

ENDORSED

SEP 30 2015

Clerk of the Napa Superior Court
By: J. OLIVER
Deputy

CASE MANAGEMENT CONFERENCE

DATE: 9-8-15

TIME: 8:30am

PLACE: Courtroom F

~~925 Brown Street, Napa CA 94559~~

111 Third

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15 Attorneys for Plaintiffs

DELAY REDUCTION CASE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF NAPA (UNLIMITED JURISDICTION)

16 LORI RICHARDS, an individual;
17 BRENDA BERDAHL, an individual; and
18 SARA SHORB, an individual;
19 Plaintiffs,
20 v.
21 SCALABLE COMMERCE LLC, a California
22 limited liability company;
23 0937316 B.C. LTD, a Canadian company;
24 MINDFULNESS MOUNTAIN
25 MARKETING I.LC, a Delaware limited
26 liability company;
27 VENNQ.COM, a business entity of unknown
28 organization; and
29 DOES 1-500;
30 Defendants.

) Case No.: **26 - 67 410 -**
)
)
) **COMPLAINT FOR DAMAGES**
)
) **1. VIOLATIONS OF CALIFORNIA**
) **RESTRICTIONS ON UNSOLICITED**
) **COMMERCIAL E-MAIL (Cal. Bus. &**
) **Prof. Code § 17529.5)**

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

BY FAX

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

18 LORI RICHARDS, an individual;) Case No.:
19 BRENDA BERDAHL, an individual; and)
20 SARA SHORB, an individual;)

21 Plaintiffs,)
22 v.)

23 SCALABLE COMMERCE LLC, a California)
24 limited liability company;)
25 0937316 B.C. LTD, a Canadian company;)
26 MINDFULNESS MOUNTAIN)
27 MARKETING LLC, a Delaware limited)
28 liability company;)
29 VENNQ.COM, a business entity of unknown)
30 organization; and)
31 DOES 1-500;)

Defendants.)

COMPLAINT FOR DAMAGES

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

COME NOW PLAINTIFFS LORI RICHARDS *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 COMMERCE
3 LLC doing business as “Kids Live Safe” (“KLS”) and its third party advertising networks and
4 affiliates (aka “publishers”), including but not limited to the other named Defendants, for
5 advertising in and sending at least 68 unlawful spams to Plaintiffs. Two representative samples
6 (*Figures 1-2*) appear after this page.

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

9 3. The spams all violated California Business & Professions Code § 17529.5 (“Section
10 17529.5”) due to materially false and deceptive information contained in or accompanying the
11 email headers (i.e. From Name, Sender Email Address, and Subject Line).

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

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. KLS knowingly and willfully continues to advertise in unlawful spams despite numerous
19 other settlements and lawsuits.

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 KLS 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 8. 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.

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Subject: ⚠ THERE IS A PREDATOR IN YOUR AREA - Oct. 11, 2014

From: COMMUNITY ALERT (KidsLiveSafe@tarttech.com)

To: [REDACTED]@yahoo.com,

Date: Saturday, October 11, 2014 10:29 AM

⚠ THERE IS A PREDATOR IN YOUR AREA - Oct. 11, 2014



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 <<](#)

ATTENTION: 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 is not a Government Agency or in any way associated with the Government.

Kids Live Safe | 3905 State St., Suite 7-228 | Santa Barbara, CA 93105

If you do not wish to receive any future promotional emails, Please click here or write to: 185-911 Yates st Victoria, BC V8V4Y9, CA

Figure 1

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Subject: ⚠ Child Predators Alert in your area - Dec. 10, 2014 ⚠

From: Sex Offender Alerts KLS (kls_jrBmQrS@mindfulmailer6.com)

To: kls_mkzxL@mindfulmailer6.com;

Date: Friday, December 19, 2014 6:16 AM

[CLICK HERE TO SEE AREA PREDATORS](#)



WARNING
Neighborhood Safety Alert!!!

You are receiving this email because there may be a risk of Sex Offender activity in your area.

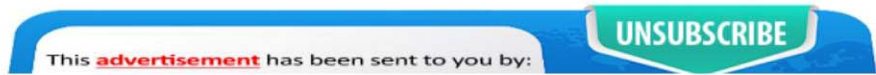
If you would like to know who they are, where they live, and how you can protect your family from sexual predators,
Please Click Here

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

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 is not a Government Agency or in any way associated with the Government.

Kids Live Safe | 3905 State St., Suite 7-228 | Santa Barbara, CA 93105



This **advertisement** has been sent to you by: [UNSUBSCRIBE](#)

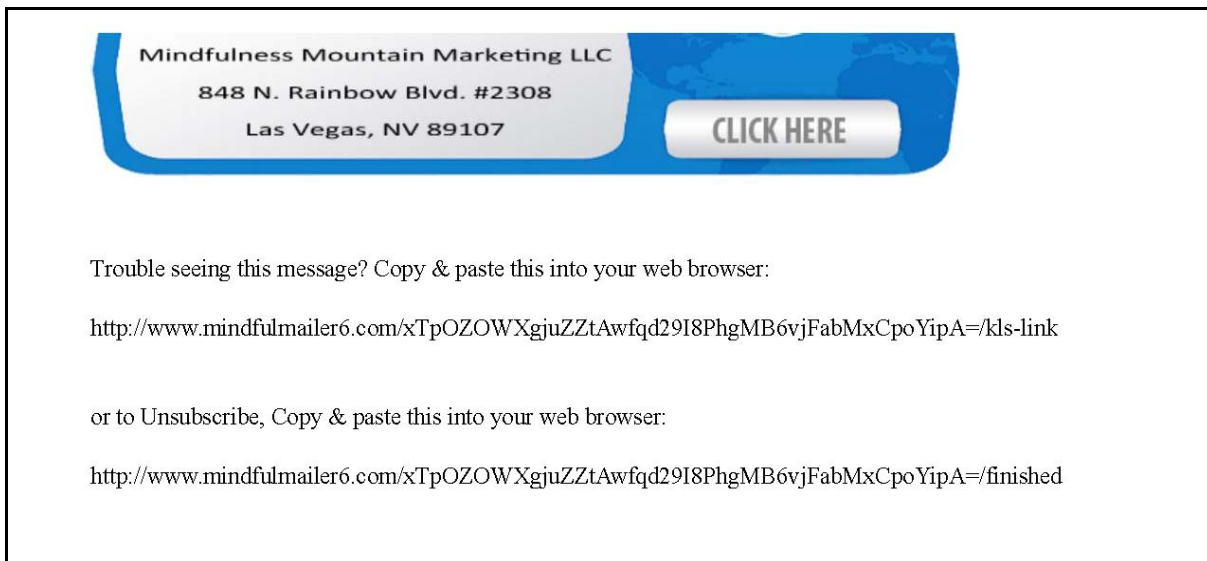


Figure 2

II. PARTIES

A. Plaintiffs

9. LORI RICHARDS (“RICHARDS”) was domiciled in and a citizen of the State of California, when she received the KLS spams at issue. The spams at issue were sent to RICHARDS’ email address that she ordinarily accesses from California.

10. BRENDA BERDAHL (“BERDAHL”) was domiciled in and a citizen of the State of California, when she received the KLS spams at issue. The spams at issue were sent to BERDAHL’s email address that she ordinarily accesses from California.

11. SARA SHORB (“SHORB”) was domiciled in and a citizen of the State of California, when she received the KLS spams at issue. The spams at issue were sent to SHORB’s email address that she ordinarily accesses from California.

12. Plaintiffs’ joinder in this Action is proper pursuant to Code of Civil Procedure § 378 because Plaintiffs seek relief based on the same series of transactions or occurrences: all received similar spams in the same general time period advertising KLS’s websites, and all of those spams were sent by KLS or its marketing agents. The same questions of law (e.g., violations of Section 17529.5, strict liability) and fact (e.g., direct consent, practices and procedures to prevent advertising in unlawful spam) will arise in this Action. The fact that each Plaintiff does not sue for *exactly* the same spams does not bar joinder: “It is not necessary that each plaintiff be interested as to every cause of action or as to all relief prayed for. Judgment may be given for

1 one or more of the plaintiffs according to their respective right to relief.” Code Civ. Proc.
2 § 378(b).

3 **B. Defendants**

4 13. Plaintiffs are informed and believe and thereon allege that Defendant SCALABLE
5 COMMERCE LLC (“KLS”) is now, and was at all relevant times, a California limited liability
6 company doing business as *KidsLiveSafe.com*, among other domain names/websites, and with a
7 primary place of business in Santa Barbara, California.

8 14. Plaintiffs are informed and believe and thereon allege that Defendant 0937316 B.C. LTD
9 (“0937316”) is now, and was at all relevant times, a Canadian company doing business as
10 *tarttech.com* and *kepttech.com*, among other domain names, and claiming its address to be a Post
11 Office Box in Westbank, British Columbia, Canada.

12 15. Plaintiffs are informed and believe and thereon allege that Defendant MINDFULNESS
13 MOUNTAIN MARKETING LLC (“MMM”) is now, and was at all relevant times, a Delaware
14 limited liability company doing business as *mindfulmailer6.com*, *marketmind6.com*,
15 *mindfuldelivery3.com*, and *mindfulserver3.com*, and claiming its address to be a box at MailLink
16 (a commercial mail receiving agency) in Las Vegas, Nevada. Plaintiffs are informed and believe
17 and thereon allege that MMM is *not* registered with the Nevada Secretary of State.

18 16. Plaintiffs are informed and believe and thereon allege that Defendant VENNQ.COM
19 (“VENNQ”) is a business entity of unknown organization doing business as *vennq.com* and
20 claiming its address to be a branch of the U.S. Postal Service in New York, New York – but
21 *without* specifying a Post Office Box number. The domain name *vennq.com* is registered to
22 “JetBeat Tech” but there is no such entity registered with the New York Department of State. A
23 Google search for “JetBeat Tech” identifies no actual entity; the only references are as the
24 registrant of *vennq.com* and other domain names.

25 17. Plaintiffs do not know the true names or legal capacities of the Defendants designated
26 herein as DOES 1 through 500, inclusive, and therefore sue said Defendants under the fictitious
27 name of “DOE.” Plaintiffs are informed and believe and thereon allege that each of the
28 Defendants designated herein as a DOE is legally responsible in some manner for the matters
29 alleged in this complaint, and is legally responsible in some manner for causing the injuries and
30 damages of which Plaintiffs complain. Plaintiffs are informed and believe and thereon allege
31 that each of the Defendants designated herein as a DOE Defendant was, at all times relevant to

1 the matters alleged within this complaint, acting in conjunction with the named Defendants,
2 whether as a director, officer, employee, agent, affiliate, customer, participant, or co-conspirator.
3 When the identities of DOE Defendants 1-500 are discovered, or otherwise made available,
4 Plaintiffs will seek to amend this Complaint to allege their identity and involvement with
5 particularity.

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

13 14 **III. JURISDICTION AND VENUE**

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

16 19. This California Superior Court has jurisdiction over the Action because all Plaintiffs and
17 KLS are California citizens and the amount in controversy is more than \$25,000.

18 **B. Venue is Proper in Napa County**

19 20. "A corporation or association may be sued in the county where . . . the obligation or
20 liability arises." Code Civ. Proc. § 395.5.

21 For purposes of laying venue, a liability 'arises' where the injury occurs. . . . The
22 'obligation or liability' provision of section 395.5 does *not* require that the
23 defendant perform any act inside the county for venue to be proper; it merely
24 requires that *the obligation arise there*.

25 *Black Diamond Asphalt Inc. v. Superior Court of San Joaquin County*, 109 Cal. App. 4th 166,
26 172, 173 (3d Dist. 2003) (internal citations omitted) (emphasis added). Here, even if the
27 unlawful spams originated outside of Napa, Defendants' obligations arose in Napa County,
28 where Lead Plaintiff RICHARDS received the spams and was damaged.

1 **IV. SIXTY EIGHT UNLAWFUL SPAMS**

2 21. Plaintiffs allege that Defendants engaged in tortious conduct: “wrongful act[s] other than
3 a breach of contract for which relief may be obtained in the form of damages or an injunction.”

4 *See Merriam-Webster, www.merriam-webster.com/dictionary/tort* (last viewed Nov. 5, 2013).

5 22. California’s False Advertising Law, Business & Professions Code § 17500

6 prohibits “not only advertising which is false, but also advertising which[,]
7 although true, is either actually misleading or which has a capacity, likelihood or
8 tendency to deceive or confuse the public.” . . . [T]he UCL and the false
advertising law prohibit deceptive advertising even if it is not actually false.

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

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

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

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

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

21
22 ² “‘Unsolicited commercial e-mail advertisement’ means a commercial e-mail advertisement sent
23 to a recipient who meets both of the following criteria: (1) The recipient has not provided direct
consent to receive advertisements from the advertiser. (2) The recipient does not have a
24 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,
25 or extension of credit.” Bus. & Prof. Code § 17529.1(o).

26
27 ³ “‘Direct consent’ means that the recipient has expressly consented to receive e-mail
28 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).

29
30
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
his or her e-mail address, or has made an application, purchase, or transaction, with or without
consideration, regarding products or services offered by the advertiser. [.]” Bus. & Prof. Code
§ 17529.1(l).

1 25. Plaintiffs did not consent or acquiesce to receive the KLS spams at issue. Plaintiffs did
2 not waive or release any rights or claims related to the KLS spams at issue.

3 26. KLS advertised in, sent, and/or conspired to send at least 68 unlawful spams that
4 Plaintiffs received at their “California email addresses”⁵ as shown below:

| PLAINTIFF | SPAMS RECEIVED |
|-----------|----------------|
| RICHARDS | 5 |
| BERDAHL | 10 |
| SHORB | 53 |

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

11 28. The spams are all unlawful because there is materially false and deceptive information
12 contained in or accompanying the email headers, as described in more detail below.

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

15 29. Section 17529.5(a)(2) prohibits falsified or misrepresented information contained in or
16 accompanying email headers.

17 30. The From Name field is part of email headers. The From Name does *not* include the
18 Sender Email Address. So, for example, if an email’s From Line says: “John Doe
19 <johndoe@yahoo.com>”, the From Name is *just* “John Doe.”

20 31. The From Name in an email’s headers is, not surprisingly, supposed to identify who the
21 email is *from*; it is not supposed to be an advertising message. Because computers must use
22 standard protocols in order to communicate, the Internet Engineering Task Force created a
23 collection of “Requests for Comment” (“RFCs”) that define the rules that enable email to work.
24 According to RFC 5322 at ¶ 3.6.2 (emphasis in original):

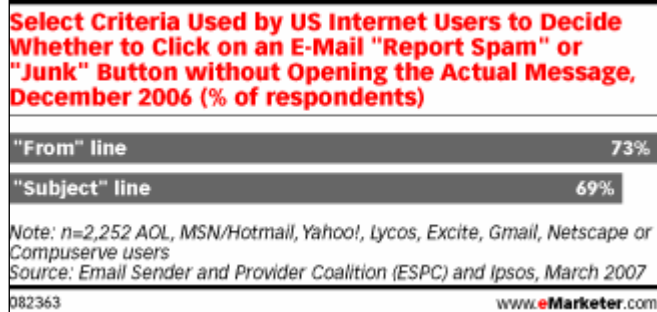
25 The “From:” field specifies the author(s) of the message, that is, the mailbox(es)
26 of the person(s) or system(s) responsible for the writing of the message. . . . In all
27 cases, the “From:” field SHOULD NOT contain any mailbox that does not belong
28 to the author(s) of the message.

29
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 32. Plaintiffs do not insist on any *particular* label (e.g., “Scalable Commerce,” “Scalable
2 Commerce LLC,” “Kids Live Safe,” “KidsLiveSafe.com,” etc.) in the From Name field. Rather,
3 Plaintiffs contend that the text, whatever it is, cannot misrepresent *who* the emails are from.

4 33. The From Name is important to an email user, because in almost all email programs, the
5 inbox view only displays a list of emails, showing the From Name, Subject Line, and Send Date.

6 Therefore, even *if* the body of the email
7 identifies the advertiser, the recipient will
8 not know that until s/he has already
9 clicked to open the email.



10 34. Indeed, empirical evidence has
11 demonstrated that the From Name is the
12 *most* important factor email recipients use to determine whether or not an email is spam. *See*
13 eMarketer, E-Mail Open Rates Hinge on ‘Subject’ Line, *available at*

14 <http://www.emarketer.com/Article/E-Mail-Open-Rates-Hinge-on-Subject-Line/1005550> (Oct.
15 31, 2007). Thus, a From Name that misrepresents who a spam is from is *not* a mere technical
16 error; rather, it is a material misrepresentation of the most important part of the email header.

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

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

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

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

29 ... The seven [] emails do not truly reveal who sent the email The []
30 “senders” identified in the headers of the [] seven emails do not exist or are
31 otherwise misrepresented, namely Paid Survey, Your Business, Christian Dating,

1 Your Promotion, Bank Wire Transfer Available, Dating Generic, and Join Elite. .
2 . . . Thus the sender information (“from”) is misrepresented.

3 203 Cal. App. 4th 1083, 1088, 1090-91, 1093 (1st Dist. 2012), *petition for review denied*, 2012
4 Cal. LEXIS 4979 (Cal. May 23, 2012), *petition for certiori denied*, 2012 U.S. LEXIS 8423 (U.S.
5 Oct. 29, 2012), *petition for rehearing denied*, 2013 U.S. LEXIS 243 (U.S. Jan. 7, 2013). More
6 specifically, *Balsam* confirmed that generic From Names that “do not exist or are otherwise
7 misrepresented when they do not represent any real company and cannot be readily traced back
8 to the true owner/sender” violate the statute. *Id.* at 1093. The Court affirmed the award of
9 \$1,000 liquidated damages for the seven emails with misrepresented information in the From
10 Name field, even though most of the spams identified the advertiser in the body. *Id.* at 1091,
11 1093. Therefore, truthful information in the body of a spam does not cure misrepresented
12 information contained in or accompanying the headers.

13 37. Most of the spams that Plaintiffs received advertising KLS’s websites showed generic
14 text in the From Name field, e.g., “Sex Offender Alerts.” Generic text like “Sex Offender
15 Alerts” might be an accurate *Subject Line*, but the spams are not *from* “Sex Offender Alerts.”
16 This generic text misrepresented who the spams were really from, and therefore violated Section
17 17529.5.

18 38. Plaintiffs are informed and believe and thereon allege that KLS may have registered “Sex
19 Offender Alerts” as a fictitious business name (“FBN”) with the Santa Barbara County Clerk.
20 Regardless, the generic phrase – even if it is a registered FBN – does not identify KLS. Many
21 websites could describe themselves using the same generic phrases; the recipient cannot know
22 which, without opening the spams. The generic phrase still misrepresents *who* the spams are
23 from.

24 39. Some of the spams had generic and false From Names – *not* registered FBNs – such as
25 “ALERT,” “COMMUNITY ALERT,” and “URGENT ALERT.” These all-caps From Names
26 are particularly false and misrepresented because they claim that they are ALERTING the
27 recipients to something URGENT that has *just happened* that demands their immediate attention.
28 Moreover, “COMMUNITY ALERT” falsely represents that the spam came from a community
29 organization near the recipients, as opposed to coming from distant, for-profit company KLS.

30 40. Plaintiffs are informed and believe and thereon allege that KLS knowingly chooses to
31 advertise using generic From Names like “Sex Offender Alerts” and “ALERT” precisely so the

1 recipients would *not* know who the emails were really from when viewing the spams in the inbox
2 view. This forces recipients to open the emails to see if the emails might actually be from the
3 police or a community group, or someone to whom recipients gave direct consent to send them
4 commercial email advertisements... or if the emails are in fact, as is the case here, nothing but
5 spams from a for-profit entity that has no idea where recipients of its spams live and whether
6 there is any sexual predator activity near them that justifies an urgent alert.

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

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

11 42. Registration information for the domain names used to send spams is information
12 contained in or accompanying email headers.

13 43. “[H]eader information in a commercial e-mail is falsified or misrepresented for purposes
14 of section 17529.5(a)(2) when it uses a sender domain name that *neither* identifies the actual
15 sender on its face *nor* is readily traceable to the sender using a publicly available online database
16 such as WHOIS.” *Balsam*, 203 Cal. App. 4th at 1101 (emphasis in original).

17 44. Most of the spams that Plaintiffs received advertising KLS were sent from domain names
18 that:

- 19 • Did not identify KLS or the sender on their face, and
- 20 • Were deliberately registered so as to not be readily traceable to the sender by
21 querying the Whois database,

22 in violation of Section 17529.5. *Balsam*, 203 Cal. App. 4th at 1097-1101.

23 45. Example of not-readily-traceable domain names include:

- 24 • BERDAHL received spams sent from the domain name *throatstories.net*, which is
25 registered to “Office First,” claiming its address to be a box at a branch of The
26 UPS Store in Portland, Oregon. Plaintiffs are informed and believe and thereon
27 allege that no such entity exists.
- 28 • BERDAHL received spams sent from the domain name *riskraft.net*, which is
29 registered to “Energizer Holdings,” claiming its address to be a box at a branch of
30 The UPS Store in Broomfield, Colorado. Plaintiffs are informed and believe and
31 thereon allege that no such entity exists.

- SHORB received spams sent from the domain names *mindfulmailer6.com*, *marketmind6.com*, *mindfuldelivery3.com*, and *mindfulserver3.com*. These domain names are all registered to “Mindfulness Mountain Marketing,” claiming its address to be a box at MailLink (a commercial mail receiving agency) in Las Vegas, Nevada. Even though MMM appears to be a Delaware limited liability company, it doesn’t change the fact that an ordinary consumer cannot readily identify MMM from the Whois query because MMM is not registered with the Nevada Secretary of State – the state in which it publicly claims to be located.

46. Plaintiffs could not identify KLS or its spamming affiliates who sent most of the spams at issue by querying the Whois database for the domain names used to send many of the spams at issue.

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

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

48. The Subject Line is part of email headers.

49. Most of the spams that Plaintiffs received contain Subject Lines with falsified and/or misrepresented information. Plaintiffs allege that these Subject Lines are *absolutely* false and/or misrepresented and violate Section 17529.5(a)(2), as opposed to misleading *relative* to the contents/body of the spams, which would be a violation of Section 17529.5(a)(3).

50. Example of falsified/misrepresented Subject Lines include:

- “Neighborhood Child Predator Risk Alert”
- “Child Predators Alert in your area – [date]”
- “THERE IS A SEXUAL PREDATOR IN YOUR AREA – [date]”

51. These Subject Lines contain false and misrepresented information because neither KLS nor its marketing agents knew if there were child predators in Plaintiffs’ areas/neighborhoods when the spams were sent. KLS knowingly advertises using inflammatory, false, and misrepresented Subject Lines referencing current child predator/sexual predator activity in spam recipients’ area/neighborhood in order to frighten recipients into opening the emails and signing up for its products and services. And, even if KLS or its marketing agents knew that there were child predators nearby, neither KLS nor its agents knew if anything had recently occurred, much

1 less occurred on a specific date, that would trigger such an ALERT or especially an URGENT
2 ALERT.

3 **E. KLS is Strictly Liable for Spams Sent By its Marketing Agents**

4 52. Plaintiffs are informed and believe and thereon allege that KLS contracted with third
5 party advertising networks and affiliates, including but not limited to the other named
6 Defendants, to advertise its websites for the purpose of selling products and services for a profit.

7 53. No one forced KLS to outsource any of its advertising to third party spam networks and
8 spammers.

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

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

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

16 Bus. & Prof. Code § 17529(j)(k).

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

19 Bus. & Prof. Code § 17529.5 (emphasis added). Of course, KLS’s agents are also liable for
20 sending unlawful spams. See *Balsam*, generally.

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

24 [S]ection 17529.5 makes it unlawful for a person or entity “to advertise in a
25 commercial e-mail advertisement” that contains any of the deceptive statements
26 described in subdivisions (a)(1)-(3). Thus, by its plain terms, the statute is not
27 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.

28 Thus, like other California statutes prohibiting false or misleading business
29 practices, the statute makes an entity *strictly liable* for advertising in a
30 commercial e-mail that violates the substantive provisions described in section
31 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 **F. Plaintiffs Sue for Statutory Liquidated Damages; No Proof of Reliance or Actual**
5 **Damages is Necessary**

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

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

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

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

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

23 **G. Defendants’ Actions Were Willful and Preclude any Reduction in Statutory Damages**

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

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

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

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

5 65. Moreover, Plaintiffs are informed and believe and thereon allege that Defendants
6 intended to deceive recipients of their spam messages through the use of falsified and/or
7 misrepresented information in From Names, domain name registrations, and Subject Lines, as
8 described herein.

9 66. Subject Lines and From Names do not write themselves and domain names do not
10 register themselves; the false and misrepresented information contained in and accompanying the
11 email headers are not “clerical errors.” Plaintiffs are informed and believe and thereon allege
12 that Defendants went to great lengths to create falsified and misrepresented information
13 contained in and accompanying the email headers in order to deceive recipients, Internet Service
14 Providers, and spam filters.

15 67. Plaintiffs are informed and believe and thereon allege that Defendants intended to profit,
16 actually profited, and continue to profit, and were unjustly enriched by, their wrongful conduct
17 as described herein.

18 68. Plaintiffs are informed and believe and thereon allege that KLS has received numerous
19 complaints related to unlawful spamming prior to this Action, and yet did nothing to reform its
20 practices.

21 69. Punitive damages are appropriate to punish malicious and oppressive conduct by
22 Defendants, and to deter others from engaging in such conduct. *See* Civ. Code § 3294.

23
24 **FIRST CAUSE OF ACTION**

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

28 70. Plaintiffs hereby incorporate the foregoing paragraphs as though set forth in full herein.

29 71. Plaintiffs received most of the spams at issue within one year prior to filing this
30 Complaint. For the spams that are more than one year old, KLS – although not its marketing
31 agents – agreed to toll the statute of limitations through September 30, 2015.

1 72. Defendants advertised in, sent, and/or caused to be sent at least 68 unsolicited
2 commercial email advertisements to Plaintiffs' California electronic mail addresses that had
3 materially falsified and/or misrepresented information contained in or accompanying the email
4 headers, in violation of Section 17529.5. The unlawful elements of these spams represent willful
5 acts of falsity and deception, rather than clerical errors.

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

8 74. Defendants have not established and implemented, with due care, practices and
9 procedures to effectively prevent advertising in unlawful spams that violate Section 17529.5 that
10 would entitle them to a reduction in statutory damages.

11 75. Plaintiffs seek reimbursement of attorneys' fees and costs as authorized by Section
12 17529.5(b)(1)(C).

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

19
20 WHEREFORE, Plaintiffs pray for judgment against Defendants as hereinafter set forth.

21
22 **PRAYER FOR RELIEF**

23 **(Against All Defendants)**

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

26 B. Liquidated damages against KLS in the amount of \$1,000 for each of at least 68 unlawful
27 spams, as authorized by Section 17529.5(b)(1)(B)(ii), for a total of at least \$68,000, as set
28 forth below:

29

| PLAINTIFF | LIQUIDATED DAMAGES |
|------------------|---------------------------|
| RICHARDS | \$5,000 |
| BERDAHL | \$10,000 |
| SHORB | \$53,000 |

30
31

- C. Liquidated damages in the amount of \$8,000 against 0937316 and VENNQ, jointly and severally with KLS, based on 8 spams advertising KLS that 0937316 and VENNQ sent, or conspired with others to send, to Plaintiffs.
- D. Liquidated damages in the amount of \$53,000 against MMM and VENNQ, jointly and severally with KLS, based on 53 spams advertising KLS that MMM and VENNQ sent, or conspired with others to send, to Plaintiffs.
- E. Liquidated damages in the amount of \$1,000 against VENNQ, jointly and severally with KLS, based on 1 spam advertising KLS that VENNQ sent, or conspired with others to send, to Plaintiffs.
- F. Liquidated damages against each DOE Defendant in the amount of \$1,000, jointly and severally with KLS, for each spam advertising KLS that that DOE Defendant sent, or conspired with others to send, to Plaintiffs.
- G. Attorneys' fees as authorized by Section 17529.5(b)(1)(C) and Code of Civil Procedure § 1021.5 for violations of Section 17529.5.
- H. 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. *See* Business & Professions Code § 17206(d).
- I. Punitive damages, in an amount to be determined by this Court.
- J. Costs of suit.
- K. Such other and further relief as the Court deems proper.

THE LAW OFFICES OF DANIEL BALSAM

Date: Sep. 29, 2015

BY: Daniel L Balsam

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