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6 **Attorneys for Plaintiff, ASIS Internet Services**

7
8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10 **ASIS INTERNET SERVICES, a California**)
corporation,)

Case No. C-05-5124 JCS

11
12 **Plaintiff,**)
vs.)

EXHIBIT J TO DECLARATION OF RICHARD
E. GRABOWSKI IN SUPPORT OF MOTION
FOR SUMMARY ADJUDICATION
SUBMITTED UNDER SEAL

13 **OPTIN GLOBAL, INC., a Delaware**)
Corporation, also dba Vision Media)
Limited Corp., USA Lenders Network,)
14 **USA Lenders, and USA Debt**)
15 **Consolidation Service; et al.,**)
16

17 **Defendants.**)

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19 **DOCUMENTS SUBMITTED**
20 **UNDER SEAL**
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150 Cong. Rec. E72-02, 2004 WL 170208 (Cong.Rec.)

Congressional Record --- Extension of Remarks
Proceedings and Debates of the 108th Congress, Second Session

Material in Extension of Remarks was not spoken by a Member on the floor.

In the House of Representatives
Wednesday, January 28, 2004

*E72 S. 877-CONTROLLING THE ASSAULT OF NON-SOLICITED PORNOGRAPHY AND
MARKETING ACT OF 2003-CAN-SPAM ACT OF 2003 (PL 108-187)

SPEECH OF

HON. JOHN D. DINGELL OF MICHIGAN

Wednesday, January 28, 2004

Mr. DINGELL.

Mr. Speaker, this statement represents my views as well as the views of W.J. "BILLY" TAUZIN, Chairman of the Committee on Energy and Commerce, on S. 877 the Can-Spam Act of 2003 ("the Act"). Our views on Sections one through five of the Act are contained in a separate statement submitted today by Chairman TAUZIN.

Section 6 of the legislation prohibits a person from allowing commercial e-mail messages in violation of section (5)(a)(1) to be sent by a third party if that person had knowledge of such promotion, expected to receive economic benefit from such promotion, and took no action to prevent the transmission of the e-mail messages or report such messages to the Federal Trade Commission. This section should not be interpreted to preclude any action brought under section 5 arising out of the same conduct.

Section 7 of the legislation sets forth enforcement provisions for the Act.

Subsection (a) provides for enforcement of the Act by the Federal Trade Commission (FTC) under section 18(a)(1)(B) of the Federal Trade Commission Act.

Subsection (b) provides for enforcement of the Act by certain other Federal functional regulators. Subsection (e) provides the FTC and the Federal Communications Commission (FCC) may seek injunctive relief or cease and desist orders without the showing of knowledge otherwise required under this Act.

Subsection (f) sets forth enforcement of the legislation by the States.

Paragraph (1) provides that the attorney general, or other official or agency of the State, may bring civil actions exclusively in Federal district court to enjoin violations of section 5 of the Act or obtain damages on behalf or residents of the State, equal to the greater of actual damages or statutory damages as determined under paragraph (3).

Paragraph (2) provides that State attorneys general may seek injunctive relief without the showing of knowledge otherwise required under the Act.

Paragraph (3) sets forth statutory damages.

Subparagraph (A) provides that for purposes of paragraph (1)(B)(ii) damages are determined by multiplying the number of violations, with discrete separately addressed unlawful messages each

counting as a separate violation, by up to \$250.

Subparagraph (B) limits the damages a state attorney general may recover for violations of section 5, other than section 5(a)(1) to no greater than \$2,000,000.

Subparagraph (C) allows the court, in its discretion, to increase the amount of damages awarded under subparagraph (b) to three times the amount set therein if the court finds that the defendant's conduct was willful and knowing or the defendant's unlawful activity includes one or more of the aggravating violations set forth in section 5(b).

Subparagraph (D) provides for a reduction of damages. In assessing damages under subparagraph (A), the court may consider factors including whether the defendant has established and implemented, with due care, commercially reasonable practices and procedures designed to prevent violations of section 5. The court may consider whether the violation occurred despite commercially reasonable efforts to maintain compliance with the practices and procedures designed to prevent such violations.

Subsection (f) also provides that in the case of a successful action under paragraph (1), the court, in its discretion, may award costs of the action and reasonable attorney's fees to the State.

Subsection (g) provides for a limited right of action by bona fide Internet service providers.

Paragraph (1) grants to Internet service providers adversely affected by a violation of section 5(a)(1), 5(b), or 5(d) or a pattern or practice that violates paragraph (2), (3), (4), or (5) of section 5(a) the right to bring civil action in Federal district court. The term "Internet access service" is defined to have the same meaning given that term in section 231(e)(4) of the Communications Act of 1934.

Subsection (g)(2) contains a special definition of "procure" for purposes of ISP enforcement actions that includes a scienter requirement with regard to whether a person who initiates commercial email on their behalf is engaging or will engage in a pattern or practice that violates this Act. It is the intent, with regard to the falsification violations of Section 5(a)(1), that "conscious avoidance of actual knowledge" be construed broadly in a manner consistent with a fundamental purpose of this Act to prohibit and deter falsification techniques in commercial e-mail. Therefore if the procurer has an indication that the initiator is *E73 or has engaged in any falsified spamming technique prohibited by Section 5(a)(1) or [18 U.S.C. 1037](#), the Act is intended to be read so that such a procurer meets the standard of "conscious avoidance of actual knowledge" of violations of the Act by an initiator unless the procurer and takes reasonable steps to prevent such violations by the initiator.

Actual knowledge or conscious avoidance of actual knowledge could be evidenced, for example, by information obtained by the procurer directly from an initiator, or via a complaint, warning or cease and desist communication received from a recipient, Internet access service, or law enforcement alerting the procurer that an initiator to whom the procurer is providing consideration is violating the law. Conscious avoidance of actual knowledge could also be evidenced, for example, by: (1) Doing little or nothing to determine whether suspect initiators who are marketing partners, resellers, affiliates, agents or contractors of the procurer are violating or have violated Federal or State law; (2) failing to follow the procurer's stated policies or procedures prohibiting illegal e-mail advertising methods by initiators who are marketing partners, resellers, affiliates, agents or contractors; (3) repeatedly allowing initiators who are engaged in illegal e-mail advertising methods to provide false information or to fail to identify themselves when they sign up to conduct e-mail advertising for the procurer's products or services; (4) repeatedly paying initiators whom the procurer has terminated for violating the procurer's e-mail policies prohibiting illegal spamming methods; or (5) allowing initiators who

have been terminated for violating the procurer's policies prohibiting illegal e-mail activities repeatedly to sign up for new accounts. The above is not an exhaustive list of ways in which the requisite state of mind can be evidenced.

Subparagraphs (f) and (g) allow enforcement actions for violations of certain parts of Section 5 to be brought by States and ISPs only for a "pattern or practice" of violations. The Act regulates a wide variety of commercial e-mail practices, some of which are deemed more deplorable than others and subject to higher penalties.

Such action may seek to enjoin further violations by defendants, or collect certain limited monetary damages. It is our intention that these cases be based on bona fide violations and not used as tools for anti-competitive behavior among competitors. Additionally, we intend that Internet access service providers provide actual Internet access service to customers.

Statutory damages for Internet service providers are at a lower level than those provided to federal and state regulators.

Section 8 provides for the effect of the legislation on other law.

Section (b) provides for preemption of state laws that expressly regulate the use of e-mail to send commercial messages, including laws that regulate the form or manner of sending commercial e-mail (e.g. labeling requirements). It does not preempt statutes dealing with fraud, falsity, or deception in any portion of a commercial e-mail message or attachment thereto. Thus, State opt-in spam laws, such as California S.B. 186 enacted in the fall of 2003, state opt-out spam laws, and state ADV labeling requirements for commercial e-mail would be entirely preempted, except to the limited extent that those laws also prohibited use of falsification techniques or deception such as those prohibited in [18 U.S.C.1037](#), Section 5(a)(1) and Section 5(a)(2) of this Act. Similarly, State anti-spam laws, such as Virginia's, that expressly regulate or criminalize e-mail falsification techniques would not be preempted. In addition, Section 8(b) is not intended to preempt general purpose State deceptive trade practice laws, or State common law rules, such as State trespass to chattels theories, that have been used in anti-spam litigation. Nor does Section 8(b) preempt State laws relating to acts of fraud or computer crime. However, to the extent any State or local law regulates the manner of sending commercial e-mail, the mere titling of the law as an "anti-fraud statute" or the combination of commercial e-mail regulation provisions with actual falsification or computer crime provisions in the same statute is not sufficient to avoid preemption of those regulatory provisions by this Act.

Section 9 provides the FTC with authority to establish a do not e-mail registry.

The provision requires the FTC to set forth a plan and timetable for establishing a national do not e-mail registry. The FTC is required to report to the Congress on any practical, technical, security, privacy, enforceability or other concerns the FTC may have with such a registry.

We expect that the FTC will proceed with due care in this important inquiry. In particular, the FTC should take care not to inadvertently adopt a do not e-mail registry that would facilitate the availability of working e-mail addresses to persons who might use them in violation of this Act.

Section 14 requires the FCC to promulgate rules to prevent the sending of unsolicited e-mail messages to wireless customers, without the express consent of such customers.

150 Cong. Rec. E72-02, 2004 WL 170208 (Cong.Rec.)

END OF DOCUMENT

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Miscellaneous Information

Lead Type: LowRateAdvisors.com (AZIQL / QLGLB)
 Current Major Status: Killed from LOLA (8050)
 Loan Grade: Refi200
 PEM Code: 0
 PEM Score: 0
 Lead Source: LowRateAdvisors.com

Status History:

11/25/2005	12:13PM	Retire lead / Bogus lead - bad data	
11/25/2005	12:13PM	Attempted to contact borrower / (Outbound) Home (707) 476-8984	Shirley Johnson
11/08/2005	12:08PM	Attempted to contact borrower / (Outbound) Home (707) 476-8984	Shirley Johnson
11/08/2005	12:06PM	Attempted to contact borrower / (Outbound) Home (707) 476-8984	Shirley Johnson
11/08/2005	12:06PM	Attempted to contact borrower / (Outbound) Home (707) 476-8984	Shirley Johnson
11/05/2005	4:24PM	Attempted to contact borrower / Home Phone Left Message	Shirley Johnson
11/05/2005	4:23PM	Attempted to contact borrower / (Outbound) Home (707) 476-8984	Shirley Johnson
11/05/2005	4:20PM	Attempted to contact borrower / (Outbound) Home (707) 476-8984	Shirley Johnson
11/04/2005	6:58PM	Attempted to contact borrower / (Outbound) Home (707) 476-8984	Shirley Johnson
11/04/2005	6:58PM	Attempted to contact borrower / Home Phone Left Message	Shirley Johnson
11/03/2005	3:28PM	Attempted to contact borrower / Home Phone Left Message	Shirley Johnson
11/03/2005	3:27PM	Email sent - Additional 7th Street Addr. REFI	Shirley Johnson
11/02/2005	5:08PM	Attempted to contact borrower / Home Phone Left Message	Shirley Johnson
10/31/2005	2:39PM	Attempted to contact borrower / (Outbound) Home (707) 476-8984	Shirley Johnson
10/31/2005	2:39PM	Attempted to contact borrower / Home Phone Left Message	Shirley Johnson
10/31/2005	2:38PM	Email sent - Info/Initial Questions REFINANCE	Shirley Johnson
10/31/2005	4:45PM	Banker Transfer from LOLA	Richard Soto
10/28/2005	5:19PM	Attempted to contact borrower / Home Phone Left Message	Richard Soto
10/28/2005	5:18PM	Attempted to contact borrower / (Outbound) Home (707) 476-8984	Richard Soto
10/28/2005	5:14PM	Attempted to contact borrower / (Outbound) Home (707) 476-8984	Richard Soto
10/28/2005	5:13PM	Attempted to contact borrower / (Outbound) Home (707) 476-8984	Richard Soto
10/28/2005	4:45PM	Banker Assigned (LAE)	Richard Soto
10/28/2005	4:44PM	Initial Contact	LOLA System

Mortgage Banker: Shirley Johnson Ext. 58340 CBID: 16534
 Banker's Sales Director: Bob Guttenberg Ext. 57756 CBID: 1326
 Branch: Quicken Web - Laurel Park

Mortgage Type/Loan Terms

Web application number: 4676575979
 Loan Purpose: Refinance
 Loan Amount: \$80,000.00
 Estimated market value: \$275,000.00
 LTV: 29.09%
 Total interest rate: 0.000%
 Total points paid by client: Zero
 Monthly P&I payment: \$0.00
 Calculated MI: No

Subject Property Information

Address: 2589 Royal Drive
 Fortuna CA 95540
 County:
 Property type: Single Family
 Occupancy type: Primary Residence
 State Matrices/Fee Schedule
 View Map of Subject Property: View Map

Requested Loan Amount Detail

Current loan balance: \$80,000.00
 Cash out requested: No

Miscellaneous Refinance Information

How long will you own the home:
 Current interest rate: 0.000%
 Rate lock requested: No
 Current Monthly Loan Payment:
 Annual property taxes: \$0.00
 Annual homeowners insurance: \$0.00

About The Primary Client: Bruce Wolf

Name: Bruce Wolf
 SSN:
 Birthdate: Info Not Provided
 Home phone: (707) 476-8984
 Work phone: (707) 476-8984
 E-Mail address: bbb@asis.com
 Marital status:
 About where you live - Bruce Wolf
 Address: 2589 Royal Drive
 Fortuna CA 95540
 Original MID: 2589RoyalWolfBruce95540
 MID: 2589RoyalWolfBruce95540
 View Map of Present Address: View Map
 GET LOCAL NEWS FOR Fortuna, CA: GET LOCAL
 Appraisal Turn Times: Appraisal Turn Times
 Rent/Own: Rent Free
 Years at address: 0.00
 Employers & employment income - Bruce Wolf
 Employer: Employer - Unknown