

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EARTHLINK, INC.,)
)
 Plaintiff,)
)
 v.) CASE NO. 1:04-CV-3142 CAP
)
 KSTM, LLC; TANYA BIBEAU; and)
 John Does 1-5,)
)
 Defendants.)

FIRST AMENDED COMPLAINT
FOR INJUNCTION AND DAMAGES

Plaintiff EarthLink, Inc. ("EarthLink" or "Plaintiff") files this First Amended Complaint For Injunction And Damages ("Verified Complaint") against KSTM, LLC, Tanya Bibeau, and John Does 1-5 (collectively, "Defendants"), whose wrongful acts, individually and in combination, have caused and continue to cause substantial and irreparable harm to EarthLink.

Jurisdictional Allegations

1.

Plaintiff EarthLink is a Delaware Corporation with its principal place of business at 1375 Peachtree Street N.E., Atlanta, Fulton County, Georgia 30309.

2.

Defendants committed illegal acts that were intended to and did cause harm to EarthLink in the State of Georgia. Defendants

have maintained systematic and continuous contacts with Georgia via the below-described e-mail and Internet-related crimes and violations. Defendants have, in violation of state and federal law, used EarthLink's Georgia computers and servers to transmit their e-mails to, among millions of other victims/recipients, numerous Georgia residents. Defendants were at all times aware that their wrongful acts would harm EarthLink and its computer network in Georgia, which is the headquarters, nerve center, and principal base (both business-wise and computer-wise) of EarthLink's operations. Accordingly, Defendants are subject to jurisdiction pursuant to, among other sources, the Georgia Long-Arm Statute (O.C.G.A. § 9-10-91) and the principles set forth in Calder v. Jones, 465 U.S. 783 (1984).

3.

KSTM, LLC is a Nevada limited liability company that is subject to jurisdiction and venue in this Court and may be served by service of process on its registered agent: Nevada Corporation Serves, Ltd at 4231 Dant Blvd, Reno, Nevada 89509-7020.

4.

Tanya Bibeau a resident of the State of California who is subject to jurisdiction and venue in this Court and may be

served at his address in Van Nuys, CA 91406 (complete address information excluded pursuant to Standing Order 04-02).

5.

John Does 1-5 are individuals whose names and identities are not yet known to EarthLink. Through investigation and discovery in the instant case, EarthLink will determine the identities of these John Doe Defendants and will identify them by amendment to this Verified Complaint.

6.

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

7.

Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b)(2).

FACTUAL ALLEGATIONS COMMON TO ALL COUNTS

ISPs And The Internet

8.

The acts complained of herein were committed by Defendants through their use of the Internet, a complex communications network that links private and public networks and computers. These networks and computers are interconnected through telephone lines, fiber optic cables, and other high-speed telecommunications lines. A substantial portion of the lines and equipment that comprise the Internet are owned and/or

administered by "Internet Service Providers" ("ISPs"). ISPs provide their end-user customers with a variety of Internet-related services, including Internet connectivity and the ability to communicate with other Internet users via electronic mail ("e-mail").

9.

The e-mail system and computer network of a given ISP was created and exists solely for the benefit of that ISP and its subscribers. The computer equipment comprising a given ISP's computer network (including the ISP's e-mail-related servers and computers) is the private property of that ISP. The ISP therefore has the legal right to establish and enforce rules governing access to and use of its computer network. Accordingly, any access to or use of the ISP's network in violation of the ISP's rules and policies gives rise to a variety of causes of action against the violator for his unauthorized and illegal trespass upon the ISP's network.

Unsolicited Commercial E-mail ("Spam") - Generally

10.

Among the categories of conduct prohibited by every major ISP in the United States (including EarthLink) is the sending of unsolicited commercial e-mail (pejoratively referred to as "spam") into, out of, or through the ISP's computer network.

ISPs prohibit spam because it jeopardizes the performance and viability of the ISP's computer system; because the recipient users and ISPs must pay for the resources used by the spammer to send and deliver the spammer's e-mails; and because the advertised products and services are often fraudulent and/or illegal.

11.

Spam impairs the efficiency of the Internet as a whole and of the Internet-related and proprietary services offered by the victim ISPs. Spam is the equivalent of a COD package that the recipient ISP and end-users are forced to accept, or a series of costly collect calls that the victim is forced to accept and that tie up the victim's phone systems. Because spam allows the sender to shift the delivery costs to the victim ISPs and the victim recipients, spam is proliferating at an exponential rate. Spam now accounts for roughly three-quarters or more of all electronic mail traffic (up from an estimated 7 percent in 2001).

12.

As has been recognized by the United States Congress, spam causes irreparable harm and significant monetary damages to ISPs and Internet users. ISPs must continually expand the size and capacity of their computer networks to accommodate the ever-

increasing glut of these illegal e-mails. Spam severely and irreparably damages the business reputation of innocent individuals and companies who are often falsely identified or implicated by the spammer as having had some voluntary role in the origination or transmission of the offending e-mail. Spam also harms the individual end-user recipients targeted by the spammers. These universally-despised e-mails cause the user-recipients to waste time, money, and computer resources in relation to the storage, review, and inevitable deletion of the unwanted spam.

"Spoofing"

13.

Spammers (including the Defendants identified herein) often take fraudulent or illegal steps to hide the true source of their e-mails. These practices are sometimes referred to collectively as "spoofing." Spammers who engage in "spoofing" manipulate their illegal e-mails so that the finger of responsibility is pointed at some innocent or uninvolved third-party ISP or Internet user. Forms of spoofing include:

- (a) manipulation of the message header to alter the identification of the sender's true name and domain (i.e., manually forging the "from" address);
- (b) falsely referencing an innocent or uninvolved person or entity in the text of the message as having played some role in the sending of the message; and/or

- (c) routing the e-mail or message through an innocent ISP's system to create an electronic trail that falsely indicates that the ISP was voluntarily involved in the sending and/or transport of the spam.

The Illegality Of Spam

14.

If spam is expressly prohibited by the publicly-posted policies of a given ISP (as is the case with EarthLink and every other major ISP in the United States), the sending of spam into, out of, or through the computer network of that ISP is actionable under a variety of federal and state causes of action, including the Computer Fraud and Abuse act, common law trespass, and a variety of other causes. See e.g., EarthLink v. Judith Carmack, Rashawn Dewer, et. al., No. 02-CV-1740 (N.D. Ga. January 7, 2004) (Order and Default Judgment by Judge Martin); EarthLink v. Howard Carmack, No. 02-CV-3041 (N.D. Ga. May 7, 2003) (Findings of Fact, Conclusions of Law, and Judgment by Judge Thrash); EarthLink v. Smith, et. al., No. 01-CV-2099 (N.D. Ga. July 9, 2002) (Findings of Fact, Conclusions of Law, and Judgment by Chief Judge Evans); Verizon Online Services, Inc. v. Ralsky, 203 F. Supp. 2d 601, 609 (E.D. Va. 2002); America Online, Inc. v. IMS, 24 F. Supp. 2d 548, 551-52 (E.D. Va. 1998); America Online, Inc. v. LCGM, 46 F. Supp.2d 444 (E.D. Va. 1998);

Hotmail Corp. v. Van\$ Money Pie Inc., 1998 WL 388389, 47
U.S.P.Q.2d 1020 (N.D. Cal. 1998).

15.

To supplement the various causes of action under which spam was already illegal, Congress enacted the Controlling the Assault of Non-solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act"). The CAN-SPAM Act, which took effect on January 1, 2004, provides a series of prohibitions and remedies applicable to all senders of unsolicited commercial e-mail. The CAN-SPAM Act preempts only a limited set of spam-specific state statutes, none of which are relied upon or referenced in this Complaint. The CAN-SPAM Act expressly preserves all other spam-related causes of action. Accordingly, some types of spam-related misconduct may comply with the CAN-SPAM Act and yet, if forbidden by the involved ISP, nonetheless be actionable under the other causes of action set forth in this Complaint.

Plaintiff EarthLink, Inc.

16.

Plaintiff EarthLink is one of the largest ISPs in the world, providing Internet connectivity and e-commerce-related services to roughly 5 million individuals and businesses from more than 5,000 points of presence ("POPs"). EarthLink's headquarters and principal place of business - including its

executive department, its key legal personnel, its call center representatives, the head and key members of its fraud and abuse team, and the essential portion of the EarthLink network of computers, equipment, and personnel necessary for the provision of e-mail and Internet service to its customers and users - are located in Atlanta, Georgia. Georgia is also home to the portion of EarthLink's computer network that is necessarily accessed anytime an Internet user purchases an EarthLink account via the Internet.

17.

The Internet-related services offered by EarthLink include e-mail functionality, by which EarthLink's members are allowed to compose, send, and retrieve e-mail messages by use of their unique EarthLink e-mail addresses (e.g., petewellborn@earthlink.net or wellbornbakery@mindspring.com). EarthLink members may send and receive e-mails to and from other EarthLink members, as well as any other Internet users. EarthLink's costs of doing business are borne in substantial part by membership fees and service fees paid by its members.

18.

EarthLink has invested substantial sums of money in developing and marketing its Internet-related network and services. EarthLink's computer network is not designed to

accommodate, and is vulnerable to disruption by, indiscriminate and unauthorized mass mailings of unsolicited commercial e-mail. Accordingly, EarthLink has strict policies against the transmission of unsolicited commercial e-mail into, out of, or through the EarthLink network.

19.

EarthLink's absolute prohibition against unsolicited commercial e-mail is set forth in its Commercial E-mail Policy (its "CEP"). EarthLink's CEP is publicly posted at EarthLink's web site at www.earthlink.net/about/policies. The CEP is available to and accessible by all Internet users. The CEP governs any use of EarthLink's e-mail system and computer network, whether by an EarthLink member or by some other Internet user (e.g., a non-EarthLink member who sends e-mail into the EarthLink network). A true and correct copy of the EarthLink CEP is attached hereto at Exhibit A.

20.

EarthLink's CEP functions like a virtual "no trespassing" sign to the world, effectively putting all senders of unsolicited commercial e-mail on notice that the sending of such e-mail into, out of, or through EarthLink's network is unauthorized and illegal. The CEP provides in pertinent part that:

EarthLink prohibits the transmission of any and all unsolicited commercial emails ("spam") into, out of, or through the EarthLink Network. This prohibition includes the sending of spam by any Internet user to an EarthLink email address. EarthLink also prohibits the transmission into, out of, or through the EarthLink Network of any commercial email in which the sender has employed fraudulent or deceptive measures to disguise or obscure the actual source or sender of the email, including but not limited to: (a) the use of forged, false, or modified headers; (b) the use of forged ("spoofed"), invalid, or nonexistent "from" addresses; and/or (c) the intentional use without authorization of a third-party's mail servers or computer equipment to send or relay the commercial email ("third party relay" or "server hijacking"). In addition, EarthLink prohibits the transmission into, out of, or through the EarthLink Network of any commercial email in which the sender has used deceptive, misleading, off-topic, or gibberish language, text, or characters in the subject line or the text of the email, a primary effect of which is to disguise the actual nature or subject of the email. Finally, in relation to any commercial email sent using Internet resources other than the EarthLink Network, EarthLink prohibits the use of or reference to any EarthLink email address or EarthLink Domain in a manner that does or might create the erroneous impression that the email was sent into, out of, or through the EarthLink Network, including but not limited to any reference in the "from" line to an EarthLink email address.

21.

EarthLink's prohibition against unsolicited commercial e-mail is also memorialized in its Acceptable Use Policy ("AUP"). The AUP is publicly posted at EarthLink's web site at www.earthlink.net/about/policies and is available to and accessible by all Internet users. A true and correct copy of the EarthLink AUP is attached hereto at Exhibit B. The AUP governs any use of EarthLink's e-mail system and computer network, whether by an EarthLink member or by some other Internet user (e.g., a non-EarthLink member who sends e-mail into the EarthLink network). The AUP has, at all relevant times, included strict prohibitions against various categories

of e-mail-related misconduct, including the sending of unsolicited commercial e-mail into, out of, or through EarthLink's network. As does EarthLink's CEP, this AUP functions like a virtual "no trespassing" sign to the world, effectively putting all senders of unsolicited commercial e-mail on notice that the sending of such e-mail into, out of, or through EarthLink's network is unauthorized and illegal.

Defendants And Their Wrongful Acts - Generally

22.

Defendants have engaged in the below-described illegal acts, including unsolicited commercial e-mail campaigns in relation to which they have converted and trespassed upon EarthLink's computer network in bad faith for their own wrongful purposes. Moreover, in addition to these spam-related violations against EarthLink, Defendants have, upon information and belief, committed and are committing the same actionable conduct against other major ISPs and e-mail providers, including, without limitation, America Online, Microsoft, and/or Yahoo.

23.

Defendants have sent and/or procured the sending of millions of unsolicited commercial e-mails into and through the EarthLink network during 2004. Defendants' illegal e-mails solicit contact information from the spam recipients by touting

low mortgage or loan rates. A true copy of a sample of Defendants' illegal e-mails is attached hereto at Exhibit C.

24.

Defendants' e-mails direct recipients to, *inter alia*, the Internet web site: <http://eiwd.info.newusesforyou.com/aps/cms>. At the web site, responding recipients are instructed to enter their names and other contact information.

25.

Defendants then sell the responding recipients' names and contact information (the "mortgage lead") to either: (a) other mortgage lead sellers, who then resell the information; or (b) "legitimate" mortgage and finance companies, who in turn attempt to sell their services to the people identified in the purchased leads.

Willful And Intentional Nature Of Defendants' Conduct

26.

Defendants have been aware at all relevant times that their use of EarthLink's name and computers was not authorized. Defendants have also been aware at all times that they were prohibited from spamming EarthLink accounts with their illegal e-mails. Finally, Defendants have at all relevant times been aware of the damage to all legitimate and ethical Internet users

and Internet-related companies, including EarthLink, caused by their illegal activities.

27.

Defendants were necessarily aware of the illegality of their spam-related activities and the harm that would necessarily result on the basis of, among other means: (1) EarthLink's publicly-posted CEP and AUP; (2) the massive publicity surrounding the numerous anti-spam lawsuits and campaigns waged and won by EarthLink and other ISPs over the past decade; (3) the massive number of complaints that Defendants and/or their upstream telecommunication service providers must necessarily have received in relation to their spamming-campaigns; and (4) the repeated cancellations of Internet service that these Defendants must necessarily have experienced as a result of their illegal spamming campaigns.

28.

Defendants' awareness of the unauthorized and illegal nature of their e-mail campaigns is also apparent from: (1) the deceptive techniques they use in an effort to beat or circumvent the spam filters and other spam-blocking techniques employed by the victim ISPs and end-users; and (2) the deceptive techniques they use to conceal their identities as they continue to spam.

Resulting Harm To EarthLink

29.

In being forced to deliver the illegal e-mails sent by Defendants, EarthLink has incurred and continues to incur substantial bandwidth- and delivery-related costs. EarthLink has also been forced to devote substantial time, resources, and money to the problems caused by the illegal acts of Defendants and other spammers.

30.

EarthLink's phone lines, servers, and computers have been bombarded with a multitude of complaint calls and e-mails complaining of Defendants' illegal acts. As Defendants were aware would occur, their illegal schemes have damaged and continue to damage the reputation of EarthLink and the performance of EarthLink's Georgia computer systems.

31.

Defendants' wrongful acts have accordingly resulted in substantial harm to EarthLink, including irreparable injury to its reputation, loss of goodwill, lost profits, employee costs, attorney fees, and other pecuniary damages. Unless enjoined by this Court, Defendants will continue these acts, thereby causing EarthLink further immediate and irreparable damage.

COUNT I
GENERAL VIOLATIONS OF
THE CAN-SPAM ACT

32.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 27 above as if the same were set forth herein in full.

33.

Defendants have committed actionable violations of the CAN-SPAM Act (15 U.S.C. § 7701 et seq.) by engaging in one or more forms of the following categories of prohibited conduct:

(a)

In violation of 15 U.S.C. § 7704(a)(1)(A), Defendants initiated the transmission, to a protected computer, of a commercial electronic mail message that contained, or was accompanied by, header information that was materially false or materially misleading. Specifically, the header information of said e-mail included an originating electronic mail address, domain name, or Internet Protocol address, the access to which, for purposes of initiating the message, was obtained by means of false or fraudulent pretenses or representations; and/or

(b)

In violation of 15 U.S.C. § 7704(a)(1)(B), Defendants initiated the transmission, to a protected computer, of a commercial electronic mail message that contained, or was

accompanied by, header information that was materially false or materially misleading. Specifically, the "from" line (the line identifying or purporting to identify a person initiating the message) of said e-mail failed to accurately identify the person who initiated the message; and/or

(c)

In violation of 15 U.S.C. § 7704(a)(1)(C), Defendants initiated the transmission, to a protected computer, of a commercial electronic mail message that contained, or was accompanied by, header information that was materially false or materially misleading. Specifically, the header information of said e-mail failed to identify accurately a protected computer used to initiate the message because Defendants knowingly used another protected computer to relay or retransmit the message for purposes of disguising its origin; and/or

(d)

In violation of 15 U.S.C. § 7704(a)(1), Defendants initiated the transmission, to a protected computer, of a commercial electronic mail message that contained, or was accompanied by, header information that was otherwise materially false or materially misleading; and/or

(e)

In violation of 15 U.S.C. § 7704(a)(2), Defendants engaged in a pattern or practice of misconduct involving repeated instances of the following misconduct: Defendants initiated the transmission to a protected computer of a commercial electronic mail message, while having actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that the subject heading of the message would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message; and/or

(f)

In violation of 15 U.S.C. § 7704(a)(3)(A)(i), Defendants engaged in a pattern or practice of misconduct involving repeated instances of the following misconduct: Defendants initiated the transmission to a protected computer of a commercial electronic mail message that did not contain a functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that the recipient could use to submit, in a manner specified in the message, a reply electronic mail message or other form of Internet-based communication requesting not to receive future

commercial electronic mail messages from that sender at the electronic mail address where the message was received; and/or

(g)

In violation of 15 U.S.C. § 7704(a)(3)(A)(ii), Defendants engaged in a pattern or practice of misconduct involving repeated instances of the following misconduct: Defendants initiated the transmission to a protected computer of a commercial electronic mail message that did not contain a functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that remained capable of receiving such messages or communications for no less than 30 days after the transmission of the original message; and/or

(h)

In violation of 15 U.S.C. § 7704(a)(4)(A)(i), Defendants engaged in a pattern or practice of misconduct involving repeated instances of the following misconduct: After a recipient of Defendants' commercial e-mail made a request using a mechanism provided pursuant to 15 U.S.C. § 7704(a)(3) not to receive such e-mail, Defendants nonetheless initiated the transmission to said recipient, more than 10 business days after the receipt of such request, of a commercial electronic mail

message that fell within the scope of the recipient's request;
and/or

(i)

In violation of 15 U.S.C. § 7704(a)(4)(A)(ii), Defendants engaged in a pattern or practice of misconduct involving repeated instances of the following misconduct: The recipient of a commercial e-mail made a request to the sender using a mechanism provided pursuant to 15 U.S.C. § 7704(a)(3) not to receive such e-mail. Acting on behalf of the sender, Defendants initiated the transmission to the recipient, more than 10 business days after the receipt of the recipient's request to the sender, of a commercial electronic mail message with actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such message fell within the scope of the recipient's request; and/or

(j)

In violation of 15 U.S.C. § 7704(a)(4)(A)(iii), Defendants engaged in a pattern or practice of misconduct involving repeated instances of the following misconduct: The recipient of a commercial e-mail made a request using a mechanism provided pursuant to 15 U.S.C. § 7704(a)(3) not to receive such e-mail. Acting on behalf of the sender, Defendants assisted in initiating the transmission to the recipient, through the

provision or selection of addresses to which the message would be sent, of a commercial electronic mail message with actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such message would violate clause 15 U.S.C. § 7704(a)(4)(A)(i) or (ii); and/or

(k)

In violation of 15 U.S.C. § 7704(a)(4)(A)(iv), Defendants engaged in a pattern or practice of misconduct involving repeated instances of the following misconduct: The recipient of a commercial e-mail made a request using a mechanism provided pursuant to 15 U.S.C. § 7704(a)(3) not to receive such e-mail. With knowledge that the recipient made such a request, Defendants sold, leased, exchanged, or otherwise transferred or released the electronic mail address of the recipient for a purpose other than compliance with 15 U.S.C. U.S.C. § 7701 et seq. (the CAN-SPAM Act); and/or

(l)

In violation of 15 U.S.C. § 7704(a)(5)(A)(i), Defendants engaged in a pattern or practice of misconduct involving repeated instances of the following misconduct: Defendants initiated the transmission to a protected computer of a commercial electronic mail message that failed to provide clear

and conspicuous identification that the message was an advertisement or solicitation; and/or

(m)

In violation of 15 U.S.C. § 7704(a)(5)(A)(ii), Defendants engaged in a pattern or practice of misconduct involving repeated instances of the following misconduct: Defendants initiated the transmission to a protected computer of a commercial electronic mail message that failed to provide clear and conspicuous notice of the recipient's opportunity to decline to receive further commercial electronic mail messages from the sender; and/or

(n)

In violation of 15 U.S.C. § 7704(a)(5)(A)(iii), Defendants engaged in a pattern or practice of misconduct involving repeated instances of the following misconduct: Defendants initiated the transmission to a protected computer of a commercial electronic mail message that failed to provide a valid physical postal address for the sender.

34.

As a result of Defendants' acts, EarthLink has suffered and continues to suffer and incur irreparable injury, loss of reputation, and pecuniary damages to be proved at trial. Unless enjoined by this Court, Defendants will continue these acts,

thereby causing EarthLink further immediate and irreparable damage.

COUNT II
AGGRAVATED VIOLATIONS
OF THE CAN-SPAM ACT

35.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 30 above as if the same were set forth herein in full.

36.

Defendants have committed aggravated violations of the CAN-SPAM Act by engaging in one or more forms of the following categories of prohibited conduct:

(a)

In violation of 15 U.S.C. § 7704(b)(1)(A)(i), Defendants initiated the transmission to a protected computer of a commercial electronic mail message that is unlawful under 15 U.S.C. § 7704(a) or assisted in the origination of such message through the provision or selection of addresses to which the message was transmitted, while having actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that the electronic mail address of the recipient was obtained using an automated means from an Internet website or proprietary online service operated by another person, and

such website or online service included, at the time the address was obtained, a notice stating that the operator of such website or online service will not give, sell, or otherwise transfer addresses maintained by such website or online service to any other party for the purposes of initiating, or enabling others to initiate, electronic mail messages; and/or

(b)

In violation of 15 U.S.C. § 7704(b)(1)(A)(ii), Defendants initiated the transmission to a protected computer of a commercial electronic mail message that is unlawful under 15 U.S.C. § 7704(a), or assisted in the origination of such message through the provision or selection of addresses to which the message was transmitted, while having actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that the electronic mail address of the recipient was obtained using an automated means that generates possible electronic mail addresses by combining names, letters, or numbers into numerous permutations; and/or

(c)

In violation of 15 U.S.C. § 7704(b)(2), Defendants used scripts or other automated means to register for multiple electronic mail accounts or online user accounts from which a

commercial electronic mail message that was unlawful under 15 U.S.C. § 7704(a) was transmitted; and/or

(d)

In violation of 15 U.S.C. § 7704(b)(3), Defendants knowingly relayed or retransmitted a commercial electronic mail message that was unlawful under 15 U.S.C. § 7704(a) from a protected computer or computer network that such person accessed without authorization.

37.

As a result of Defendants' acts, EarthLink has suffered and continues to suffer and incur irreparable injury, loss of reputation, and pecuniary damages to be proved at trial. Unless enjoined by this Court, Defendants will continue these acts, thereby causing EarthLink further immediate and irreparable damage.

COUNT III
FEDERAL CIVIL RICO VIOLATIONS

38.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 33 above as if the same were set forth herein in full.

39.

18 U.S.C. § 1964 creates a private cause of action for persons and entities injured by violations of 18 U.S.C. § 1962 (the federal Racketeer Influenced & Corrupt Organizations Act).

40.

Defendants' theft of computer resources, e-mail schemes, mail fraud, and wire fraud detailed above constitute "racketeering activity" as that term is defined in 18 U.S.C. § 1961.

41.

Defendants' theft, scams, and schemes detailed above constitute a pattern of racketeering activity, as required by 18 U.S.C. § 1961.

42.

In violation of 18 U.S.C. § 1962(a), Defendants have, through the pattern of racketeering activity described above and through the income derived therefrom, used and/or invested such income and its proceeds to acquire, establish and operate an enterprise engaged in and affecting interstate and foreign commerce.

43.

In violation of 18 U.S.C. § 1962(b), Defendants have, through the pattern of racketeering activity described above and through the proceeds derived therefrom, acquired and/or

maintained, directly or indirectly, an interest in and/or control of an enterprise engaged in and affecting interstate and foreign commerce.

44.

In violation of 18 U.S.C. § 1962(c), Defendants have, through a pattern of racketeering activity, conducted and participated in, directly or indirectly, an enterprise engaged in and affecting interstate and foreign commerce.

45.

In violation of 18 U.S.C. § 1962(d), Defendants have conspired and/or endeavored to violate the provisions of 18 U.S.C. §§ 1962 (a), (b) and (c).

46.

Pursuant to 18 U.S.C. § 1964, Defendants are liable to EarthLink for three times EarthLink's actual damages, punitive damages, attorney fees, investigative costs, and all other costs associated with or necessitated by the present litigation.

47.

Pursuant to 18 U.S.C. § 1964, EarthLink is entitled to a preliminary injunction and a permanent injunction directing Defendants to cease and desist from the above-described conduct.

COUNT IV
VIOLATION OF THE COMPUTER
FRAUD AND ABUSE ACT

48.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 43 above as if the same were set forth herein in full.

49.

Defendants have and are engaged in acts constituting violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 et seq.

50.

EarthLink maintains one or more computers as defined in § 1030(e) of the Computer Fraud and Abuse Act through which e-mail transmissions are received, stored and/or disseminated.

51.

Defendants, without authorization, or at the very least exceeding any authorization which they might have reasonably claimed, knowingly and willfully caused, through the means of a computer used in interstate commerce, the transmission of programs, information, codes or commands to EarthLink's computer facilities, with the intent, or at the very least, with reckless disregard of a substantial and unjustified risk, that their transmissions would damage, or cause damage to, a computer,

computer system, network, information, data or program comprising a part of EarthLink's computer facilities.

52.

Defendants' willful transmission of one or more programs, information, codes or commands to EarthLink's computer facilities have in fact caused or contributed to damage to and/or diminished performance of the computers, computer systems, networks, information, data, and programs which comprise said facilities and furthermore have caused the withholding and denial of use of the computers, computer services, systems, networks, information, data, and programs of EarthLink's computer facilities, thereby causing injury to EarthLink.

53.

The foregoing acts and conduct of Defendants have caused, and if not enjoined will continue to cause, loss or damage to one or more other persons, including EarthLink, of a value aggregating \$1,000 or more during the applicable one year period.

54.

As a result of Defendants' acts, EarthLink has suffered and continues to suffer and incur irreparable injury, loss of reputation, and pecuniary damages to be proved at trial. Unless

enjoined by this Court, Defendants will continue these acts, thereby causing EarthLink further immediate and irreparable damage.

COUNT V
UNFAIR COMPETITION THROUGH
FALSE DESIGNATION (LANHAM ACT)

55.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 50 above as if the same were set forth herein in full.

56.

Defendants have and are engaged in acts of unfair competition through the use of false designations of origin and false advertising in violation of Section 43(a) of the Trademark Act of 1946, 15 U.S.C. § 1125(a).

57.

Defendants have used and are using the domain names and service marks "earthlink.net" and "mindspring.com" in relation to their illegal e-mails. Accordingly, Defendants have made and are making false express and implied representations that their services and junk e-mails originate with, are associated with, and/or are endorsed or allowed by EarthLink in such a manner as to create a likelihood of confusion among the recipients and readers of those e-mails, thereby inducing the belief that,

contrary to fact, Defendants' advertisements are sponsored by, approved by, or otherwise tolerated by EarthLink.

58.

Defendants' acts have irreparably damaged, impaired, and diluted EarthLink's goodwill and good name. This is especially true insofar as Defendants' acts induce those viewing or receiving Defendants' advertisements to conclude incorrectly, on the basis of this misrepresentation, that EarthLink was somehow connected with, condoned, or otherwise participated in or allowed the illegal e-mails and schemes.

59.

Defendants' use of EarthLink's "earthlink.net" and "mindspring.com" domain names and service marks in connection with their illegal acts and e-mails constitutes a false designation of origin. Defendants' representations that their services and advertisements are endorsed or permitted by EarthLink constitute a use of false descriptions or representations of fact, within the meaning of Section 43(a) of the Trademark Act of 1946, 15 U.S.C. § 1125(a). Further, Defendants' use of EarthLink's domain names/service marks "earthlink.net" and "mindspring.com" constitutes unfair competition entitling EarthLink to the remedies afforded

pursuant to Section 43(a) of the Trademark Act of 1946, 15 U.S.C. § 1125(a).

60.

As a result of Defendants' acts, EarthLink has suffered and continues to suffer and incur irreparable injury, loss of reputation, and pecuniary damages to be proved at trial. Unless enjoined by this Court, Defendants will continue these acts, thereby causing EarthLink further immediate and irreparable damage.

COUNT VI
DILUTION OF FAMOUS MARK (LANHAM ACT)

61.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 56 above as if the same were set forth herein in full.

62.

Defendants have and are engaged in acts constituting service mark dilution in violation of Section 43(c) of the Trademark Act of 1946, 1115 U.S.C. § 25(c).

63.

Defendants have made commercial use of the names and mark "earthlink.net" and "mindspring.com" with the willful intent to trade on EarthLink's reputation and to cause dilution of those famous marks/names.

64.

Defendants' use of these names and marks began long after EarthLink's marks and names had become well-known and famous.

65.

Defendants' use of these names and marks causes dilution of their distinctive quality.

66.

Defendants' use of these names and marks lessens their capacity to identify and distinguish EarthLink's goods, services, and customers.

67.

Defendants' activities complained of herein constitute service mark dilution within the meaning of Section 43(c) of the Trademark Act of 1946, 15 U.S.C. §§ 1125(c).

68.

As a result of Defendants' acts, EarthLink has suffered and continues to suffer and incur irreparable injury, loss of reputation, and pecuniary damages to be proved at trial. Unless enjoined by this Court, Defendants will continue these acts, thereby causing EarthLink further immediate and irreparable damage.

COUNT VII
GEORGIA CIVIL RICO VIOLATIONS

69.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 64 above as if the same were set forth herein in full.

70.

O.C.G.A. § 16-14-6(c) creates a private cause of action for persons and entities injured by violations of O.C.G.A. 16-14-4 (Georgia's "RICO" or Racketeer Influenced & Corrupt Organizations Act).

71.

Defendants' fraudulent scams and schemes detailed above (and, in fact, each individual e-mail sent by Defendants) constitute "racketeering activity" as that term is defined in O.C.G.A. § 16-14-3(3).

72.

Defendants' e-mails and illegal Internet-related schemes constitute a pattern of racketeering activity, as required by O.C.G.A. § 16-14-3(2).

73.

In violation of O.C.G.A. § 16-14-4(a), Defendants have, through the pattern of racketeering activity described above and through the proceeds derived therefrom, acquired and/or

maintained, directly or indirectly, an interest in and/or control of an enterprise, real property, and/or personal property (including but not limited to money).

74.

In violation of O.C.G.A. § 16-14-4(b), Defendants have, through a pattern of racketeering activity, conducted and participated in, directly or indirectly, an enterprise.

75.

In violation of O.C.G.A. § 16-14-4(c), Defendants have conspired and/or endeavored to violate the provisions of § 16-14-4(a) and (b).

76.

Pursuant to O.C.G.A. § 16-14-6, Defendants are liable to EarthLink for three times its actual damages, punitive damages, attorney fees, investigative costs, and all other costs associated with or necessitated by the present litigation.

77.

Pursuant to O.C.G.A. § 16-14-6, EarthLink is entitled to a preliminary injunction and a permanent injunction directing Defendants to cease and desist from the above-described conduct.

COUNT VIII
VIOLATION OF THE GEORGIA
COMPUTER SYSTEMS PROTECTION ACT
(COMPUTER THEFT AND TRESPASS)

78.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 73 above as if the same were set forth herein in full.

79.

Defendants have and are engaged in acts constituting violation of the Georgia Computer Systems Protection Act, O.C.G.A. §§ 16-9-90 et seq.

80.

In committing the wrongful acts detailed above, including but not limited to Defendants' theft of and trespass upon EarthLink's computer resources, Defendants have used the computers and/or computer networks of EarthLink with knowledge that such use was and is without authority and with the intention of taking EarthLink's property, obtaining that property by deceitful means or artful practice, and/or converting that property to Defendants' use in violation of Defendants' legal obligations.

81.

Defendants have accordingly committed "Computer Theft" as that term is defined at O.C.G.A. § 16-9-93(a).

82.

Furthermore, in committing the wrongful acts detailed above, including but not limited to Defendants' theft of EarthLink accounts and their theft of and trespass upon EarthLink's computer resources, Defendants have used the computers and/or computer networks of EarthLink with knowledge that such use was and is without authority and with the intention of interfering with EarthLink's and its members' use of EarthLink computer programs and data, and/or altering, damaging and/or causing the malfunction of EarthLink's network and computer system.

83.

Defendants have accordingly committed "Computer Trespass" as that term is defined at O.C.G.A. § 16-9-93(b).

84.

Defendants' violation of the Georgia Computer Systems Protection Act has caused and continues to cause EarthLink to suffer irreparable injury, loss of reputation, and pecuniary damages to be proved at trial. Unless enjoined by this Court, Defendants will continue these acts of misappropriation, thereby causing EarthLink further immediate and irreparable damage.

COUNT IX
TRESPASS

85.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 80 above as if the same were set forth herein in full.

86.

Defendants have and are engaged in acts of trespass to property in violation of the law of the State of Georgia.

87.

The computers, computer networks, and computer services that comprise EarthLink's e-mail system are the personal property of EarthLink. Defendants, without authorization, have intentionally used EarthLink's e-mail systems and computer resources for their own commercial benefit. This unauthorized use by Defendants has deprived EarthLink and its customers of the legitimate use of this proprietary and commercially valuable system.

88.

Defendants' trespass upon EarthLink's commercial property has caused and continues to cause EarthLink to suffer irreparable injury, loss of reputation, and pecuniary damages to be proved at trial. Unless enjoined by this Court, Defendants

will continue these acts of trespass, thereby causing EarthLink further immediate and irreparable damage.

COUNT X
UNFAIR COMPETITION (STATE)

89.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 84 above as if the same were set forth herein in full.

90.

Defendants have and are engaged in fraudulent acts or practices in violation of the prohibition against unfair competition found at O.C.G.A. § 23-2-55.

91.

Defendants have used and are using EarthLink's computer equipment and name in connection with the above-described e-mail schemes in such a manner as to misrepresent the source, sponsorship, approval, and/or certification of the e-mail schemes and advertisements. The use of this name and domain designation by Defendants creates the unreasonable risk that recipients and other readers of the e-mails described above may conclude that there exists some affiliation, connection or association between and among EarthLink, the e-mails, and the sender of the e-mails.

92.

Defendants' acts have damaged, impaired, and diluted that part of EarthLink's goodwill and good name symbolized by the above-noted names and marks of EarthLink. The nature, probable tendency, and effect of Defendants' use of these names and properties in the manner alleged is to enable Defendants to deceive the public.

93.

Defendants' use of EarthLink's intellectual property (the above-noted domain designations and names) as alleged constitutes unfair competition as prohibited by O.C.G.A. § 23-2-5.

94.

Defendants had actual knowledge of EarthLink's rights at the time they decided to use EarthLink's mark and name(s) in connection with their illegal e-mail-related schemes. Thus, Defendants willfully and deliberately infringed upon EarthLink's rights.

95.

Defendants' unfair business practices are of a recurring nature and harmful to the consumers and the public at large, as well as EarthLink. These practices constitute unlawful, unfair, and fraudulent business practices and unfair, deceptive, untrue, and misleading advertising.

96.

As a result of Defendants' acts, EarthLink has suffered and continues to suffer and incur irreparable injury, loss of reputation, and pecuniary damages to be proved at trial. Unless enjoined by this Court, Defendants will continue these acts, thereby causing EarthLink further immediate and irreparable damage.

COUNT XI
DECEPTIVE TRADE PRACTICES

97.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 92 above as if the same were set forth herein in full.

98.

Defendants have and are engaged in fraudulent acts or practices in violation of the prohibition against deceptive trade practices found at O.C.G.A. § 10-1-372 et seq.

99.

Defendants have used and are using EarthLink's intellectual property in connection with the above-described e-mail schemes in such a manner as to misrepresent the source, sponsorship, approval, and/or certification of the e-mail schemes and advertisements. The use of these names by Defendants creates an unreasonable risk that recipients and other readers of the e-

mails described above may conclude that there exists some affiliation, connection, or association between and among EarthLink, the e-mails, and the sender of the e-mails.

100.

Defendants' acts have damaged, impaired, and diluted that part of EarthLink's goodwill symbolized by EarthLink's names and marks. The nature, probable tendency, and effect of Defendants' use of these names/marks in the manner alleged is to enable Defendants to deceive the public.

101.

Defendants' use of EarthLink's names and marks in the manner alleged constitutes deceptive trade practices of a type prohibited by O.C.G.A. § 10-1-372 et seq.

102.

Defendants had actual knowledge of EarthLink's rights at the time they decided to use EarthLink's intellectual property in connection with their illegal-e-mail-related schemes. Thus, Defendants willfully and deliberately infringed upon EarthLink's rights.

103.

Defendants' unfair business practices are of a recurring nature and harmful to the consumers and the public at large, as well as to EarthLink. These practices constitute unlawful,

unfair, fraudulent, and deceptive business practices, and unfair, deceptive, untrue, and misleading advertising.

104.

As a result of Defendants' acts, EarthLink has suffered and continues to suffer and incur irreparable injury, loss of reputation, and pecuniary damages to be proved at trial. Unless enjoined by this Court, Defendants will continue these acts, thereby causing EarthLink further immediate and irreparable damage.

COUNT XII
MISAPPROPRIATION OF COMPUTER RESOURCES

105.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 100 above as if the same were set forth herein in full.

106.

Defendants have and are engaged in acts of misappropriation in that Defendants, without authorization, have used EarthLink's proprietary e-mail system and proprietary computer resources in relation to the transmission of their illegal e-mails to EarthLink members.

107.

Defendants' use of EarthLink's computer systems and resources, from which Defendants derived profits or income to

the detriment of EarthLink and its customers, constitutes the unfair and unlawful misappropriation of valuable commercial property and resources owned by EarthLink.

108.

Defendants' unlawful and inequitable activities have damaged and diluted the commercial value of the services offered by EarthLink and have resulted in the misappropriation by Defendants of EarthLink's equipment, skill, expenditures, and labors.

109.

The activities of Defendants described herein constitute misappropriation of EarthLink's commercial property and services in violation of the common law of the State of Georgia.

110.

Defendants' misappropriation of EarthLink's commercial property and services has caused and continues to cause EarthLink to suffer irreparable injury, loss of reputation, and pecuniary damages to be proved at trial. Unless enjoined by this Court, Defendants will continue these acts of misappropriation, thereby causing EarthLink further immediate and irreparable damage.

COUNT XIII
CONVERSION

111.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 106 above as if the same were set forth herein in full.

112.

Defendants have and are engaged in acts of conversion in violation of the law of the State of Georgia.

113.

The computers, computer networks, and computer services that comprise EarthLink's e-mail systems are the personal property of EarthLink. Defendants, without authorization, have intentionally used EarthLink's e-mail systems for Defendants' own commercial benefit. This unauthorized use by Defendants has deprived EarthLink and its customers of the legitimate use of these proprietary and commercially valuable systems.

114.

Defendants' conversion of EarthLink's commercial property has caused and continues to cause EarthLink to suffer irreparable injury, loss of reputation, and pecuniary damages to be proved at trial. Unless enjoined by this Court, Defendants will continue these acts of conversion, thereby causing EarthLink further immediate and irreparable damage.

COUNT XIV
UNJUST ENRICHMENT

115.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 110 above as if the same were set forth herein in full.

116.

Defendants have and are engaged in acts of unjust enrichment entitling EarthLink to quasi-contractual relief under the law of the State of Georgia.

117.

Defendants have derived economic benefit from the dissemination of unsolicited commercial messages through the unauthorized use of EarthLink's proprietary computer resources, equipment, and intellectual property.

118.

Defendants have paid no compensation to EarthLink for the dissemination of Defendants' unsolicited messages and advertisements using EarthLink's names, marks, and resources.

119.

As a result of their conduct, Defendants have been unjustly enriched.

120.

As a result of Defendants' acts, EarthLink has suffered and continues to suffer and incur irreparable injury, loss of

reputation, and pecuniary damages to be proved at trial. Unless enjoined by this Court, Defendants will continue these acts, thereby causing EarthLink further immediate and irreparable damage.

COUNT XV
NUISANCE PURSUANT
TO O.C.G.A. § 41-1-1

121.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 116 above as if the same were set forth herein in full.

122.

The computers, computer networks, and computer services that comprise EarthLink's e-mail systems are the personal property of EarthLink. Defendants, without authorization, have intentionally interfered with EarthLink's right of legitimate use of its proprietary and commercially valuable systems.

123.

Defendants' illegal e-mail practices detailed above, including their illegal access to and use of EarthLink's e-mail system and their sending of universally-despised unsolicited commercial e-mails, constitute a "nuisance" as that term is described in O.C.G.A. § 41-1-1.

124.

The sending of unsolicited commercial e-mail, especially when sent in violation of the involved ISP's policies and rules, constitutes a "nuisance per se."

125.

Defendants' illegal e-mail practices detailed above, including their illegal access to and use of EarthLink's e-mail system and their sending of universally-despised unsolicited commercial e-mails, have caused hurt, inconvenience, and damage to EarthLink.

126.

Defendants are in complete control of the illegal e-mail practices detailed above, including their illegal access to and use of EarthLink's e-mail system and their sending of universally-despised unsolicited commercial e-mails. Defendants have knowingly and willfully carried out their illegal e-mail schemes.

127.

Defendants' commission of the above-described nuisance has caused and continues to cause EarthLink to suffer irreparable injury, loss of reputation, and pecuniary damages to be proved at trial. Unless enjoined by this Court, Defendants will continue these acts of conversion, thereby causing EarthLink further immediate and irreparable damage.

COUNT XVI
ATTORNEY FEES PURSUANT
TO O.C.G.A. § 13-6-11

128.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 123 above as if the same were set forth herein in full.

129.

In relation to their wrongful acts described above and to each and every count set forth above, Defendants have acted in bad faith and have caused EarthLink unnecessary trouble and expense. As detailed above, Defendants intentionally and in bad faith engaged in Internet-related misconduct with full knowledge of the harm that would result to EarthLink and its members.

130.

EarthLink is entitled to recover all expenses and fees arising from the misconduct of Defendants giving rise to the present litigation, including the reasonable attorney fees expended by EarthLink, pursuant to O.C.G.A. § 13-6-11.

131.

EarthLink is entitled to recover prejudgment interest on its damages pursuant to O.C.G.A. § 13-6-13.

COUNT XVII
PUNITIVE DAMAGES PURSUANT
TO O.C.G.A. § 51-12-51

132.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 127 above as if the same were set forth herein in full.

133.

In relation to their wrongful acts described above and to each and every count set forth above, Defendants have acted with willful misconduct, malice, fraud, wantonness, oppression, and/or that entire want of care which raises a presumption of conscious indifference to the consequences of their actions.

134.

Defendants knew that their intentional wrongful acts would cause substantial harm to EarthLink. Defendants intended the consequences of their actions. The express goal of Defendants' wrongful acts was financial gain for Defendants' benefit and at EarthLink's expense.

135.

Given the egregious and intentional nature of Defendants' conduct, EarthLink is entitled to an award of punitive damages pursuant to O.C.G.A. § 51-12-5.1 to punish and penalize these Defendants, to deter these Defendants from similar future misconduct, and to deter other persons and entities similarly

situated to Defendants from engaging in future misconduct like that of Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff EarthLink prays for judgment against Defendants, and each of them, jointly and severally, that includes:

- (a) A preliminary and permanent injunction enjoining Defendants and any affiliated persons or entities from directly or indirectly sending or transmitting **any unsolicited commercial e-mails to any ISP or Internet user**, including but not limited to any such messages that reference or use in any way EarthLink's property, computers, domains, users, or marks;
- (b) Special and general damages in an amount to be proven at trial;
- (c) The trebling of its damages pursuant to statutory law cited herein;
- (d) Punitive and exemplary damages in an amount to be proven at trial;
- (e) Reasonable attorney fees herein;

(f) Costs of suit incurred herein; and

(g) Such other and further relief as this Court may deem
just and proper.

This 14th day of November, 2005.

Respectfully submitted,

WELLBORN & WALLACE, LLC

/s Jamie P. Woodard
Paul F. Wellborn, III
Georgia Bar No. 746720
Jamie P. Woodard
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Attorneys for EarthLink, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EARTHLINK, INC.,)	
)	
Plaintiff,)	
)	
v.)	CASE NO. 1:04-CV-3142 CAP
)	
KSTM, LLC; TANYA BIBEAU; and)	
John Does 1-5,)	
)	
Defendants.)	

**RULE 7.1 CERTIFICATE OF
COMPLIANCE WITH LOCAL RULE 5.1**

This is to certify that the foregoing Verified Complaint was prepared using 12 point Courier New font and accordingly complies with Local Rule 5.1. This certificate is given in compliance with Local Rule 7.1(D) this 14th day of November, 2005.

WELLBORN & WALLACE, LLC

/s Jamie P. Woodard
Jamie P. Woodard
Georgia Bar No. 775792