

## **EXHIBIT 5**



**Kirkpatrick & Lockhart Nicholson Graham LLP**

Case 5:05-cv-05189-RTD Document 1-6 Filed 11/22/2005 Page 2 of 15  
Herron Davis Building  
535 Smithfield Street  
Pittsburgh, PA 15222-2312  
412.355.6500  
Fax 412.355.6501  
www.klmg.com

May 17, 2005

Kelly A. DeMarchis

412.355.6305  
Fax: 412.355.6501  
kdemarchis@klmg.com

**Via E-MAIL and  
CERTIFIED MAIL/RETURN RECEIPT REQUESTED**

RewardsGateway / Member Promotions  
c/o VC Ecommerce Solutions  
22647 Ventura Boulevard, Suite 258  
Woodland Hills, CA 91364

Pressreleasers.net  
c/o Harrison Direct  
Network Operations  
2648 E. Workman Avenue, #476  
West Covina, CA 91791

**Re: RewardsGateway—Unauthorized Use of  
WAL-MART Intellectual Property; Our File: 020717-A141**

Dear Sir or Madam:

We represent Wal-Mart Stores, Inc. ("Wal-Mart"). Wal-Mart is the owner of the Wal-Mart trade name and numerous trademarks and service marks, including the famous WAL\*MART name and logo and the SAM'S CLUB name and logo, among others (collectively, the "WAL-MART Marks"). Wal-Mart has established substantial and valuable good will in its marks and trade name and has the exclusive right to use its marks and trade name.

It has come to Wal-Mart's attention that RewardsGateway has been sending solicitations via e-mail that offer \$500 Sam's Club gift cards in exchange for enrolling in its "Rewards" program at [www.rewardsgateway.com](http://www.rewardsgateway.com). This program does not appear to be legitimate and we are aware of numerous complaints by participants who have never received the promised gift card. Wal-Mart has not authorized RewardsGateway to use the WAL-MART Marks and name in connection with publicizing its business. In addition, Wal-Mart is not affiliated, connected, or associated with RewardsGateway and does not sponsor or endorse RewardsGateway's business or the business of any other sites affiliated with RewardsGateway. RewardsGateway's use of the WAL-MART Marks and name is likely to cause the consuming public to believe that RewardsGateway's activities are affiliated with or authorized by Wal-Mart.

Consequently, RewardsGateway's actions may constitute, among other things, trademark infringement and false designation of origin. We therefore demand that RewardsGateway cease and desist from infringing Wal-Mart's intellectual property. To that end, RewardsGateway must immediately:



Kirkpatrick & Lockhart Nicholson Graham LLP  
RewardsGateway

May 17, 2005

Page 2

1. Cease using the Wal-Mart name, any WAL-MART Marks, and any other intellectual property owned by Wal-Mart or any other intellectual property confusingly similar thereto on www.rewardsgateway.com, any other websites or other materials, in e-mail solicitations or otherwise in connection with its business activities;
2. Identify an authorized RewardsGateway representative by providing his or her real name, complete mailing address and telephone number; and
3. Confirm in writing that RewardsGateway has fully complied with all of Wal-Mart's demands by signing and returning the attached acknowledgement.

RewardsGateway must fully comply with Wal-Mart's demands by **June 1, 2005**. Should RewardsGateway fail to comply and should Wal-Mart choose to exercise all of its legal rights, Wal-Mart may be entitled to, among other things, an injunction, RewardsGateway's profits, Wal-Mart's actual damages, and/or Wal-Mart's attorney's fees and costs.

The demands made herein are not made to the exclusion of other rights or remedies to which Wal-Mart is entitled, and nothing in this letter, nor any act or omission by Wal-Mart, shall be construed as a waiver of any right or remedy possessed by Wal-Mart, all of which are expressly reserved.

We look forward to your prompt response.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kelly A. DeMarchis', written over a horizontal line.

Kelly A. DeMarchis

KAD/kat



Kirkpatrick & Lockhart Nicholson Graham LLP  
RewardsGateway

May 17, 2005

Page 3

**ACKNOWLEDGEMENT**

RewardsGateway, through the authorized representative set forth below, agrees to, and has fully complied with, the provisions set forth in Wal-Mart's letter.

Signed: \_\_\_\_\_

Name Printed: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**DeMarchis, Kelly A.**

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**From:** Bennet Kelley [bkelley@valueclick.com]  
**Sent:** Thursday, May 26, 2005 7:57 PM  
**To:** DeMarchis, Kelly A.  
**Cc:** Itownsend@owe.com  
**Subject:** WAL-MART File 02717-A141

Dear Ms. DeMarchis:

I am writing in response to your May 17, 2005 letter addressed to RewardsGateway.com which is a division of our subsidiary VC E-Commerce Solutions ("VCES"). I apologize for the delay in responding, but I was on holiday.

As an initial matter, VCES vigorously disputes your contention that RewardsGateway "does not appear to be legitimate." VCES is committed to proper Internet practices and follows FTC disclosure guidelines. RewardsGateway fully stands by its representations and provides the reward advertised to qualifying users.

VCES also disputes your contention that we are infringing Wal-Mart's trademark rights, as we have taken steps to avoid any likelihood of consumer confusion. The gift card image used is distinct from Wal-Mart's and our copy plainly states in large print that the site has "no affiliation or association" with Wal-Mart or the other entities listed on the site.

The site also states that the "trademarks, service marks, logos, and/or domain names (including, without limitation, the individual names of products and retailers) are the property of their respective owners, who have no association with or make any endorsement of the products or services provided by RewardsGateway.com." In addition, the promotion makes no suggestion of affiliation with Wal-Mart since it merely offers to purchase a gift card of the consumer's choosing and Wal-Mart is just one of several gift cards listed in the promotion which includes the gift cards of Wal-Mart's competitors.

Nonetheless, we are happy to engage in a dialogue as to how to move forward in a way acceptable to Wal-Mart that still preserves VCES' right to advertise the products we offer. I hope we can work together to achieve a prompt and amicable resolution of this matter.

Very truly yours,

*Bennet G. Kelley*

ValueClick, Inc.  
30699 Russell Ranch Road  
Suite 250  
Westlake Village, CA 91361  
(818) 575-4739  
(702) 924-8740 (efax)  
bkelley@valueclick.com

08/05/2005





**Kirkpatrick & Lockhart Nicholson Graham LLP**

Henry W. Oliver Building  
535 Smithfield Street  
Pittsburgh, PA 15222-2312  
412.355.6500  
Fax 412.355.6501  
www.klmg.com

June 9, 2005

Kelly A. DeMarchis  
412.355.6305  
Fax: 412.355.6501  
kdemarchis@klmg.com

**Via E-MAIL, FACSIMILE and  
CERTIFIED MAIL/RETURN RECEIPT REQUESTED**

Mr. Bennet G. Kelley  
ValueClick, Inc.  
30699 Russell Ranch Road  
Suite 250  
Westlake Village, CA 91361

**Re: VC E-Commerce Solutions / RewardsGateway—Unauthorized Use of  
WAL-MART Intellectual Property; Our File: 020717-A141**

Dear Mr. Kelley:

As you are aware, we represent Wal-Mart Stores, Inc. ("Wal-Mart"). We write in response to your email communication of May 26, 2005. After reviewing your email, we disagree with your assessment that VC E-Commerce Solutions ("VCES") and RewardsGateway.com are not infringing Wal-Mart's rights in its intellectual property.

Our understanding of your business is that you send unsolicited emails that include the Sam's Club name and/or mark both in the subject header and the body of the emails. We believe that this activity is likely to cause confusion, cause mistake or deceive consumers as to the source of the emails by leading consumers to believe that the advertisement originates from Sam's Club or an entity affiliated with Sam's Club. In addition, such actions are likely to cause confusion, cause mistake or deceive as to Sam's Club sponsorship of, approval of or affiliation with you, your promotion and/or the email solicitations. Although these emails may link to a website that purports to disclaim affiliation with the listed products or retailers and states that the "trademarks, service marks, logos, and/or domain names ... are the property of their respective owners," no such statements appear in the email solicitations. As such, even if these purported disclaimers are sufficient to prevent confusion among visitors to your website, such disclaimers are not sufficient to prevent confusion among the recipients of your unsolicited emails.

In light of the above, we reiterate our demand that you immediately cease and desist from all infringement of Wal-Mart's intellectual property as outlined in our previous letter. In addition, you must confirm in writing that you have fully complied with Wal-Mart's demands by signing and returning the acknowledgement included in that letter. If you fail to immediately comply with Wal-Mart's demands, we will recommend to Wal-Mart that it pursue any and all remedies available to it under the law.



Kirkpatrick & Lockhart Nicholson Graham LLP

Mr. Bennet G. Kelley  
June 9, 2005  
Page 2

We look forward to your prompt response.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kelly A. DeMarchis', written in a cursive style.

Kelly A. DeMarchis

**DeMarchis, Kelly A.**

---

**From:** Bennet Kelley [bkelly@valueclick.com]  
**Sent:** Monday, June 13, 2005 2:48 PM  
**To:** DeMarchis, Kelly A.  
**Subject:** RE: VC E-Commerce Solutions / RewardsGateway-Unauthorized Use of WAL-MART Intellectual Property; Our File: 020717-A141

If we used the same disclaimers used in our website in email texts, would that be sufficient for Wal-Mart?

Very truly yours,

Bennet G. Kelley  
ValueClick, Inc.  
[bkelly@valueclick.com](mailto:bkelly@valueclick.com)

---

**From:** DeMarchis, Kelly A. [mailto:kdemarchis@king.com]  
**Sent:** Thursday, June 09, 2005 8:17 AM  
**To:** Bennet Kelley  
**Subject:** VC E-Commerce Solutions / RewardsGateway-Unauthorized Use of WAL-MART Intellectual Property; Our File: 020717-A141

Dear Mr. Kelley:

As you are aware, we represent Wal-Mart Stores, Inc. ("Wal-Mart"). We write in response to your email communication of May 26, 2005. After reviewing your email, we disagree with your assessment that VC E-Commerce Solutions ("VCES") and RewardsGateway.com are not infringing Wal-Mart's rights in its intellectual property.

Our understanding of your business is that you send unsolicited emails that include the Sam's Club name and/or mark both in the subject header and the body of the emails. We believe that this activity is likely to cause confusion, cause mistake or deceive consumers as to the source of the emails by leading consumers to believe that the advertisement originates from Sam's Club or an entity affiliated with Sam's Club. In addition, such actions are likely to cause confusion, cause mistake or deceive as to Sam's Club sponsorship of, approval of or affiliation with you, your promotion and/or the email solicitations. Although these emails may link to a website that purports to disclaim affiliation with the listed products or retailers and states that the "trademarks, service marks, logos, and/or domain names ... are the property of their respective owners," no such statements appear in the email solicitations. As such, even if these purported disclaimers are sufficient to prevent confusion among visitors to your website, such disclaimers are not sufficient to prevent confusion among the recipients of your unsolicited emails.

In light of the above, we reiterate our demand that you immediately cease and desist from all infringement of Wal-Mart's intellectual property as outlined in our previous letter. In addition, you must confirm in writing that you have fully complied with Wal-Mart's demands by signing and returning the acknowledgement included in that letter. If you fail to immediately comply with Wal-Mart's demands, we will recommend to Wal-Mart that it pursue any and all remedies available to it under the law.

We look forward to your prompt response.

06/14/2005

Sincerely,

**Kelly A. DeMarchis**

Kirkpatrick & Lockhart Nicholson Graham LLP

Henry W. Oliver Building

535 Smithfield Street

Pittsburgh, PA 15222

412.355.6305 (phone)

412.355.6501 (fax)

[kdemarchis@kln.com](mailto:kdemarchis@kln.com)

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06/14/2005

**DeMarchis, Kelly A.**

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**From:** DeMarchis, Kelly A.  
**Sent:** Tuesday, June 14, 2005 10:17 AM  
**To:** 'Bennet Kelley'  
**Subject:** RE: VC E-Commerce Solutions / RewardsGateway-Unauthorized Use of WAL-MART Intellectual Property; Our File: 020717-A141

Mr. Kelley,

Thank you for your email. Although disclaimers are sometimes effective in preventing consumer confusion, we do not believe that adding disclaimers to your email texts will prevent consumer confusion especially in situations where the subject line of the email contains the Wal-Mart Marks. Upon receiving such emails, consumers are likely to believe that the unsolicited email originated from Wal-Mart Stores, Inc. ("Wal-Mart") or that Wal-Mart approved the unsolicited email. The consumer may not open the email or may not read through the entire text of the email and as such, the disclaimer would not be effective. As such, we once again must demand that you cease and desist from sending emails using the Wal-Mart Marks either in the text or in the subject line of the email.

Sincerely,

Kelly A. DeMarchis

---

**From:** Bennet Kelley [mailto:[bkelly@valueclick.com](mailto:bkelly@valueclick.com)]  
**Sent:** Monday, June 13, 2005 2:48 PM  
**To:** DeMarchis, Kelly A.  
**Subject:** RE: VC E-Commerce Solutions / RewardsGateway-Unauthorized Use of WAL-MART Intellectual Property; Our File: 020717-A141

If we used the same disclaimers used in our website in email texts, would that be sufficient for Wal-Mart?

Very truly yours,

Bennet G. Kelley  
ValueClick, Inc.  
[bkelly@valueclick.com](mailto:bkelly@valueclick.com)

---

**From:** DeMarchis, Kelly A. [mailto:[kdemarchis@kling.com](mailto:kdemarchis@kling.com)]  
**Sent:** Thursday, June 09, 2005 8:17 AM  
**To:** Bennet Kelley  
**Subject:** VC E-Commerce Solutions / RewardsGateway-Unauthorized Use of WAL-MART Intellectual Property; Our File: 020717-A141

Dear Mr. Kelley:

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06/14/2005

and RewardsGateway.com are not infringing Wal-Mart's rights in its intellectual property.

Our understanding of your business is that you send unsolicited emails that include the Sam's Club name and/or mark both in the subject header and the body of the emails. We believe that this activity is likely to cause confusion, cause mistake or deceive consumers as to the source of the emails by leading consumers to believe that the advertisement originates from Sam's Club or an entity affiliated with Sam's Club. In addition, such actions are likely to cause confusion, cause mistake or deceive as to Sam's Club sponsorship of, approval of or affiliation with you, your promotion and/or the email solicitations. Although these emails may link to a website that purports to disclaim affiliation with the listed products or retailers and states that the "trademarks, service marks, logos, and/or domain names ... are the property of their respective owners," no such statements appear in the email solicitations. As such, even if these purported disclaimers are sufficient to prevent confusion among visitors to your website, such disclaimers are not sufficient to prevent confusion among the recipients of your unsolicited emails.

In light of the above, we reiterate our demand that you immediately cease and desist from all infringement of Wal-Mart's intellectual property as outlined in our previous letter. In addition, you must confirm in writing that you have fully complied with Wal-Mart's demands by signing and returning the acknowledgement included in that letter. If you fail to immediately comply with Wal-Mart's demands, we will recommend to Wal-Mart that it pursue any and all remedies available to it under the law.

We look forward to your prompt response.

Sincerely,

**Kelly A. DeMarchis**

Kirkpatrick & Lockhart Nicholson Graham LLP

Henry W. Oliver Building

535 Smithfield Street

Pittsburgh, PA 15222

412.355.6305 (phone)

412.355.6501 (fax)

kdemarchis@klnng.com

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**DeMarchis, Kelly A.**

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**From:** Bennet Kelley [bkelley@valueclick.com]  
**Sent:** Tuesday, June 14, 2005 12:07 PM  
**To:** DeMarchis, Kelly A.  
**Subject:** RE: VC E-Commerce Solutions / RewardsGateway-Unauthorized Use of WAL-MART Intellectual Property; Our File: 020717-A141

Kelly:

Thank you for your response and consideration of our position.

It appears that you are operating under a false assumption. RewardsGateway does not send unsolicited commercial email and requires that marketers working on its behalf adhere to this same standard and only send to consumers who have consented to receive such messages. Bulk commercial email and unsolicited commercial email are not one and the same.

I believe your demand is too broad under existing law, but we would be willing to consider the following solution:

1. The email subject line either will not contain a Wal-Mart mark or such reference is used as part of a list of companies (e.g., Get a Gift Card From Acme, Beta or Wal-Mart); and
2. The email text will contain the same disclaimers as the website itself.

We are eager to work with you to resolve this matter in a manner that protects both parties' rights.

Very truly yours,

Bennet G. Kelley  
ValueClick, Inc.  
[bkelley@valueclick.com](mailto:bkelley@valueclick.com)

---

**From:** DeMarchis, Kelly A. [mailto:kdemarchis@kln.com]  
**Sent:** Tuesday, June 14, 2005 7:17 AM  
**To:** Bennet Kelley  
**Subject:** RE: VC E-Commerce Solutions / RewardsGateway-Unauthorized Use of WAL-MART Intellectual Property; Our File: 020717-A141

Mr. Kelley,

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06/15/2005

The consumer may not open the email or may not read through the entire text of the email and as such, the disclaimer would not be effective. As such, we once again must demand that you cease and desist from sending emails using the Wal-Mart Marks either in the text or in the subject line of the email.

Sincerely,

Kelly A. DeMarchis

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**Sent:** Monday, June 13, 2005 2:48 PM  
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Very truly yours,

Bennet G. Kelley  
ValueClick, Inc.  
[bkelly@valueclick.com](mailto:bkelly@valueclick.com)

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**To:** Bennet Kelley  
**Subject:** VC E-Commerce Solutions / RewardsGateway-Unauthorized Use of WAL-MART Intellectual Property; Our File: 020717-A141

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06/15/2005

the law.

We look forward to your prompt response.

Sincerely,

**Kelly A. DeMarchis**

Kirkpatrick & Lockhart Nicholson Graham LLP

Henry W. Oliver Building

535 Smithfield Street

Pittsburgh, PA 15222

412.355.6305 (phone)

412.355.6501 (fax)

[kdemarchis@kln.com](mailto:kdemarchis@kln.com)

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