. Plaintiffs are  
12 informed and believe and thereon allege that CABLE sent, conspired to send, assisted in the  
13 sending, and/or contracted with others to send, three of the spams at issue in this Action to  
14 MARQUEZ. More specifically, Plaintiffs are informed and believe and thereon allege that  
15 CABLE or its agents fabricated numerous nonexistent entities and claimed that these entities  
16 actually sent the spams. MARQUEZ received two spams claiming that they were sent by “Cable  
17 Audio, 1077 Silas Deane Hwy #232, Wethersfield, Connecticut 06109 US,” and one spam  
18 claiming that it was sent by “Timeout Publishing, 2018 Electric RD #275, Roanoke, VA 24018  
19 United States.” Both of these nonexistent entities claim their addresses to be boxes at branches  
20 of The UPS Store or other commercial mail receiving agencies. Plaintiffs are informed and  
21 believe and thereon allege that an ordinary consumer cannot readily ascertain the identity of the  
22 true sender of the spams based on these nonsensical entities referenced in the spams.

23 14. Plaintiffs do not know the true names or legal capacities of the Defendants designated  
24 herein as DOES 1 through 1,000, inclusive, and therefore sue said Defendants under the  
25 fictitious name of “DOE.” Plaintiffs are informed and believe and thereon allege that each of the  
26 Defendants designated herein as a DOE is legally responsible in some manner for the matters  
27 alleged in this Complaint, and is legally responsible in some manner for causing the injuries and  
28 damages of which Plaintiffs complain. Plaintiffs are informed and believe and thereon allege  
29 that each of the Defendants designated herein as a DOE Defendant was, at all times relevant to  
30 the matters alleged within this complaint, acting in conjunction with the named Defendants,  
31 whether as a director, officer, employee, agent, affiliate, customer, participant, or co-conspirator.

1 When the identities of DOE Defendants 1-1,000 are discovered, or otherwise made available,  
2 Plaintiffs will seek to amend this Complaint to allege their identity and involvement with  
3 particularity.

4 15. Defendants' joinder in this Action is proper pursuant to Code of Civil Procedure § 379  
5 because Plaintiffs seek relief jointly and severally from Defendants arising from the same series  
6 of transactions and occurrences, and because common questions of law and fact as to Defendants  
7 will arise in the Action. The fact that all Defendants may not be implicated in all spams does not  
8 bar joinder: "It is not necessary that each defendant be interested as to every cause of action or as  
9 to all relief prayed for. Judgment may be given against one or more defendants according to  
10 their respective liabilities." Code Civ. Proc. § 379.

### 11 12 **III. JURISDICTION AND VENUE**

#### 13 **A. Jurisdiction is Proper in a California (Limited Jurisdiction) Superior Court**

14 16. This California Superior Court has jurisdiction over the Action because at all relevant  
15 times, Plaintiffs and Defendant MATOMY were all located in California, and the amount in  
16 controversy at the time of filing is more than \$10,000 and less than \$25,000.

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

18 17. Venue is proper in San Francisco County because lead defendant JGW has not designated  
19 the location and address of a principal office in California or registered to do business in  
20 California with the California Secretary of State. *See Easton v. Superior Court of San Diego*  
21 (*Schneider Bros. Inc.*), 12 Cal. App. 3d 243, 246 (4th Dist. 1970).

22 18. Venue is also proper in San Francisco County because Defendant MATOMY is located  
23 in San Francisco County. *See* Code Civ. Proc. § 395.

### 24 25 **IV. THIRTEEN UNLAWFUL SPAMS**

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

29 20. California's False Advertising Law, Business & Professions Code § 17500

30 prohibits "not only advertising which is false, but also advertising which[,]  
31 although true, is either actually misleading or which has a capacity, likelihood or

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.

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

**A. The Emails at Issue are “Spams”**

21. The emails at issue are “commercial email advertisements”<sup>1</sup> because they were initiated for the purpose of advertising and promoting JGW’s products and services.

22. The emails are “unsolicited commercial email advertisements”<sup>2</sup> because neither Plaintiff gave “direct consent”<sup>3</sup> to, or had a “preexisting or current business relationship”<sup>4</sup> with, JGW – the advertiser in the spams.

23. Plaintiffs did not consent or acquiesce to receive the spams at issue.

24. Plaintiffs did not waive or release any rights or claims related to the spams at issue.

25. Defendants JGW, MERCURY, MATOMY, and possibly DOES advertised in, sent, and/or conspired to send at least 10 unlawful spams advertising JGW that KOTTONG received at her “California email address”<sup>5</sup> from January 9-February 10, 2016.

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<sup>1</sup> “‘Commercial e-mail advertisement’ means any electronic mail message initiated for the 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).

<sup>2</sup> “‘Unsolicited commercial e-mail advertisement’ means a commercial e-mail advertisement sent to a recipient who meets both of the following criteria: (1) The recipient has not provided direct consent to receive advertisements from the advertiser. (2) The recipient does not have a 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).

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

<sup>4</sup> “‘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 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).

<sup>5</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

26. Defendants JGW, MERCURY, CABLE, and possibly DOES advertised in, sent, and/or conspired to send at least three unlawful spams advertising JGW that MARQUEZ received at her California email address on May 23, 2016.

27. Details of the spams are as follows:

Spam #	Recipient	Date	From Name	Purported Sending Domain Name	Purported Sender
1	KOTTONG	2016-01-09	Peachtree Financial Solutions	toysrus.com	Corpn Restudygroup, Dallas TX
2	KOTTONG	2016-02-01	Peachtree Financial Solutions	ebates.com	Corpn Restudygroup, Dallas TX
3	KOTTONG	2016-02-05	**Peachtree_Financial_Solutions**	longhornsteakhouse.com	Pixosite Lacorp, Rio Rancho NM
4	KOTTONG	2016-02-06	Peachtree Financial *Solutions*	ebates.ca	Know Autoworld, Universal City, TX
5	KOTTONG	2016-02-06	Peachtree Financial *Solutions*	toysrus.com	Diasegmentation Jobs, Natick MA
6	KOTTONG	2016-02-06	-Peachtree Financial Solutions-*	toysrus.com	Diasegmentation Jobs, Natick MA
7	KOTTONG	2016-02-09	Peachtree Financial Solutions	toysrus.com	Susauto Freshor, Council Bluffs IA
8	KOTTONG	2016-02-09	Peachtree Financial Solutions	mcdonalds.com	Susauto Freshor, Council Bluffs IA
9	KOTTONG	2016-02-09	Peachtree Financial Solutions	burlingtonstores.com	Susauto Freshor, Council Bluffs IA
10	KOTTONG	2016-02-10	Peachtree Financial Solutions	toysrus.com	Susauto Freshor, Council Bluffs IA
11	MARQUEZ	2016-05-23	J.G. Wentworth	masnsports.com	Cable Audio, Wethersfield CT
12	MARQUEZ	2016-05-23	J.G. Wentworth	masnsports.com	Cable Audio, Wethersfield CT
13	MARQUEZ	2016-05-23	J.G. Wentworth	masnsports.com	Timeout Publishing, Roanoke VA

28. The spams are all unlawful due to the use of third parties' domain names without permission and forged information in the email headers, as described in more detail below.

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 **B. Spams Containing a Third Party's Domain Name Without Permission Violate Business**  
2 **& Professions Code § 17529.5(a)(1)**

3 29. Section 17529.5(a)(1) prohibits spams containing or accompanied by a third party's  
4 domain name without the permission of the third party.

5 30. Plaintiffs are informed and believe and thereon allege that all of the spams at issue in this  
6 Action contain third parties' domain names without permission of the third parties. Specifically:

7 31. Plaintiffs are informed and believe and thereon allege that third party Burlington Stores  
8 Inc. (Burlington, New Jersey) did not give permission for its domain name *burlingtonstores.com*  
9 to appear in or accompany one of the spams at issue in this Action.

10 32. Plaintiffs are informed and believe and thereon allege that third party Ebates Performance  
11 Marketing Inc. (Toronto, Ontario, Canada) did not give permission for its domain name  
12 *ebates.ca* to appear in or accompany one of the spams at issue in this Action.

13 33. Plaintiffs are informed and believe and thereon allege that third party Ebates Inc. (San  
14 Francisco, California) did not give permission for its domain name *ebates.com* to appear in or  
15 accompany one of the spams at issue in this Action.

16 34. Plaintiffs are informed and believe and thereon allege that third party Darden Restaurants  
17 Inc. (Orlando, Florida) did not give permission for its domain name *longhornsteakhouse.com* to  
18 appear in or accompany one of the spams at issue in this Action.

19 35. Plaintiffs are informed and believe and thereon allege that third party TCR Sports  
20 Broadcasting Holding LLP dba Mid-Atlantic Sports Network (Baltimore, Maryland) did not give  
21 permission for its domain name *masnsports.com* to appear in or accompany three of the spams at  
22 issue in this Action.

23 36. Plaintiffs are informed and believe and thereon allege that third party McDonald's  
24 Corporation (Oak Brook, Illinois) did not give permission for its domain name *mcdonalds.com* to  
25 appear in or accompany one of the spams at issue in this Action.

26 37. Plaintiffs are informed and believe and thereon allege that third parties Geoffrey  
27 LLC/Toys R Us Inc. (Wayne, New Jersey) did not give permission for their domain name  
28 *toysrus.com* to appear in or accompany five of the spams at issue in this Action.

29 38. Plaintiffs could see the third parties' domain names when they viewed the spams, as  
30 shown in *Figure 1*.

31 39. Such unauthorized use of third parties' domain names without permission is materially  
false and deceptive. Plaintiffs are informed and believe and thereon allege that JGW and/or its

1 marketing agents forged the Sender Email Addresses so that the advertisements would include  
2 domain names belonging to legitimate third party businesses in order to:

- 3 • Falsely lend an air of legitimacy to the spams by leveraging the brand equity of  
4 legitimate advertisers, making the recipients believe that McDonalds, Toys R Us,  
5 etc. endorse JGW, and
- 6 • Trick spam filters as to the source of the spams. If JGW and its marketing agents  
7 used their *own* domain names, it would be more likely that spam filters would be  
8 able to automatically identify the domain names as being associated with  
9 spammers, and block the spams. On the other hand, emails purportedly sent by  
10 *mcdonalds.com, toysrus.com, etc.* are more likely to be treated as legitimate  
11 emails and not spams, and therefore not blocked.

12 40. Furthermore, assuming that these spams were *not* actually sent from the domain names  
13 that appear in the Sender Email Addresses, which Plaintiffs are informed and believe and thereon  
14 allege to be the case, then the spams also contained falsified and forged information, which  
15 violates Section 17529.5(a)(2).

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

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

20 42. A spam's headers are part of the email and part of the email advertisement.

21 43. “[H]eader information in a commercial e-mail is falsified or misrepresented for purposes  
22 of section 17529.5(a)(2) when it uses a sender domain name that *neither* identifies the actual  
23 sender on its face *nor* is readily traceable to the sender using a publicly available online database  
24 such as WHOIS.” *Balsam v. Trancos Inc.*, 203 Cal. App. 4th 1083, 1101 (1st Dist. 2012),  
25 *petition for review denied*, 2012 Cal. LEXIS 4979 (Cal. May 23, 2012), *petition for certiori*  
26 *denied*, 2012 U.S. LEXIS 8423 (U.S. Oct. 29, 2012), *petition for rehearing denied*, 2013 U.S.  
27 LEXIS 243 (U.S. Jan. 7, 2013). (emphasis in original).

28 44. All of the spams that Plaintiffs received advertising JGW were forged so that it *appears*  
29 that third parties – Burlington Stores, Mid-Atlantic Sports Network, etc. – sent the spams. The  
30 *purported* sending domain names did not identify any of the Defendants on their face, nor –  
31 since they belong to third parties – are the domain names readily traceable to the sender by

1 querying the Whois database, in violation of Section 17529.5. *Balsam*, 203 Cal. App. 4th at  
2 1097-1101.

3 45. Plaintiffs could not identify the sender of any of the spams by querying the Whois  
4 database for the domain names (*burlingtonstores.com*, *masnsports.com*, etc.) *purportedly* used to  
5 send all of the spams at issue.

6 **D. JGW is Strictly Liable for Spams Sent By its Marketing Agents**

7 46. Plaintiffs are informed and believe and thereon allege that JGW contracted with third  
8 party advertising networks and affiliates, including but not limited to MERCURY, MATOMY,  
9 and CABLE, to advertise its websites *peachtreefinancial.com* and *myjgwentworth.com* via email  
10 for the purpose of selling products and services for a profit.

11 47. No one forced JGW to outsource any of its advertising to spam networks and spammers.

12 48. Advertisers are liable for advertising in spams, even if third parties hit the Send button.

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

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

18 Bus. & Prof. Code § 17529(j)(k).

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

21 Bus. & Prof. Code § 17529.5 (emphasis added).

22 49. In fact, in *Hypertouch Inc. v. ValueClick Inc. et al*, the court of appeal held that  
23 advertisers are *strictly liable* for advertising in false and deceptive spams, even if the spams were  
24 sent by third 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  
applies more broadly to any entity that advertises in those e-mails.

29 Thus, like other California statutes prohibiting false or misleading business  
30 practices, the statute makes an entity *strictly liable* for advertising in a  
31 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. *Id.* at 829.

4 50. The advertising networks and affiliates who sent the spams, such as MERCURY,  
5 MATOMY, and CABLE, are also liable for sending unlawful spams. *See Balsam*, generally.

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

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

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

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

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

21 55. However, Plaintiffs did suffer damages by receiving the unlawful spams advertising  
22 Defendant’s products and services in the state of California, at their California email addresses.  
23 Bus. & Prof. Code § 17529(d), (e), (g), (h). Regardless, Plaintiffs do not seek actual damages in  
24 this Action, only liquidated damages. Bus. & Prof. Code § 17529.5(b)(1)(B).

25 **F. Defendants’ Actions Were Willful and Preclude any Reduction in Statutory Damages**

26 56. Section 17529.5 authorizes this Court to reduce the statutory damages to \$100 per spam.  
27 But, to secure the reduction, Defendants have the burden of proof to demonstrate not only that  
28 *established* practices and procedures to prevent unlawful spamming, but also that they  
29 *implemented* those practices and procedures, and that the practices and procedures are *effective*.  
30 Bus. & Prof. Code § 17529.5(b)(2).

31 57. Plaintiffs are informed and believe and thereon allege that Defendants have not  
established and implemented, with due care, practices and procedures reasonably designed to

1 effectively prevent unsolicited commercial e-mail advertisements that are in violation of  
2 Section 17529.5.

3 58. Even if Defendants had established any practices and procedures to prevent advertising in  
4 unlawful spam, such practices and procedures were not reasonably designed so as to be effective.

5 59. Even if Defendants reasonably designed practices and procedures to prevent advertising  
6 in unlawful spam, such practices and procedures were not implemented so as to be effective, as  
7 shown by the very existence of these spams.

8 60. Even if JGW had practices and procedures to prevent unlawful spamming, someone – the  
9 entity(-ies) who actually forged the spams’ headers and included third parties’ domain names  
10 such as *ebates.com* and *longhornsteakhouse.com* – certainly do not have such practices and  
11 procedures. Indeed, the senders’ practices and procedures were designed precisely to violate  
12 Section 17529.5. Therefore, no reduction in statutory damages is available.

13 61. Emails do not forge their own headers to include unrelated third parties’ domain names  
14 by themselves. The false and misrepresented information contained in and accompanying the  
15 email headers are not “clerical errors.” Plaintiffs are informed and believe and thereon allege  
16 that Defendants intended to deceive spam recipients, Internet Service Providers, and spam filters  
17 by forging spam headers and including third parties’ domain names without permission, and  
18 knowingly and willfully took steps to do exactly that.

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

22  
23 **FIRST CAUSE OF ACTION**

24 **[Violations of California Restrictions on Unsolicited Commercial Email,**  
25 **California Business & Professions Code § 17529.5]**  
26 **(Against All Defendants)**

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

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

29 65. Defendants advertised in, sent, and/or caused to be sent at least 10 spams to  
30 KOTTONG’s California email address and 3 spams to MARQUEZ’s California email address  
31 that contained third parties’ domain names without permission and forged header information, in

1 violation of Section 17529.5. The unlawful elements of these spams represent willful acts of  
2 material falsity and deception, rather than clerical errors.

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

5 67. Defendants have not established and implemented, with due care, practices and  
6 procedures to effectively prevent advertising in unlawful spams that violate Section 17529.5 that  
7 would entitle them to a reduction in statutory damages.

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

10 69. 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 California 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 for each of at least 13  
24 unlawful spams, as authorized by Section 17529.5(b)(1)(B)(ii), for a total of at least  
25 \$13,000 as set forth below:

- 26 • Liquidated damages jointly and severally against JGW, MERCURY, MATOMY, and  
27 all DOE Defendants involved in sending spams to KOTTONG, in the amount of  
28 \$1,000 per spam, or \$10,000.
- 29 • Liquidated damages jointly and severally against JGW, MERCURY, CABLE, and all  
30 DOE Defendants involved in sending spams to MARQUEZ, in the amount of \$1,000  
31 per spam, or \$3,000.

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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. Costs of suit.
- E. Such other and further relief as the Court deems proper.

THE LAW OFFICES OF DANIEL BALSAM



Date: January 9, 2017

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

DANIEL BALSAM  
Attorneys for Plaintiffs