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By: Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EARTHLINK, INC.,)	
)	
Plaintiff,)	
)	
v.)	CASE NO. 1:04-CV-3008 CAP
)	
)	
CHRISTINA REESE; YAMBOCS, INC.;)	
ANGELA M. NICKERSON d/b/a)	
YAMBOCS.COM; and JOHN DOES 4-25)	
(the "ASMP Spammers"),)	
)	
Defendants.)	

**VERIFIED FIRST AMENDED COMPLAINT FOR
INJUNCTION AND DAMAGES**

Plaintiff EarthLink, Inc. ("EarthLink" or "Plaintiff") files this Verified First Amended Complaint For Injunction And Damages ("First Amended Complaint" or "FAC") against Christina Reese, YamboCS, Inc., Angela M. Nickerson d/b/a YamboCS.com, and John Does 4-25 (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, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984).

3.

Defendant Christina Reese ("Reese") is a resident of Redmond, King County, Washington. She may be served at her residence there.

4.

Defendant YamboCS, Inc. ("YamboCS") is a Washington Corporation with its principal place of business at 6422 Lake Sammamish Parkway E #116, Redmond, King County, Washington. It

may be served through its registered agent and/or officers at that location.

5.

Defendant Angela M. Nickerson ("Nickerson") is a resident of Redmond, King County, Washington. She may be served at her residence there.

6.

The remaining John Doe Defendants' names and identities are not yet known to EarthLink. Defendants have used sophisticated and illegal measures to hide their identities from EarthLink, including identity theft and credit card fraud. 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.

7.

This Court has subject matter jurisdiction.

8.

Venue is proper in this judicial district.

FACTUAL ALLEGATIONS COMMON TO ALL COUNTS

ISPs And The Internet

9.

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").

10.

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.

Dial-Up Accounts And ASMTF

11.

The original and most popular form of Internet account is the "dial-up" account, which uses a non-dedicated analog

telephone line (i.e., the user's "regular" telephone line) and a "modem" (the user's computer/telephone line interface) to connect the user's computer to the Internet. Potential customers of EarthLink may purchase dial-up accounts via, among other means, "signing up" over the Internet. The purchase of an EarthLink dial-up account via the Internet necessarily involves the access to and use of EarthLink's Georgia computers (i.e., EarthLink's registration-related computers are located in Georgia).

12.

To initiate an Internet connection, an EarthLink dial-up user typically directs his modem to dial one of the access phone numbers belonging to EarthLink. This access call typically terminates at (or "rings into") a cluster of EarthLink computer equipment known as a Point-of-Presence (a "POP"). Once connected via his dial-up connection, the user can send e-mail, surf the Internet, and otherwise enjoy the benefits of his EarthLink account. Some EarthLink dial-up account holders, however, have the need from time to time to access EarthLink's e-mail system via some means other than an EarthLink dial-up connection. These users, for example, may already have Internet access via an account with some other ISP, or may find themselves in public settings (hotels, Internet cafes, etc.) that offer non-EarthLink connectivity. These users are able, using a process known as "Authenticated Simple Mail Transfer Protocol" ("ASMTTP") to log-on

to the Internet using a non-EarthLink account and then connect directly into EarthLink's ASMTTP mail servers to send mail using EarthLink's computer network.

13.

In other words, the ASMTTP process allows the sender to access EarthLink's ASMTTP mail servers without regard to which ISP the sender used to connect to the Internet. An ASMTTP sender could, for instance, log onto the Internet using an Internet account obtained from a European ISP and, while connected to the Internet via his European account, directly access EarthLink's ASMTTP mail servers using his EarthLink user name and password and then use those EarthLink servers to send his e-mails.

14.

The functionality offered by ASMTTP may be desirable for, among reasons: cost-related concerns; to allow the user to keep an "old" e-mail address after changing ISPs; for the convenience of users who are "on the road" and connecting to the Internet through a borrowed account; and numerous other legitimate uses. ASMTTP also permits multiple users of a single EarthLink account to simultaneously access the EarthLink e-mail system from multiple different computers. When employed properly, ASMTTP can therefore be a useful feature that allows, for instance, the employees of a given business that maintains a single EarthLink account to send and receive EarthLink e-mails simultaneously and

from different computers.

15.

ASMTTP also provides, however, the potential for abuse. A single ASMTTP sender, using hundreds of non-EarthLink Internet connections/computers that he had stolen or otherwise obtained, could connect to the Internet using those hundreds of connections/computers and then, with a single EarthLink user name and password, simultaneously use each of those accounts to access EarthLink's ASMTTP mail servers. This ASMTTP sender would then be able, with that single EarthLink account, to send illegal e-mails from his hundreds of non-EarthLink accounts/connections as fast as that system and his connections would allow. (This is what Defendants have done in the instant case, as is described below.) In a scheme like this, the ASMTTP sender necessarily accesses (trespasses upon) EarthLink's Georgia computers during his EarthLink log-on (i.e., the authentication of his user name and password necessarily involves access to EarthLink's Georgia computer system).

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

16.

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.

17.

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 of all electronic mail traffic (up from an estimated 7 percent in 2001).

18.

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"

19.

Spammers typically take fraudulent steps to hide the true source of their e-mails. This practice, which is referred to as "spoofing," represents the Internet equivalent of "passing off." Spammers who engage in "spoofing" manipulate their illegal e-mails so that the finger of responsibility is pointed at some 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

20.

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. John Does, et. al., No. 02-CV-1740 (N.D. Ga. January 1, 2004) (Order and Default Judgment by Judge Martin); EarthLink v. 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. May 7, 2003) (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).

21.

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.

22.

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.

23.

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., petewellbcorn@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.

24.

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.

25.

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.

26.

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.

27.

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 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

28.

Defendants are criminals. They have knowingly and willfully engaged in illegal acts, including credit card theft, account theft, the receipt and use of stolen credit card numbers and/or computer accounts, identity theft, fraud, spamming, and/or spoofing. Specifically, Defendants have engaged in unsolicited commercial e-mail campaigns in relation to which they have: (a) converted EarthLink's computer resources and trespassed upon EarthLink's computer equipment for their own purposes; (b) stolen Internet-related services from EarthLink and/or knowingly received and used EarthLink services stolen by someone else; (c) stolen and used passwords and credit-card numbers from innocent third-parties; (d) infringed upon the intellectual property of EarthLink; (e) damaged EarthLink's business reputation; and/or (f) otherwise committed the wrongful acts described below. Moreover, upon information and belief, in addition to their spam-related violations against EarthLink and its Members, Defendants have committed and are committing similar spam-related violations against other major ISPs and e-mail providers.

29.

The defendants include those people or entities collectively dubbed the "ASMTTP Spammers" by EarthLink's Fraud and Abuse Department. From mid-2004 to and through the time of EarthLink's filing of this Verified Complaint, the ASMTTP Spammers have used stolen and/or bogus credit card numbers and bank account numbers to fraudulently obtain hundreds of dial-up Internet accounts from EarthLink. These fraudulent account purchases all occurred via the Internet and all involved the ASMTTP Spammers' access to and use of EarthLink's Georgia computers. The ASMTTP Spammers then use these stolen accounts in violation of federal law, state law, and EarthLink's written policies to send their illegal spam e-mails to EarthLink Members and other Internet users.

30.

The ASMTTP Spammers spam with each newly-obtained account until EarthLink learns of the illegal use and deactivates the account. As one account is terminated, the ASMTTP Spammers replace it with another stolen EarthLink account. The harm effected by the ASMTTP Spammers is especially egregious because they use the above-described ASMTTP method to send their e-mails, by which each stolen EarthLink account is used to enable hundreds of simultaneous connections to EarthLink's ASMTTP mail servers, with each connection pumping out illegal e-mails as fast as EarthLink's and their own computer systems will allow. Moreover,

upon information and belief, the non-EarthLink connections/computers that the ASMTTP spammers use to connect to the Internet are stolen, hijacked, or otherwise illegally obtained or accessed by the ASMTTP Spammers. The ASMTTP Spammers' criminal scheme necessarily involves their access to and use of EarthLink's Georgia computer network.

31.

All of the ASMTTP Spammers' e-mails advertise pornographic web sites. A given ASMTTP e-mail contains an obscene or sexually-suggestive subject line, sexually explicit pictures and text, and a link to the sender's web site (the "pass-through" web site). When a recipient of these illegal e-mails clicks on the link in the e-mail and accesses the sender's pass-through web site, he is redirected to the "master" pornographic site that the e-mail actually advertised. The sender's identity (his unique salesperson number or "affiliate code") is encoded in the link that carries out the redirection from the pass-through web site to the master web site so that the owner of the master site knows which salesperson to credit for any resulting sales. A small sampling of ASMTTP Spammer e-mails, which are too voluminous to attach to this Complaint in their entirety, is attached hereto at Exhibit C. A chart showing sample pass-through/master web site relationships and related information is attached hereto at Exhibit D.

32.

Defendants Reese, Nickerson, and YamboCS are three members of the ASMTTP Spammer criminal enterprise.

33.

Specifically, these three defendants sent, or caused to be sent, in excess of ten thousand unsolicited commercial e-mail messages advertising the pornographic website www.mashaworld.com. All of these messages were sent using the scheme of theft, fraud, and identity theft described above.

Defendants' State-of-Mind; Resulting Damages

34.

Defendants have at all times been aware of the illegality of spamming and the resulting harm by, 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 those Defendants necessarily received in relation to their spamming-campaigns; and (4) the repeated cancellations of Internet service that these spammers necessarily experienced in relation to their spamming campaigns. Moreover, Defendants' awareness of the unauthorized and illegal nature of their e-mail campaigns is readily 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 stolen identities and credit cards they use to help conceal their true identities.

35.

Defendants have also been aware of at all times, and have willfully disregarded, the harm and damages caused to their victims, including EarthLink and its Members. Each Defendant has at all times been aware of the illegality of and harm caused by his spamming and spoofing schemes.

36.

EarthLink's phone lines, servers, and computers have been bombarded with a multitude of complaint calls and e-mails from Internet users and other Internet-related companies and ISPs around the world who complained of the Defendants' illegal acts and/or who thought that EarthLink had somehow participated in or condoned those bad acts, or had failed to take reasonable steps to prevent these acts.

37.

EarthLink has been forced to devote substantial time and resources to the problems caused by Defendants' illegal acts. These wrongful acts have accordingly resulted in substantial money damages for EarthLink, including loss of reputation and lost profits.

38.

Defendants were aware at all times of the illegal nature and consequences of their credit card and password fraud and theft

and of their spamming and spoofing operations. Furthermore, Defendants knew that the quantity of complaints and returned mail resulting from their illegal schemes would damage the reputation of EarthLink and the performance of EarthLink's Georgia computer systems.

39.

Defendants likewise knew that their use of EarthLink's name and computers was not authorized. Defendants also knew 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 acts.

COUNT I
GENERAL VIOLATIONS OF
THE CAN-SPAM ACT

40.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 above as if the same were set forth herein in full.

41.

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.

42.

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

43.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 42 above as if the same were set forth herein in full.

44.

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.

45.

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

46.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 45 above as if the same were set forth herein in full.

47.

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).

48.

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.

49.

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

50.

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.

51.

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.

52.

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.

53.

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).

54.

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.

55.

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

56.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 55 above as if the same were set forth herein in full.

57.

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

58.

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.

59.

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.

60.

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.

61.

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.

62.

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)

63.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 62 above as if the same were set forth herein in full.

64.

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).

65.

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.

66.

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.

67.

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).

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 VI
DILUTION OF FAMOUS MARK (LANHAM ACT)

69.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 68 above as if the same were set forth herein in full.

70.

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).

71.

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.

72.

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

73.

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

74.

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

75.

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).

76.

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

77.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 76 above as if the same were set forth herein in full.

78.

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).

79.

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).

80.

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).

81.

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).

82.

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.

83.

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).

84.

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.

85.

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)

86.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 85 above as if the same were set forth herein in full.

87.

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.

88.

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.

89.

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

90.

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.

91.

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

92.

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

93.

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.

94.

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

95.

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.

96.

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)

97.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 96 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 unfair competition found at O.C.G.A. § 23-2-55.

99.

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.

100.

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.

101.

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.

102.

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.

103.

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.

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 XI
DECEPTIVE TRADE PRACTICES

105.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 104 above as if the same were set forth herein in full.

106.

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.

107.

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.

108.

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.

109.

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.

110.

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.

111.

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.

112.

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

113.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 112 above as if the same were set forth herein in full.

114.

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.

115.

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.

116.

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.

117.

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.

118.

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

119.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 118 above as if the same were set forth herein in full.

120.

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

121.

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.

122.

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

123.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 122 above as if the same were set forth herein in full.

124.

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

125.

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.

126.

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

127.

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

128.

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

129.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 128 above as if the same were set forth herein in full.

130.

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.

131.

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.

132.

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."

133.

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.

134.

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.

135.

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

136.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 135 above as if the same were set forth herein in full.

137.

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.

138.

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.

139.

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

140.

EarthLink realleges and incorporates by reference the allegations contained in paragraphs 1 through 139 above as if the same were set forth herein in full.

141.

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.

142.

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.

143.

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:

- (d) 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;
- (e) Special and general damages in an amount to be proven at trial;
- (f) The trebling of its damages pursuant to statutory law cited herein;
- (g) Punitive and exemplary damages in an amount to be proven at trial;
- (h) Reasonable attorney fees herein;

(i) Costs of suit incurred herein; and

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

Respectfully submitted this 18th day of January, 2005.

WELLBORN & WALLACE, LLC



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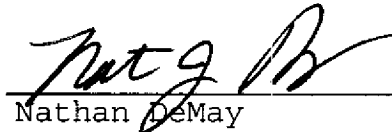
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Attorneys for EarthLink, Inc

VERIFICATION

Under penalty of perjury, I represent and aver on this 18th day of January, 2005 that the facts set forth in the preceding Verified Complaint are true and correct.



Nathan DeMay
Senior Manager, Fraud and Abuse Team
EarthLink, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EARTHLINK, INC.,)	
)	
Plaintiff,)	
)	
v.)	CASE NO. 1:04-CV-3008 CAP
)	
)	
CHRISTINA REESE; YAMBOCS, INC.;)	
ANGELA M. NICKERSON d/b/a)	
YAMBOCS.COM; and JOHN DOES 4-25)	
(the "ASMTIP Spammers"),)	
)	
Defendants.)	

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

This is to certify that the foregoing Verified First Amended 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 18th day of January, 2005.

WELLBORN & WALLACE, LLC



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