

ENDORSED
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Superior Court of California
County of San Francisco

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

18 FENWICK CRECY, an individual;
19 MARGIE BARR, an individual;
20 JASON BISHOP, an individual;
21 DANIEL HANNEGAN, an individual;
22 ELIZABETH KLUEGER, an individual;
23 MIRANDA PERRY, an individual;
24 KRISTEN RIDLEY, an individual;
25 AMANDA ROMERO, an individual; and
26 MORGAN SHAW, an individual;

27 Plaintiffs,

28 v.

29 SCALABLE COMMERCE LLC, a California
30 limited liability company; and
31 DOES 1-500;

Defendants.

) Case No.: **CGC-15-543734**
)
)
) **COMPLAINT FOR DAMAGES**
) **1. VIOLATIONS OF CALIFORNIA**
) **RESTRICTIONS ON UNSOLICITED**
) **COMMERCIAL E-MAIL (Cal. Bus. &**
) **Prof. Code § 17529.5)**

BY FAX

COME NOW PLAINTIFFS FENWICK CRECY *et al* and file this Complaint for one cause of
action against Defendants SCALABLE COMMERCE LLC *et al* and allege as follows:

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

2 1. Plaintiffs bring this Action against professional spammers SCALABLE
3 COMMERCE LLC doing business as “Kids Live Safe” (“KLS”) and its third party affiliates
4 (also known as “publishers”) for advertising in and sending at least 326 unlawful spams to
5 Plaintiffs. A representative sample (*Figure 1*) appears on the next page.

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

8 3. The spams all violated California Business & Professions Code § 17529.5 (“Section
9 17529.5”) due to material falsity and deception: the inclusion of third parties’ domain names
10 without permission by the third parties, and/or misrepresented/falsified information contained in
11 or accompanying the email headers (From Name, Sender Email Address, and Subject Line).

12 4. KLS is strictly liable for advertising in spams sent by its third party affiliates.

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

18 6. This Court should award liquidated damages of \$1,000 per email as provided by
19 Section 17529.5(b)(1)(B)(ii), and not consider any reduction in damages, because KLS failed to
20 implement reasonably effective systems designed to prevent the sending of unlawful spam in
21 violation of the statute. The unlawful elements of these spams represent willful acts of falsity
22 and deception, rather than clerical errors.

23 7. This Court should award Plaintiffs their attorneys’ fees pursuant to Section
24 17529.5(b)(1)(C). *See also* Code of Civil Procedure § 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 //

Subject: Mbarr,Public Notice + Neighborhood Safety Warning

From: Sex-Offender-Alerts (nytdirect@nytimes.com)

To: [REDACTED]@yahoo.com;

Date: Tuesday, August 6, 2013 7:56 AM

Identify Sexual Predators in Your Neighborhood ??? Free Search

NEIGHBORHOOD SAFETY WARNING!!!

You are receiving this email because we have detected Sex Offender activity in your area.

If you would like to know **who they are, where they live, and how you can protect your family** from sexual predators, [please click here.](#)

Note: the website you are about to access contains actual sex offender information. Please use extreme caution when utilizing .this service.

Learning the truth about who lives near your family can be shocking and disturbing. By proceeding you agree to utilize Kids Live Safe solely for informational purposes and to protect your children and loved ones.

I Understand and Want to Proceed >>

This is a Kids Live Safe advertisement. To unsubscribe, write to us at the address below or [click here](#).
Kids Live Safe
3905 State St, Suite 7-228
Santa Barbara, CA 93105

If you'd like to unsubscribe or have received this message in error please [click here](#) or write to :
103 W main St. # 30 Blytheville, AK 72315 US

Figure 1

1 **II. PARTIES**

2 **A. Plaintiffs**

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

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

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

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

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

18 13. MIRANDA PERRY (“PERRY”) was domiciled in and a citizen of the State of
19 California, when she received the spams at issue. The spams at issue were sent to PERRY’s
20 email address that she ordinarily accesses from California.

21 14. KRISTEN RIDLEY (“RIDLEY”) was domiciled in and a citizen of the State of
22 California, when she received the spams at issue. The spams at issue were sent to RIDLEY’s
23 email address that she ordinarily accesses from California.

24 15. AMANDA ROMERO (“ROMERO”) was domiciled in and a citizen of the State of
25 California, when she received the spams at issue. The spams at issue were sent to ROMERO’s
26 email address that she ordinarily accesses from California.

27 16. MORGAN SHAW (“SHAW”) was domiciled in and a citizen of the State of California,
28 when she received the spams at issue. The spams at issue were sent to SHAW’s email address
29 that she ordinarily accesses from California.

30 17. Plaintiffs’ joinder in this Action is proper because Plaintiffs seek relief based on the same
31 series of transactions or occurrences: all received similar spams in the same general time period

1 advertising KLS's websites, and all of those spams were sent by KLS or its marketing agents.
2 The same questions of law (e.g., violations of Section 17529.5, strict liability) and fact (e.g.,
3 direct consent, practices and procedures to prevent advertising in unlawful spam) will arise in
4 this Action. The fact that each Plaintiff does not sue for *exactly* the same spams does not bar
5 joinder: "It is not necessary that each plaintiff be interested as to every cause of action or as to all
6 relief prayed for. Judgment may be given for one or more of the plaintiffs according to their
7 respective right to relief." Code Civ. Proc. § 378(b).

8 **B. Defendants**

9 18. Plaintiffs are informed and believe and thereon allege that Defendant SCALABLE
10 COMMERCE LLC doing business as "Kids Live Safe" ("KLS") is now, and was at all relevant
11 times, a California limited liability company with a primary place of business in Santa Barbara,
12 California, doing business as *KidsLiveSafe.com*, among other domain names/websites.

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

25
26 **III. JURISDICTION AND VENUE**

27 **A. Jurisdiction is Proper in a California Superior Court**

28 20. This California Superior Court has jurisdiction over the Action because all Plaintiffs and
29 KLS are California citizens and the amount in controversy is more than \$25,000.
30
31

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

2 21. Venue is proper in San Francisco County because a company can be sued where the
3 cause of action arises, *see* Code of Civil Procedure § 395.5. CRECY received the spams at issue
4 in San Francisco County.

5
6 **IV. AT LEAST 326 UNLAWFUL SPAMS**

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

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

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

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

17 24. The emails at issue are “commercial email advertisements”¹ because they were initiated
18 for the purpose of advertising and promoting the sale of KLS’s products and services related to
19 sexual predators.

20 25. The emails are “unsolicited commercial email advertisements”² because no Plaintiff gave
21 “direct consent”³ to, or had a “preexisting or current business relationship”⁴ with, KLS.

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

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

³ “‘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).

1 26. KLS advertised in, sent, and/or conspired to send at least 326 unlawful spams that
2 Plaintiffs received at their “California email addresses”⁵ within one year prior to the filing of this
3 Action, as shown below:

4 PLAINTIFF	SPAMS RECEIVED
5 BARR	35
6 BISHOP	35
7 CRECY	56
8 HANNEGAN	85
9 KLUEGER	38
10 PERRY	33
11 RIDLEY	8
12 ROMERO	9
13 SHAW	27

14 27. Plaintiffs’ email addresses play no part in determining whether or not the emails have
15 falsified, misrepresented, forged, misleading, or otherwise deceptive information contained in or
16 accompanying the email headers.

17 28. The spams are all unlawful because they are materially false and deceptive, by inclusion
18 of third parties’ domain names without permission by the third parties, and/or materially
19 falsified/misrepresented information in the email headers, as described in more detail below.

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

22 29. Section 17529.5(a)(1) prohibits spams containing or accompanied by a third party’s
23 domain name without the permission of the third party.

24 30. Many of the spams at issue in this Action include domain names in the sender email
25 address field that – Plaintiffs are informed and believe and thereon allege – belong to third
26 parties and appear without permission of the third parties. For example:

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

⁵ “‘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).

- BARR received spams advertising KLS showing email addresses @nytimes.com in the Sender Email Address field. Plaintiffs are informed and believe and thereon allege that The New York Times Company owns the domain name nytimes.com, and that The New York Times Company did not give anyone permission to include its domain name nytimes.com in these spams.
- BISHOP received spams advertising KLS showing email addresses @wellsfargoemail.com in the Sender Email Address field. Plaintiffs are informed and believe and thereon allege that Wells Fargo & Company owns the domain name wellsfargoemail.com, and that Wells Fargo & Company did not give anyone permission to include its domain name wellsfargoemail.com in this spam.

31. Plaintiffs also received spams advertising KLS with the following additional domain names in the Sender Email Address field: *1-day.co.nz*, *burlingtoncoatfactory.com*, *jcpenneyem.com*, *keppcalling.net*, *kokobooks.com*, *meetit.com*, *one.org*, *otterbox.com*, *petinsurance.com*, *qikmail.com*, *reebokusnews.com*, *saatchionline.com*, *secretescapes.com*, *shopbonton.com*, *teamsnap.com*, *tumblr.com*. Plaintiffs similarly believe that none of the third parties who own these domain names gave permission for their domain names to appear in these spams.

32. Such unauthorized use of third parties' domain names is materially false and deceptive. There can be no dispute that these spams were *not* sent from The New York Times Company, Wells Fargo & Company, etc. Plaintiffs are informed and believe and thereon allege that KLS and/or its marketing agents forge the Sender Email Addresses to include domain names belonging to legitimate third party businesses in order to:

- Falsely lend an air of legitimacy to the spams by leveraging the brand equity of legitimate advertisers like The New York Times Company, Wells Fargo & Company, etc., and
- Trick spam filters as to the source of the spams. If KLS and its marketing agents used their *own* domain names, it would be more likely that spam filters would be able to automatically identify the domain names as being associated with spammers, and block the spams. On the other hand, domain names like *nytimes.com* and *wellsfargoemail.com* are more likely to be treated as legitimate emails and not spams.

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

5 **C. Spams With False and Misrepresented Text in From Names Violate Business &**
6 **Professions Code § 17529.5(a)(2)**

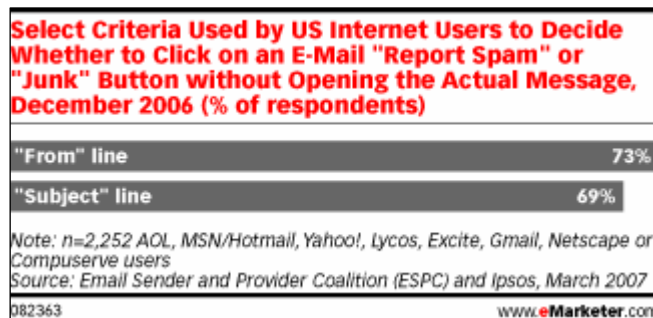
7 34. Section 17529.5(a)(2) prohibits falsified or misrepresented information contained in or
8 accompanying email headers.

9 35. The From Name field is part of email headers. The From Name does *not* include the
10 Sender Email Address.

11 36. Plaintiffs do not insist on any *particular* label (e.g., “Scalable Commerce,” “Scalable
12 Commerce LLC,” “Kids Live Safe,” “KidsLiveSafe.com,” etc.) in the From Name field. Rather,
13 Plaintiffs contend that the text, whatever it is, cannot misrepresent *who* the emails are from.

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

18 38. Indeed, empirical evidence has
19 demonstrated that the From Name is the
20 *most* important factor email recipients use
21 to determine whether or not an email is
22 spam. See eMarketer, E-Mail Open Rates
23 Hinge on ‘Subject’ Line, *available at*



24 <http://www.emarketer.com/Article/E-Mail-Open-Rates-Hinge-on-Subject-Line/1005550> (Oct.
25 31, 2007). Thus, a From Name that misrepresents who a spam is from is *not* a mere technical
26 error; rather, it is a material misrepresentation of the most important part of the email header.

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

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

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

4 40. Most of the spams that Plaintiffs received advertising KLS's websites showed generic
5 text in the From Name field, e.g., "Sex Offender Alerts," "SAFETY ALERT," "Family Safety
6 Alert," "Protect Your Children," "POLICE ALERT," "Local Authorities," "Neighborhood
7 Watch." Generic text like "Sex Offender Alerts" might be an accurate *Subject Line*, but the
8 spams are not *from* "Sex Offender Alerts." These From Names, and other similar From Names
9 containing generic text, misrepresented who the spams were really from, and therefore violated
10 Section 17529.5.

11 41. Plaintiffs are informed and believe and thereon allege that KLS may have registered
12 some – *but not all* – of these generic phrases as fictitious business names ("FBNs") with the
13 Santa Barbara County Clerk. Regardless, these generic phrases – even if they are registered
14 FBNs – do not identify KLS. Many websites could describe themselves using the same generic
15 phrases; how is the recipient supposed to know which, without opening the spams? The generic
16 phrases still misrepresent *who* the spams are from.

17 42. From Names such as "POLICE ALERT" and "Local Authorities" are particularly false
18 and misrepresent the fact that the spams are *not* from the police or other local authorities, but
19 rather from for-profit company KLS. Similarly, the From Name "Neighborhood Watch"
20 misrepresents the fact that the spams are *not* from the recipient's neighborhood watch group, but
21 rather from for-profit company KLS.

22 43. Plaintiffs are informed and believe and thereon allege that KLS knowingly chooses to use
23 generic text in From Names like "Sex Offender Alerts" and "POLICE ALERT" precisely so the
24 recipients would *not* know who the emails were really from when viewing the spams in the inbox
25 view. This forces recipients to open the emails to see if the emails might actually be from the
26 police or other local authorities, or someone to whom recipients gave direct consent to send them
27 commercial email advertisements... or if the emails are in fact, as is the case here, nothing but
28 spams from a for-profit idea that has no idea where recipients of its spams live and whether there
29 is any urgent sexual predator activity near them.

1 44. Moreover, some of the spams did not identify KLS – the advertiser – in the body of the
2 spams. Nor did the spams accurately identify KLS’s affiliates – the actual senders – in the body
3 of the spams.

4 **D. Spams With False and Misrepresented Subject Lines Violate Business & Professions**
5 **Code § 17529.5(a)(2)**

6 45. Section 17529.5(a)(2) prohibits falsified, misrepresented, or forged information in email
7 headers.

8 46. The Subject Line is part of email headers.

9 47. Most of the spams that Plaintiffs received contain Subject Lines with falsified and/or
10 misrepresented information. Plaintiffs allege that these Subject Lines are *absolutely* false and/or
11 misrepresented and violate Section 17529.5(a)(2), as opposed to misleading *relative* to the
12 contents/body of the spams, which would be a violation of Section 17529.5(a)(3). To name but a
13 few examples:

- 14 • Plaintiffs received spams advertising KLS with the Subject Line “URGENT
15 PEDOPHILE ALERT: Child PREDATOR Alert in YOUR AREA,” “[ALERT A
16 -Sexual-Predator- is in Your Neighborhood],” “Pedophile Alert in your area,”
17 “Neighborhood Child Predator Alert,” “Notification of Pedophile Activity,”
18 “Reports of a registered sex offender near you,” “Child Predator Warning in your
19 area – [specific date]” and similar variations thereof. These Subject Lines contain
20 false and misrepresented information because neither KLS nor its affiliates knew
21 if there were pedophiles or child predators in Plaintiffs’ areas/neighborhoods or
22 near Plaintiffs when the spams were sent, and even if KLS or its affiliate knew
23 that there were pedophiles nearby, neither KLS nor its affiliates knew if anything
24 had recently occurred, much less occurred on a specific date, that would trigger
25 such an alert or especially an “urgent alert.”
- 26 • Plaintiffs received spams advertising KLS with the Subject Line “Public Notice
27 Neighborhood Safety Warning.” This Subject Line contains false and
28 misrepresented information because KLS is a private for-profit company; its
29 spams are not *public* notices. Furthermore, neither KLS nor its affiliates knew if
30 there were pedophiles or child predators in Plaintiffs’ neighborhoods when the
31 spams were sent, and even if they knew that there were pedophiles nearby, neither

1 KLS nor its affiliates knew if anything had recently occurred that would trigger a
2 “safety warning.”

- 3 • Plaintiffs received spams advertising KLS with the highly specific Subject Lines
4 “(4) New Sexual Predators Spotted,” “(2) Sex Predators in your area – View Map
5 Now,” and “(1) NEW SEXUAL PREDATOR MOVED INTO YOUR
6 NEIGHBORHOOD – [VIEW MAP].” These Subject Lines contain false and
7 misrepresented information because, since neither KLS nor its affiliates knew
8 where Plaintiffs live,⁶ KLS and its affiliates had no specific information when the
9 spams were sent that precisely *four* – not three, not five – new sexual predators
10 have been spotted anywhere near Plaintiffs, or that precisely *two* – not one, not
11 three – sex predators are in Plaintiffs’ area that they can view on a map now, or
12 that precisely *one* – not two, not three – sexual predators recently moved into
13 Plaintiffs’ neighborhoods. And even if KLS and its affiliates believe that there
14 are sexual predators in *every* neighborhood, KLS and its affiliates have no
15 specific information of current activity in Plaintiffs’ neighborhoods such that
16 Plaintiffs need an alert about it.
- 17 • Plaintiffs received spams advertising KLS with the Subject Line “Your arrest
18 record has been viewed.” These Subject Lines contain false and misrepresented
19 information because neither KLS nor its affiliates had any idea when the spams
20 were sent if any of the Plaintiffs have an arrest record,⁷ and even if a Plaintiff
21 does have an arrest record, neither KLS nor its affiliate has any idea if such record
22 has been viewed – and if so, when, where, and by whom.
- 23 • Plaintiffs received spams advertising KLS with *no* Subject Lines. These spams
24 are false and misrepresented because the spams *are* about something, but the
25 recipient cannot tell from looking at the Subject Line field, particularly when the
26 From Name field is *also* blank. These spams are “lies of omission.”

27
28 ⁶ KLS seems to believe that BARR lives in Seattle. She does not, and never has. This further
29 demonstrates that BARR never gave KLS direct consent to send her commercial email
30 advertisements.

31 ⁷ Section 17529.5 sets forth a reasonable, objective standard. Therefore, whether or not any of
these *particular* plaintiffs has an arrest record is irrelevant.

1 48. In sum, KLS pretends to be public authorities and knowingly uses inflammatory, false,
2 and misrepresented Subject Lines referencing current pedophile or sexual predator activity in
3 spam recipients' area/neighborhood, or viewing arrest records, in order to frighten recipients into
4 opening the emails and signing up for its products and services, even though KLS has no
5 particular knowledge of such current sexual predator activity near spam recipients that justifies
6 triggering urgent alerts, or particular knowledge of viewing arrest records. KLS's spamming is
7 false and deliberately formulaic, with no regards whatsoever for the truth. Indeed, Plaintiffs are
8 informed and believe and thereon allege that KLS advertises in spams with the Subject Line
9 "Public Notification: Sex Offender Detected [+ in User Zip Code]." This Subject Line
10 demonstrates that neither KLS nor its affiliate have any actual knowledge of sexual predator
11 activity, but rather simply use form-fill spams to scare recipients of their spams.

12 **E. KLS is Strictly Liable for Spams Sent By its Affiliates**

13 49. Plaintiffs are informed and believe and thereon allege that KLS contracted with third
14 party advertising networks and affiliates to advertise its websites for the purpose of selling
15 products and services for a profit.

16 50. No one forced KLS to outsource any of its advertising to third party spammers.

17 51. Advertisers such as KLS are liable for advertising in spams, even if third parties hit the
18 Send button.

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

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

25 Bus. & Prof. Code § 17529(j)(k).

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

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

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

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

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

11 192 Cal. App. 4th 805, 820-21 (2d Dist. 2011) (emphasis added). The court did not find that this
12 was an arbitrary requirement; rather, the court identified sound policy reasons behind the
13 Legislature’s decision to create a strict liability statute. *Id.* at 829.

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

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

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

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

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

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

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

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

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

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

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

14 62. Moreover, Plaintiffs are informed and believe and thereon allege that Defendants
15 intended to deceive recipients of their spam messages through the use of falsified and/or
16 misrepresented information in From Names and Subject Lines, and the use of third parties'
17 domain names without permission by the third parties, as described herein.

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

24 64. Plaintiffs are informed and believe and thereon allege that Defendants intended to profit,
25 actually profited, and continue to profit, and were unjustly enriched by, their wrongful conduct
26 as described herein.

27 65. Punitive damages are appropriate to punish malicious, oppressive, and/or fraudulent
28 conduct by Defendants, and to deter others from engaging in such conduct.

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1 **FIRST CAUSE OF ACTION**

2 **[Violations of California Restrictions on Unsolicited Commercial Email,**
3 **California Business & Professions Code § 17529.5]**
4 **(Against All Defendants)**

5 66. Plaintiffs hereby incorporate the foregoing paragraphs as though set forth in full herein.

6 67. Plaintiffs received the spams at issue within one year prior to filing this Complaint,
7 taking into account tolling agreements between Plaintiffs and KLS.

8 68. Defendants advertised in, sent, and/or caused to be sent at least 326 materially false and
9 deceptive unsolicited commercial email advertisements to Plaintiffs' California electronic mail
10 addresses. The spams contain third parties' domain names without permission by the third
11 parties, and/or contain or accompanied by falsified and/or misrepresented information in the
12 email headers, in violation of Section 17529.5.

13 69. The California Legislature set liquidated damages at One Thousand Dollars (\$1,000) per
14 email.

15 70. Plaintiffs seek reimbursement of attorneys' fees and costs as authorized by Section
16 17529.5(b)(1)(C).

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

23
24 WHEREFORE, Plaintiffs pray for judgment against Defendants as hereinafter set forth.

25 **PRAYER FOR RELIEF**

26 **(Against All Defendants)**

27
28 A. An Order from this Court declaring that Defendants violated California Business &
29 Professions Code § 17529.5 by advertising in and sending unlawful spams.

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1 B. Liquidated damages against Defendants in the amount of \$1,000 for each of at least 326
2 unlawful spams, as authorized by Section 17529.5(b)(1)(B)(ii), for a total of at least
3 \$326,000, as set forth below:

PLAINTIFF	LIQUIDATED DAMAGES
BARR	\$35,000
BISHOP	\$35,000
CRECY	\$56,000
HANNEGAN	\$85,000
KLUEGER	\$38,000
PERRY	\$33,000
RIDLEY	\$8,000
ROMERO	\$9,000
SHAW	\$27,000

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11 C. Attorneys' fees as authorized by Section 17529.5(b)(1)(C) and Code of Civil Procedure
12 § 1021.5 for violations of Section 17529.5.

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

17 E. Punitive damages, in an amount to be determined by this Court.

18 F. Costs of suit.

19 G. Such other and further relief as the Court deems proper.
20

21
22 THE LAW OFFICES OF DANIEL BALSAM

23
24 Date: January 20, 2015

BY: 

25 DANIEL L. BALSAM
26 Attorneys for Plaintiffs
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