

1 **Jason K. Singleton, State Bar #166170**
2 **Richard E. Grabowski, State Bar #236207**
3 **SINGLETON LAW GROUP**
4 **611 "L" Street, Suite A**
5 **Eureka, CA 95501**
6 **lawgroup@sbcglobal.net**

7
8
9
10 **(707) 441-1177**
11 **FAX 441-1533**

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

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

29 **ASIS INTERNET SERVICES, a California**
30 **corporation,**

31 **Plaintiff,**
32 **vs.**

33 **OPTIN GLOBAL, INC., a Delaware**
34 **Corporation, also dba Vision Media Limited**
35 **Corp., USA Lenders Network, USA Lenders,**
36 **and USA Debt Consolidation Service; et al.,**

37 **Defendants.**

Case No. C-05-5124 CW

OPPOSITION TO DEFENDANT AEGIS
CORPORATION, AMERICAN HOME
EQUITY CORPORATION, QUICKEN
LOANS INC., STATESIDE MORTGAGE,
INC., MICHAEL CUERVO, and
NATIONAL FIDELITY FUNDING'S
MOTION TO DISMISS

DATE: April 21, 2006

TIME: 10:00 a.m.

CTRM: 2, 4th Floor

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION... 1

STATEMENT OF FACTS 3

1. Why did ASIS bring this action? 5

2. Why are Aegis, AHEC, Quicken, Stateside, Northstar, and NFF in this case?. 7

ARGUMENT 11

1. Standard of review for a motion to dismiss 11

2. Plaintiff’s complaint meets the Federal Pleading Standard...... 12

3. Fraud is not an issue in violation of the CAN SPAM Act of 2003, California Business and Professions Code § 17529.5(a), or California’s common law Civil Conspiracy 15

4. Plaintiff’s complaint is sufficient if the fraud standard is required...... 17

5. The Court should consider the relevant wire fraud cases in considering dismissal. 19

6. Plaintiff did allege that Defendant Mortgage Brokers were responsible for the emails sent by SPAMMER...... 20

7. Plaintiff’s complaint is more than sufficient to state a cause of action for violation of California’s common law Civil Conspiracy.. 22

8. The question of whether Mortgage Broker Defendants had actual knowledge of the involvement of SPAMMERS is an ultimate issue of fact and should be left to a trier of fact. 23

CONCLUSION..... 24

TABLE OF AUTHORITIES

CASES

Bankcard America, Inc. v. Universal Bancard Systems, Inc., 904 F.Supp. 753, 760 (N.D.Ill.1995)19

Conley v. Gibson, 355 U.S. 41, 47 (1957).....12

Empress LLC v. City and County of San Francisco 419 F.3d 1052, 1055 – 1056 (9th Cir. 2005)22

Garter-Bare Co. v. Munsingwear, Inc., 650 F.2d 975, 980 (9th Cir.1980).....24

Harris v. Itzhaki, 183 F.3d 1043 at 1051 (9th Cir.1999).....24

In re Lupron Marketing and Sales Practices Litigation, 295 F.Supp.2d 148, 171 (D.Mass., 2003)15, 19

Lowe v. City of Monrovia, 775 F.2d 998, 1008 (9th Cir.1985)24

Saunders v. Superior Court (2d Dist.1994) 27 Cal.App.4th 832, 846 [33 Cal.Rptr.2d 438, 446]14

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)12

Swierkiewicz v. Sorema N. A. 534 US 506, 513 (2002)12, 22

Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1105 (9th Cir. 2003)15, 17, 18

STATUTES

15 U.S.C. § 7701(a)(6).....15

15 U.S.C. § 7701(a)(8).....12

15 U.S.C. § 7704(a)(1) and (2)12

15 U.S.C. § 7704(a)(2).....12

15 U.S.C. § 7704(b)(1)15

15 U.S.C. § 7706(2)(12).....19

15 U.S.C. § 7706(g)12, 15

15 U.S.C. § 7706(g)(2).....19

15 U.S.C. § 7707(b)20

California Business and Professions Code § 17500 et seq.20

California Business and Professions Code § 17529.120

California Business and Professions Code § 17529.5 passim

California Business and Professions Code § 17529.5(a) passim

California Business and Professions Code § 17529.5(a)(1), (2), and (3).....20

CAN SPAM Act of 2003..... passim

OTHER AUTHORITIES

California BAJI 12.31.....14

California BAJI 13.85.....13

GAO-06-165, a report to the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, House of Representatives - Prevalence of False Contact Information for Registered Domain Names.....4

Inside The SPAM Cartel – Trade Secrets from the Dark Side.....3

///

RULES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

***FRCP* Rule 12(b)10**
***FRCP* Rule 12(b)(6).....1, 10**
***FRCP* Rule 561, 10**
***FRCP* Rule 820**
***FRCP* Rule 8(a).....11, 17, 21, 23**
***FRCP* Rule 9(b)18, 20, 21, 23**

INTRODUCTION

1
2 Plaintiff argues that it has alleged sufficient facts to state a cause of action against:
3 Francis Prasad and Aegis Lending Corporation (hereafter “Aegis”); Michael Garcia and
4 American Home Equity Corporation (hereafter “AHEC”), Quicken Loans Inc. (hereafter
5 “Quicken”); Bruce Lerner and Stateside Mortgage, Inc. (hereafter “Stateside”); John “Terry”
6 Dorland and Michael Cuervo, dba Northstar Financial (hereafter Northstar), and Chris Valley
7 and National Fidelity Funding (hereafter “NFF”) of violation of the *CAN SPAM Act of 2003*,
8 *California Business and Professions Code* § 17529.5, and civil conspiracy to violate those
9 statutes, thereby making Defendants equally liable for the injuries of that violation and subject
10 to both injunction and penalties. This action represents one of the first private civil suits brought
11 under the *CAN SPAM Act* by an Internet Access Provider (used interchangeably herein with
12 Internet Service Provider and ISP). Plaintiff has pled the action based on the elements of the
13 *CAN SPAM Act*, *California Business and Professions Code* § 17529.5, and the California
14 common law action of civil conspiracy. If the court decides that this is not sufficient, Plaintiff
15 will move the court to amend the complaint with whatever direction and instruction the court
16 may provide.

17 While Plaintiff does not argue that it has alleged sufficient facts to survive summary
18 judgment or prevail at trial in its complaint, Plaintiff argues that it has alleged sufficient facts to
19 support an initial complaint under current case law, Federal Rules of Court and the Federal
20 Rules of Civil Procedure. Defendants refer to facts regarding the knowledge of Defendants,
21 based on industry information not contained in the Complaint. In this situation in deciding a
22 *FRCP* Rule 12(b)(6) motion to dismiss the court uses the same standard as an *FRCP* Rule 56
23 motion for summary judgment “and all parties shall be given reasonable opportunity to present
24 all material made pertinent to such a motion by Rule 56.” *FRCP* Rule 12(b)(6). Therefore,
25 Plaintiff will provide additional sworn affidavit and evidence to support its complaint.

26 Plaintiff has made this complaint after suffering egregious injury by a group of
27 conspirators who intend to misuse its Internet service resources to gain information about its
28 clients and sell mortgages to its clients. These actions by the conspirators directly violated

1 various parts of the *CAN SPAM Act* of 2003 and *California Business and Professions Code* §
2 17529.5 that prohibit sending certain types of commercial emails that meet specific conditions.

3 Defendants have complained that these terms are elements of fraud and therefore
4 Plaintiff's action sounds in fraud and therefore must meet the requirements of a complaint for
5 fraud. The language Plaintiff has used in the complaint is the language of the statutes. Plaintiff
6 has pled its complaint based on the plain language of the statutes. Plaintiff has not pled
7 common law or statutory fraud. It is unclear if the legislature intended that fraud be an element
8 of either of the named statutes, since the statutes define explicitly what amounts to a violation.
9 To the extent required by the statutes, Plaintiff has specified the actions of the parties that
10 violated the statutes. For a violation to occur the statutes do not require that any party actually
11 be deceived by the SPAM, generally an element of fraud. In fact they do not even require that
12 any receiving party, other than the ISP, actually have knowledge of the SPAM. The statutes do
13 not specify a violation for fraud. The violation is for misuse of the ISP's resources. The
14 fraudulent nature of the emails, such as use of a false header, is a condition defined by the
15 statutes, as illegal, used to differentiate them from the valid emails that represent a valid, and
16 legal, use of the ISP's resources. What the Defendants are referring to as fraud and
17 misrepresentation are conditions or specifications of the emails defined in detail in the statutes.

18 If the court does decide that the complaint falls within the particularity requirements
19 required for fraud, then Plaintiff argues that it has pled those elements necessary to show fraud
20 under this statute. Plaintiff's complaint sets forth precisely what statements or omissions were
21 made (false and misleading emails); time, place and person responsible for each such statement
22 or omission (the SPAMMERS and MORTGAGE BROKERS, and the date and times the emails
23 were received at its ISP); content of such statements or omissions (false headings, false subject
24 lines, etc.) and their effect on plaintiff (misuse of Plaintiff's resources). Therefore Defendants'
25 argument regarding fraud is in error.

26 Defendants have complained that it did not initiate the electronic message and therefore it
27 cannot be held liable under the *CAN SPAM Act* and *California Business and Professions Code*
28 § 17529.5. If this logic prevails then no person who aids and abets in the commission of a crime

1 or civil wrong could ever be held guilty or liable for the actions of another. In addition, the
2 *CAN SPAM Act* allows for the prosecution of a party who procures the services of another.
3 Plaintiff will demonstrate, to the extent necessary to show a disputed issue of fact, that
4 Defendants have financially supported and contracted with the persons and companies who
5 actually transmitted the SPAM. Plaintiff has alleged and provide pre-discovery information that
6 Defendants contracted with the conspirators with knowledge that they would use SPAM to
7 collect sales leads for Defendants. Plaintiff will demonstrate that the conspirators did use
8 SPAM. Plaintiff will demonstrate that the SPAM caused harm and injury to Plaintiff, thereby
9 breaching Defendants' duty to Plaintiff not to harm it by using SPAM. Plaintiff will
10 demonstrate that Defendants benefited from the use of SPAM by the conspirators and will
11 continue to benefit and cause harm unless the court acts.

12 Defendants argue that Plaintiff is trying to "bootstrap" Defendants into this action by
13 complaining of civil conspiracy. Plaintiff has not attempted to "bootstrap" Defendants into this
14 action. The primary driving force of SPAM on the Internet is the financial backing provided by
15 companies like Defendants. These companies intentionally and knowingly conspire with
16 spammers to gather sales leads for them, and depend on the spammers to disguise the trail back
17 to the source of the money. To put it simply, SPAM would not exist without the knowing
18 financial backing of Defendants and companies like Defendants. Defendants are in this action
19 because they got caught, and Plaintiff will demonstrate how it caught Defendants with their
20 hands in the cookie jar.

21 Defendants are equally liable for any violation that they participated in as a conspirator.
22 In addition, they are liable as procurers under the *CAN SPAM Act*. Once the underlying
23 violation is shown, all persons conspiring to achieve the objective of the conspiracy or aiding
24 and abetting the accomplishment of the objective are equally liable for the violation. Plaintiff
25 will demonstrate that Defendants financially supported the objective of the conspiracy and is the
26 ultimate beneficiary of the objective.

27 **STATEMENT OF FACTS**

28 The SPAM Cartel (a term created by "SPAMMER-X" in the book Inside The SPAM

1 Cartel – Trade Secrets from the Dark Side) has become more and more sophisticated with the
2 evolution of SPAM laws and SPAM prevention techniques. (See Exhibit A of Declaration of
3 Richard Grabowski). Today spammers do not send their emails from their own servers using
4 their own identities. Advertisers wishing to flood a potential client sector do not send email
5 advertisements from their business and do not use their own equipment or identities. This
6 problem is compounded by the fact that there is no way to confidently identify an email sender's
7 identity or even the source domain from where the email was sent. GAO-06-165, a report to the
8 Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary,
9 House of Representatives - Prevalence of False Contact Information for Registered Domain
10 Names. (See Exhibit B to Declaration of Richard Grabowski). Most of the time an email directs
11 you to an advertisers site. Even the location and owners of these sites are very difficult to
12 identify because the domain name information is almost always falsified.

13 The SPAM Cartel is now built around an industry adept in obfuscating and hiding the
14 identities of advertisers sending SPAM. The industry consists of three basic parts: the
15 spammer, who actually transmits the emails under contract to a middle man; the middle man
16 (generally referred to as a lead generation company) who contracts the spammer as an "affiliate"
17 and then contracts with the advertiser to provide sales profiles and sales leads; and the
18 advertiser/money man who contracts with the middle man for sales leads and sales profiles.
19 (See Exhibit H to Declaration of Richard Grabowski). This scenario has unfortunately turned
20 out to be very profitable for each of the parties.

21 The spammer is paid very small amounts, usually less than a dollar sometimes less than
22 ten cents, for a profile or sales lead. The spammer makes his money by delivering thousands of
23 sales leads to the middle man. (See Exhibit A to Declaration of Richard Grabowski). The
24 middle man then delivers the sales leads to the advertisers based on pre-contracted rates and
25 conditions – the more you pay the quicker you get the lead. (See Exhibit C to Declaration of
26 Richard Grabowski). The advertiser then pays the middle man and uses the lead to start his
27 sales process.

28 The advertiser is the money man in this scenario, providing all of the funds that drive the

1 system. Just as the money man in a bank robbery does not know or care how the bank robbers
2 actually carry out the theft, the money man in the SPAM industry is not interested in the details
3 and depend on obfuscation and remoteness to pretend he is not responsible. This system is now
4 prevalent in the mortgage industry, the insurance industry, and the product distribution/retail
5 industry. The middle men pay out millions of dollars a year to the spammers to go get leads.
6 The middle men have become major businesses worth in the tens of millions. In the
7 mortgage/refinance/loan industry the mortgage brokers are the advertisers. The Mortgage
8 Brokers/money men are well aware of this process as it has been extensively documented in
9 loan/mortgage industry journals. (See Exhibit D to Declaration of Richard Grabowski).

10 In addition to this process the spammer is aided by several new innovations such as
11 "Dark Mailer", one of several bulk emailing products advertised on the Internet (for \$499), that
12 guarantee to obfuscate the identity of the sender and route their SPAM through multiple servers
13 making it virtually impossible to identify the source, while sending out 500,000 emails per hour.
14 (See Exhibit E to Declaration of Richard Grabowski). If the spammer is lazy or not technically
15 competent then they can just buy a service such as Blast4traffic.com, that will send out 2.3
16 million emails every day, up to 70 million emails per month, that are guaranteed to have opted
17 in to receipt of their advertisements. (See Exhibit F to Declaration of Richard Grabowski). Of
18 course the definition of opt-in is that they sent an email to this address, called a directory
19 harvest, and no one responded or objected. No one responded or objected because the actual
20 intended recipient never sees the email because the ISP traps the emails as SPAM and disposes
21 of them. Again, there is no way to track back to the source of emails sent by these services.

22 This current description of the SPAM Cartel is provided as a framework to this case.
23 Tracking down spammers and their money partners is very difficult. To track down the parties in
24 this case the Plaintiff and its investigators have had to resort to extraordinary actions.

25 **1. Why did ASIS bring this action?**

26 ASIS Internet has received an ever increasing amount of SPAM for the past several
27 years. The cost of processing email and filtering out SPAM has grown dramatically. ASIS has
28 had to add software, hardware, staff, and network bandwidth to fight the SPAM. ASIS also

1 currently uses a service, POSTINI, to preprocess all of the mail sent to its email server, at
2 considerable cost. (See ¶2 of the Declaration of Nella White). The FTC, based on a report by
3 MXLogic, reports that 67% of all email is SPAM. (Effectiveness and Enforcement of the CAN-
4 SPAM Act: A Report to Congress, December 2005, Federal Trade Commission.) Some
5 industry experts estimate that as much as 75% of all traffic on the Internet is SPAM.

6 During the months of October and November of 2005, plaintiff received in excess of
7 10,000 emails to its servers that met the definition of SPAM under the *CAN SPAM Act of 2003*.
8 These emails were sent using obviously stolen email identities. These emails were sent with
9 false header information, so as to make tracing the source impossible. These emails were sent
10 with subject lines that contained consistently misspelled words. (See ¶3 of the Declaration of
11 Nella White). A sample of the various emails is included as Exhibit A to the declaration of
12 Nella White that demonstrate the email identity problem and the subject line problem. A sample
13 of one of the emails the eventual recipient would see and the Internet site the emails directed the
14 recipient to are also included. (See Exhibits B and C to the Declaration of Nella White). The
15 ASIS recipient email I.D. is redacted to protect the privileged corporate information of ASIS and
16 to protect ASIS and the intended recipients from retaliatory electronic attacks. (Sometimes
17 called a “Joe Job” or “Mail Bomb”, See Exhibit G to Declaration of Richard Grabowski).

18 Misspelling words in the subject and body of an email is a technique used by spammers
19 to avoid spam detection software. There were various subject lines used in these emails. Some
20 were just misspellings, such as: “Low mortgagee rates” and “Pre-approvedd rate #uzthxvml”.
21 Some were outright deceptive, such as: “Application Approval #...” and “”Your mortgagee
22 approval”. (See Exhibit A to the Declaration of Nella White).

23 Note that in some cases there are multiple intended recipients in the “To:” portion of the
24 headers, and in some cases there are multiple intended recipients in the “cc:” portion of the
25 headers. This technique allows the spammer to send a lot more emails with very little work,
26 cutting down the actual work on his server to 1/20 of the normal work, by sending 20 emails
27 with just one transmission. Note also that the names of the recipient generally begin with the
28 same letter on a single email. This is because the names are in alphabetical order of email

1 identities issued by ASIS, indicating that the list used was developed from a directory harvest.

2 The body of the emails generally made the same claims:

3 “You have been selected for our lowest rate in years...

4 You could get over \$460,000 for as little as \$350 a month!

5 Bad credit, Bank*ruptcy? Doesn’t matter, low rates are fixed no matter what!”

6 Note that the pitch appears to be coming from an actual mortgage company who is
7 guaranteeing credit worthiness and a low fixed rate, not from a spammer trying to get a sales
8 leads.

9 All of these emails asked the recipient to go to various specific Internet sites, such as
10 wwmort.com, bbmort.com, xxmort.com, etc., and contained a link to get there. However, once a
11 party went to any of those sites, the information and site information was exactly the same. (See
12 ¶4 and Exhibit C of the Declaration of Nella White). In addition the request at these sites was
13 always the same – to fill out a profile to receive free quotes.

14 Also note on the profile form the paragraph under the “Submit” button; that this form
15 authorizes the “USA Lenders Network” to send your request to multiple qualified brokers.
16 “USA Lenders Network” has been identified as the defendants OPTIN GLOBAL, RICK
17 YANG, VISION MEDIA, and PEONIE PUI TING CHEN in a federal suit filed by the FTC and
18 The State Attorney General of California, No. CV 05-1502-SC.

19 This statement also admits that the lenders and brokers who will be receiving this
20 information have already been “qualified”. This statement implies, if it does not outright state,
21 that there is an agreement in place with these lenders and brokers. (See Exhibit C to Declaration
22 of Nella White).

23 **2. Why are Aegis, AHEC, Quicken, Stateside, Northstar, and NFF in this case?**

24 ASIS Internet Services, determined to stop the spamming, decided to find out who was
25 behind the SPAM. 5. “On the evening of October 25, 2005, and extending into the early
26 hours of October 26, 2005, my mail service, mail.asis.com, received many messages regarding
27 real estate financing. I became aware of this because many of these messages were sent to email
28 addresses that were no longer active; that is, they had long since been given up by former

1 customers and were therefore available for reuse. In order to see whether they were receiving
2 spam, I aliased all of these addresses to one account name.” (See ¶5 of Declaration of Nella
3 White). “Many of the websites referred to in these email messages had an URL of the form
4 xxmort.com or xxmort.net where the ‘x’ consisted of any number or letter causing me to suspect
5 that they were related somehow.” (See ¶6 of Declaration of Nella White). “On Thursday,
6 October 27, 2005, I filled out a form on one of these websites. I chose wumort.net because it
7 clearly had been sent to a large percentage of my customer base, listed alphabetically, leading
8 me to suspect they had been gather by means of a Directory Harvest Attack.” (See ¶7 of
9 Declaration of Nella White; Exhibit C of Declaration of Nella White).

10 **Ageis**

11 The next day, at 3:25 pm on Friday, October 28, 2005, Defendant, Francis Prasad, called
12 the number listed on the form by Nella White and said:

13 “Hi, this message is for Bruce. Bruce, this is Francis calling from
14 Aegis Lending Corporation (in? near?) Sacramento. Bruce, actually,
15 I am the loan officer who has been assigned to handle your financial
request...”

16 (See Exhibit A, ¶1, to Declaration of Teresa Singleton).

17 There is no other way for Francis to have gotten the name or the number he called on
18 October 28, 2005, except from the profile completed by Nella White. “The person ‘Bruce Wolf’
19 is fictitious name along with the address created by me strictly for the purpose of this profile.
20 The telephone number given in the profile was connected to an answering machine in order to
21 record any responses made to this profile only.” (See ¶9 of Declaration of Nella White). Bruce
22 Wolf does not exist, except in Nella’s profile form.

23 Note that Francis does not say that he has purchased a lead from a vendor. He says he is
24 the loan officer assigned by Aegis Lending Corporation to handle Bruce’s request.

25 **AHEC**

26 At 12:46 pm on Friday, October 28, 2005, Michael Garcia called the number listed on
27 Nella’s form and stated:

28 “Hello, Mr. Wolf. My name is Michael Garcia and I’m from

1 American Home Equity Corporation. I'm calling in regards to an
2 application that you submitted online at GoApply regarding the
financing of your property..."

3 (See Exhibit A, ¶2, to Declaration of Teresa Singleton).

4 Again there is no way for Mr. Garcia to have gotten the telephone number he called or
5 the name Bruce Wolf, except from Nella's form. In this response Mr. Garcia has identified
6 where he got the information from. It is notable that GOAPPLY.COM has advertised that it
7 strictly enforces its SPAM policy. (See Exhibit D to Declaration of Richard Grabowski).

8 **Quicken**

9 At 12:51 pm on Friday, October 28, 2005, a Quicken representative called the number
10 listed on Nella's form and stated:

11 "Good evening, Bruce, this is Richard. I'm calling in regards to the
12 application you submitted about your refinance. I need you to give
13 me a call at 1-(800)-226-6308 at x57210. I look forward to speaking
14 with you, enable to assist you on maximizing your monthly savings.
Thank you for your time."

15 (See Exhibit A, ¶3, to Declaration of Teresa Singleton).

16 Again there is no way for Richard to have gotten the telephone number he called or the
17 name Bruce Wolf, except from Nella's form.

18 **Stateside**

19 At 12:33 pm on Friday, October 28, 2005, Bruce Lerner called the number listed on
20 Nella's form and stated:

21 "Hello. I'm calling for a 'Bruce.' My name is 'Bruce' as well. Bruce
22 Wolf, Bruce Lerner. I'm with Stateside Mortgage. You inquired
23 about a home loan. We've got some outstanding products and
24 services. You can reach me direct, toll-free, (888) 496-2800: triple-
eight, four-nine-six, twenty-eight hundred. Bruce Lerner, Stateside,
Stateside Mortgage. Thank you."

25 Bruce Lerner called back 3:53 pm on Friday and stated:

26 "I'm calling for Bruce Wolf. Bruce Lerner, Stateside Mortgage. You
27 inquired about a home loan. We got some outstanding products and
28 services to help you lower your rate, lower your payment, possibly
help you get some cash out. You can reach me direct, toll-free, (888)
496-2800: triple-eight, four-nine-six, twenty-eight hundred. Once

1 again, Bruce, calling with Stateside, Stateside Mortgage. Thank you.
2 Have a good day.”

3 (See Exhibit A, ¶4, to Declaration of Teresa Singleton).

4 Note that Bruce Lerner states that Bruce Wolf inquired about home loans, supposedly to
5 Stateside Mortgage.

6 **Northstar**

7 At 10:43 am on Friday, October 28, 2005, Defendant John Terrence Dorland called the
8 number listed on Nella’s form and stated:

9 “Mr. Wolf, this is Terry Dorland, with Northstar Financial, giving
10 you a call in regards to your online mortgage inquiry the other day.
11 It’s about 11:30 on Friday morning. Give me a call back when you
12 get an opportunity. My number is (949) 705-6874. Thank you very
13 much. Bye-bye.”

14 (See Exhibit A ¶5, to Declaration of Teresa Singleton).

15 Note that Terry Dorland knew that Bruce Wolf had made an “online mortgage inquiry”.

16 **National Fidelity Funding (NFF)**

17 At 12:33 pm on Friday, October 28, 2005, Chris Valley called the number listed on
18 Nella’s form and stated:

19 “Hi. This message is for Bruce. Bruce, my name’s Chris Valley,
20 with National Fidelity Funding. Uh, you had gotten on the internet
21 and, uh, filled out a little request form to request some information
22 on a possible refinance or bill consolidation. I’d certainly like to
23 help you look at some options that might be able to help you get that
24 done. Uh, I’d like to speak with you a little bit more in detail.”

25 At 11:42 am on Monday, October 29, 2005 Chris called back and stated:

26 “Hi. This message is for Bruce. Bruce, this is Chris Valley. I’m with
27 National Fidelity Funding. Just wanted to give you a call on your
28 recent inquiry on the internet for some options to consolidate some
debt. I’d be happy to talk to you a little bit more in detail about what
your needs are and what type of options I might have available to
you. I can be reached toll-free at 1-(866) 994-1122. If you’d like to
give me a call I’m usually here ‘til about 7 o’clock, that would be
Indiana time. Um, give me a shout, I’d be glad to, uh, talk to you a
little bit more in depth about, uh, what your needs are and how I can
help you achieve those. Thank you very much, bye-bye.”

1 (See Exhibit A, ¶6 to Declaration of Teresa Singleton).

2 In none of the calls from the Mortgage Broker Defendants did anyone assert that they had
3 purchased the name and number of Bruce Wolf from a lead generator. All of these Defendants
4 acted as though they were the company to whom Bruce Wolf had sent his request. Note the
5 number of mortgage brokers calling based on a single SPAM response, indicating just how
6 prevalent the use of SPAM is in the industry, and how little effort the mortgage brokers take to
7 prevent participating in SPAM.

8 ARGUMENT

9 1. Standard of review for a motion to dismiss.

10 An *FRCP* Rule 12(b)(6) motion for a failure to state a cause of action is judged on the
11 face of the complaint unless the motion contains other facts not contained in the complaint. The
12 motion is then judged based on the same criteria as an *FRCP* Rule 56 Motion for Summary
13 Judgment. (*FRCP* Rule 12(b)). Plaintiff believes that Defendants have brought up facts and
14 issues not contained on the face of the complaint, and that the court should review the issues of
15 Defendants' motion under the criteria defined for *FRCP* Rule 56. Further, Plaintiff believes that
16 it benefits all parties in this action, including the court, for Plaintiff to place the evidence for a
17 prima facia case on the table at this time. The relatively new *CAN SPAM Act* and the lack of
18 any precedent court decisions make it important to get the real issues of this suit in the open as
19 quickly as possible, for all party's benefit. Therefore, Plaintiff provides the information
20 available and requests the court to review the case under a Rule 56 standard.

21 Defendants argue that Plaintiff has not pled with specificity or particularity its complaint
22 sufficient to survive a motion to dismiss. Defendants further argue that because Plaintiff's
23 claims sounds in fraud that Plaintiff must plead its action with the heightened level of
24 particularity required for a fraud pleading. Plaintiff argues that it has met the requirement for
25 complaint pleading under *FRCP* Rule 8(a). Further Plaintiff argues that its action does not
26 sound in fraud and therefore the heightened standard for pleading fraud does not apply. In the
27 alternative, if the court does find that heightened standard for fraud does apply, then Plaintiff has
28 met that standard under the applicable statutes and case law.

1 Therefore, Plaintiff will endeavor to show it has met the pleading standard required, that
 2 as the non-moving party, by affidavit and other evidence, there are genuine material issues of
 3 fact and the moving parties do not have a right to dismissal under the law.

4 **2. Plaintiff's complaint meets the Federal Pleading Standard.**

5 Plaintiff's complaint is short and plain and meets the federal notice pleading standard.

6 *FRCP Rule* 8(a) requires:

7 "A pleading which sets forth a claim for relief ... shall contain (1) a
 8 short and plain statement of the grounds upon which the court's
 9 jurisdiction depends ... (2) a short and plain statement of the claim
 10 showing that the pleader is entitled to relief, and (3) a demand for
 11 judgment for the relief the pleader seeks..."

12 The federal regulations require that a complaint be "short and plain". Further the federal
 13 regulations require that the plaintiff simply "give the defendant fair notice of what the plaintiff's
 14 claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema N. A.* 534 US 506, 513
 15 (2002).

16 Plaintiff's complaint establishes the jurisdiction of the court as original jurisdiction over a
 17 cause of action based on a violation of a federal statute, the *CAN SPAM Act*. (Comp. ¶1). A
 18 demand for relief is made as to each cause of action (Comp. ¶¶ 30-33, 37-38, 46-49) and in
 19 Plaintiff's prayer for relief (Comp. Pg. 11).

20 More importantly a plaintiff need not "set out in detail the facts upon which he bases his
 21 claim." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). The court's role is limited and confined to
 22 evaluating "not whether a plaintiff will ultimately prevail," but "whether the claimant is entitled
 23 to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

24 Plaintiff alleges each element of the causes of action for violation of the *CAN SPAM Act*,
 25 the *California Business and Professions Code* § 17529.5(a), and California' common law claim
 26 of *Civil Conspiracy*.

27 Plaintiff is a qualified Internet Access Provider as authorized to bring an action under the
 28 *CAN SPAM Act*, 15 *U.S.C.* § 7706(g). (Comp. ¶ 16).

The *CAN SPAM Act*, 15 *U.S.C.* § 7704(a)(1) and (2) prohibits the transmission of a
 message, to a protected computer (Plaintiff alleged that Defendants, MORTGAGE BROKERS,

1 were working in concert with SPAMMERS and that each was the servant or master of the other
 2 (Comp. ¶14), and that Defendants transmitted over 10,000 commercial emails to its protected
 3 computer (Comp. ¶15-22), containing:

- 4 1. Header information that was false or misleading. (Plaintiff so
 5 alleged. (Comp. ¶ 25)); or
- 6 2. A subject line that “would be likely to mislead a recipient,
 7 acting reasonably under the circumstances, about a material
 8 fact regarding the contents or subject matter of the
 message...” 15 *U.S.C.* § 7704(a)(2) (Plaintiff so alleged.
 (Comp. ¶19)).

9 In addition, 15 *U.S.C.* § 7704(a)(2) allows two variations of how to determine whether the
 10 subject line is misleading: 1) “if such person has actual knowledge”; or 2) “knowledge fairly
 11 implied on the basis of objective circumstances.” Plaintiff has not pled that any Defendant had
 12 “actual knowledge” regarding the subject lines. Plaintiff has only pled that the “circumstances”
 13 required are plainly visible in the actual subject lines of the emails. (Comp. ¶19). The email
 14 subject lines received by Plaintiff were clearly intended to get someone to open the email by
 15 telling them that their loan was pre-approved (“Pre-approvedd rate #uzthxvml”) or that a loan
 16 was approved (“Notice: Loww Mortgage Ratee Approved”). (See Exhibit A to the Declaration
 17 of Nella White). This subterfuge in a subject line is exactly what the *CAN SPAM Act* is
 18 intended to stop. (15 *U.S.C.* § 7701(a)(8)).

19 Plaintiff also pled other portions of the *CAN SPAM ACT* with sufficiency to meet the
 20 requirements of the federal notice pleading standard. Plaintiff’s complaint is therefore sufficient
 21 as to the first cause of action regarding the *CAN SPAM Act* .

22 ***California Business and Professions Code*** § 17529.5(a) states that “[i]t is unlawful for
 23 any person or entity to advertise in a commercial e-mail advertisement either sent from
 24 California or sent to a California electronic mail address under any of the following
 25 circumstances:”

- 26 1. “The e-mail advertisement contains or is accompanied by
 27 falsified, misrepresented, or forged header information.”
 Plaintiff so alleged. (Comp. ¶ 35).
- 28 2. “[H]as a subject line that a person knows would be likely to
 mislead a recipient, acting reasonably under the

1 circumstances, about a material fact regarding the contents or
2 subject matter of the message.” (Plaintiff so alleged. (Comp.
3 ¶¶ 19 and 36)).

4 Plaintiff alleges that over 10,000 commercial e-mail advertisements were sent to its California
5 electronic mail addresses by Defendants (Comp. ¶17).

6 Plaintiff’s complaint is therefore sufficient as to the second cause of action regarding
7 *California Business and Professions Code* § 17529.5(a).

8 Defendant further argues that Plaintiff has not pled allegations sufficient to complain of
9 violations of California’s Common Law Conspiracy law. Plaintiff argues that it has pled each
10 and every element of California Common Law Conspiracy.

11 California common law **Civil Conspiracy** defined:

12 "Liability may also be imposed on one who aids and abets the
13 commission of an intentional tort if the person (a) knows the other's
14 conduct constitutes a breach of duty and gives substantial assistance
15 or encouragement to the others to so act or (b) gives substantial
16 assistance to the others in accomplishing a tortious result and the
17 person's own conduct, separately considered, constitutes a breach of
18 duty to the third person. (authority cited)." *Saunders v. Superior*
19 *Court* (2d Dist.1994) 27 Cal.App.4th 832, 846 [33 Cal.Rptr.2d 438,
20 446].

21 The California Civil Jury Instructions adds the requirement that one or more of the conspirators
22 commit the wrongful act “in furtherance of the conspiracy” causing another party to be injured.
23 (*California BAJI* 13.85). In this case the wrongful act was sending the SPAM to Plaintiff’s
24 email server as performed by the SPAMMERS. (Comp. ¶40). However, Plaintiff did not plead
25 that only the SPAMMERS sent the email. Plaintiff alleged that “Defendants” sent the emails.
26 (Comp. ¶¶ 14–22).

27 Plaintiff has also pled that Defendants, Aegis, AHEC, Quicken, Stateside, Northstar, and
28 NFF, knew that it was unlawful for SPAMMERS to send SPAM email and knew that this
activity breached a duty to Plaintiff. (Comp. ¶40). Plaintiff alleged that they knew about the
breach before, during and after each breach. (Comp. ¶41). Plaintiff alleged that Defendants,
Aegis, AHEC, Quicken, Stateside, Northstar, and NFF, gave “substantial assistance or
encouragement to the **SPAMMERS**”. (Comp. ¶40).

1 Defendants, Aegis, AHEC, Quicken, Stateside, Northstar, and NFF, did call Plaintiff's
2 bogus telephone number with the information that was provided to the SPAMMER. Defendants
3 identify themselves as the persons assigned to handle Plaintiff's bogus financial request.
4 SPAMMER did say in their advertisements that the mortgage brokers were "qualified",
5 implying some sort of relationship.

6 The information of Defendants knowledge and intent is in the sole control of the
7 Defendants and is a matter for discovery. *In re Lupron Marketing and Sales Practices*
8 *Litigation*, 295 F.Supp.2d 148, 171 (D.Mass., 2003). However, Plaintiff has received
9 information, through settlements with other Defendants in this case, of the contractual
10 agreements with lead generation companies/middle men. Plaintiff has also received copies of
11 the sales leads, including the lead for the fictitious character Bruce Wolf, provided by the middle
12 men to other Defendants. (See ¶2 of the Declaration of Richard Grabowski). Plaintiff is
13 reluctant to make these documents available at this time as it may significantly hamper
14 Plaintiff's investigation during discovery. Plaintiff therefore offers to make the documents
15 available to the court in camera, if the court so requires. Plaintiff will amend its complaint to
16 add the lead generation company/middle men when appropriate.

17 Since Plaintiff has met the basic requirement of alleging that SPAMMERS action was a
18 breach and that Defendants Aegis, AHEC, Quicken, Stateside, Northstar, and NFF, gave
19 SPAMMERS substantial assistance or encouragement, Plaintiff's complaint is sufficient as to
20 the third cause of action regarding Civil Conspiracy.

21 **3. Fraud is not an issue in violation of the CAN SPAM Act of 2003, California Business**
22 **and Professions Code § 17529.5(a), or California's common law Civil Conspiracy.**

23 In California fraud and misrepresentation are defined as requiring false representation,
24 knowledge of its falsity, intent to defraud or misrepresent, justifiable reliance, and damages.
25 (*Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003); *California BAJI* 12.31).
26 Therefore for this action to sound in fraud the elements of intent, reliance and injury based on
27 reliance would have to be included to show fraud. These elements are not required to show
28 liability in any of Plaintiff's causes of action and therefore these actions cannot sound in fraud.

1 The cases cited by Defendants all involve an underlying issue of fraud such as advertising fraud
2 or medical testing fraud. The underlying fraud was the actual basis of those cases. Whether the
3 SPAM is actually fraudulent is not relevant to an ISP's cause of action under the *CAN SPAM*
4 *Act* or the *California Business and Professions Code* § 17529.5(a). It is only relevant that the
5 SPAM meet certain criteria defined by the statutes. Bulk emails can have no purpose at all other
6 than to annoy people, and still meet the definition of SPAM by using headers that do not resolve
7 back to a real source.

8 The *CAN SPAM Act* makes it unlawful for any party to initiate an electronic message to
9 a protected computer that contains false header information that is materially false or materially
10 misleading. This may require an intent to deceive or defraud, however, there is no requirement
11 in the statute that the intended recipient actually receive the email. There is no requirement that
12 the intended recipient be deceived. There is no requirement that the intended recipient actually
13 rely on the deception to their detriment.

14 The *CAN SPAM Act* found that the growth in SPAM created a significant monetary
15 burden on Internet Service Providers (15 *U.S.C.* § 7701(a)(6)) and that there is a substantial
16 government interest in regulating commercial electronic mail. 15 *U.S.C.* § 7704(b)(1). The
17 legislature went on to provide the Internet Access Providers with a private right of action for
18 misuse of their resources. 15 *U.S.C.* § 7706(g). The legislature has therefore expressed a clear
19 intent that ISP's have the ability to prosecute SPAM. Notably the legislature did not provide a
20 private right of action for individual recipients of SPAM email. Other than state and federal
21 attorney general actions, only individual recipients would be able to plead an action for fraud,
22 since they are the only ones that could claim reliance and injury. Therefore, it is unlikely that
23 the legislature envisioned an action in fraud by the ISP's.

24 Since there is no requirement for reliance or detriment by the intended recipient, the
25 action cannot require a proof of fraud. Add to this the clear intent of the legislature to regulate
26 SPAM and the provision of a private right to action to the Internet Service Providers. Therefore,
27 it is unlikely that a violation of the *CAN SPAM Act* sounds in fraud.

28 *California Business and Professions Code* § 17529.5(a) does not require that the

1 intended recipient actually be deceived, or that they actually receive the email. The statute only
2 requires that the email be an advertisement sent to or from a California email and violate one of
3 the content restrictions. Plaintiff has alleged that the emails received by Plaintiff actually
4 violate both of the content restrictions. There is no requirement that the email actually deceive
5 anyone, a basic requirement of fraud. Therefore the statute does not require a proof of fraud and
6 does not sound in fraud.

7 California's Civil Conspiracy law, as discussed above, does not require the elements of
8 deception, reliance or detrimental reliance. Civil Conspiracy requires that the conspirators knew
9 that the actions of one of their party would breach a duty to the intended victim and that the
10 alleged conspirator substantially supported the action. An action for Civil Conspiracy therefore
11 does not rely on any of the elements of fraud and therefore cannot sound in fraud.

12 Since none of the causes of action in this matter require a showing of the primary
13 elements of fraud the action does not sound in fraud.

14 Therefore, Defendant's argument that the complaint is not sufficient since it must meet
15 the higher pleading standard associated with fraud is incorrect.

16 **4. Plaintiff's complaint is sufficient if the fraud standard is required.**

17 In the alternative, if the court does decide that fraud is an issue in this matter, then
18 Plaintiff argues that it has pled with sufficiency to meet the higher standard imposed.

19 The *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 – 1104 (9th Cir. 2003) case
20 cited by Defendant states that an action is "grounded in fraud" if the plaintiff alleges a "unified
21 course of fraudulent conduct" and relies "entirely on that course of conduct as the basis of a
22 claim." The *Vess* case was based on the underlying issue of medical testing fraud. In the
23 present case there is no underlying legal issue at stake. The case is based primarily on the illegal
24 misuse of Plaintiff's email server in contradiction of the *CAN SPAM Act*.

25 However, it may be possible to interpret the *CAN SPAM Act* as intent to stop fraudulent
26 mail and the harm that it causes, rather than the misuse of email server equipment. Therefore
27 the elements that relate to whether the email was fraudulent or not may fall under the heightened
28 standard. The court in *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003) held

1 that

2 “only allegations (“averments”) of fraudulent conduct must satisfy
3 the heightened pleading requirements of Rule 9(b). Allegations of
4 non-fraudulent conduct need satisfy only the ordinary notice
pleading standards of Rule 8(a).”

5 The court went on to hold that if there were allegations containing averments of fraud that were
6 pled inadequately, then only those allegations should be stripped from the complaint, and the
7 complaint should then be analyzed to see if it was sufficient under Rule 8(a). (*id.* at 1105).

8 Defendants state in their Motion to Dismiss on Page 3 line 14 that the fraudulent
9 allegations are in “information sent in e-mail messages.” Therefore only those parts of the
10 complaint dealing with the information sent in the emails must meet the heightened standard.

11 In a fraud allegation the court requires that the plaintiff allege the “who, what, where,
12 when and how” of the misconduct charged “and must set forth what is false or misleading about
13 a statement, and why it is false.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir.
14 2003):

15 **WHO** - Plaintiff alleged that SPAMMER, in conspiracy with
16 MORTGAGE BROKERS, sent the emails containing the false
17 header information and misleading subject line information. (Comp. ¶¶ 14, 15, 25, 19); (See Exhibit A to Declaration of Nella White).

18 **WHAT** – Plaintiff has described in detail what is wrong with the
19 header information and the subject line information. (Comp. ¶¶ 19,
20 25 – 29); (See Exhibit A to Declaration of Nella White)

21 **WHERE** – Plaintiff has alleged that it received the emails at its
22 email server, Plaintiff is unaware of the location of Defendant’s
23 email server. (Comp. ¶¶ 17, 24).

24 **WHEN** – Plaintiff has alleged it received in excess of 10,000 emails
25 in October and November of 2005. (Comp. ¶ 24).

26 **HOW** – Plaintiff has alleged that the emails were transmitted to its
27 server. (Comp. ¶¶ 17, 24).

28 **WHAT WAS FALSE about the emails** – Plaintiff has alleged that
the header information was false, because they were not Defendants
email identities, were stolen or high jacked, and that the subject lines
were misleading and deceptive. (Comp. ¶ 25); (See Exhibit A to
Declaration of Nella White).

WHY IS the information FALSE – Plaintiff has alleged the

1 sending emails were stolen or hijacked, the subject lines used mis-
2 spellings, and the subject lines were inaccurate as to the contents of
3 the emails – all in violation of the **CAN SPAM Act of 2003** and
4 **California Business and Professions Code** § 17529.5(a). (Comp. ¶¶
5 19, 25 - 29); (See Exhibit A to Declaration of Nella White).

6 Therefore, if Plaintiff is required to meet the higher standard of pleading required for
7 fraud, Plaintiff has met that standard.

8 **5. The court should consider the relevant wire fraud cases in considering dismissal.**

9 There are no decisions in the area of telecommunications, Internet services, or electronic
10 mail that Plaintiff’s attorney can identify regarding how *FRCP* Rule 9(b) should or should not
11 be applied to emails. However, there are at least two cases of wire fraud where the court has
12 explored the problems of dealing with electronic communications.

13 In *Bankcard America, Inc. v. Universal Bancard Systems, Inc.*, 904 F.Supp. 753, 760
14 (N.D.Ill.1995), the court held that:

15 “Where mail and wire fraud are at issue, ‘the plaintiff must, within
16 reason, describe the time, place, and content of the mail and wire
17 communications, and it must identify the parties to these
18 communications’.”

19 In *Bankcard America* the court opined that there were two circumstances that constituted
20 fraud: communications and misrepresentation. Because the action dealt with wire fraud the
21 court held that the circumstances of communication had to be pled with particularity to meet the
22 requirements of Rule 9(b). The court opined that in other cases, such as security fraud, more
23 intricate detail might be required. (*id.* at 759, 760). As described above, Plaintiff has exceeded
24 the requirement described by the *Bankcard America* court.

25 In *In re Lupron Marketing and Sales Practices Litigation*, 295 F.Supp.2d 148, 171
26 (D.Mass., 2003) the court held that in a case involving RICO and wire fraud, where a defendant
27 used interstate telecommunications, that control of the specific information is probably in the
28 exclusive control of the defendant. Therefore, the court should not dismiss the case without
making a further determination if the claim, as presented, warranted the allowance of discovery.
If so, then after discovery the plaintiff should be given an opportunity to amend the defective
complaint. (*id.* at 171).

1 In this case the use of the header information and subject line information is obviously
2 intended to obfuscate and deceive the Internet Service Provider and its customers. The
3 Defendants are in control of many of the specific details in this case that tie them to the
4 violations. Therefore, at a minimum the court should allow the case to go through discovery and
5 provide Plaintiff the opportunity to amend its complaint if it is deficient.

6 **6. Plaintiff did allege that Defendant Mortgage Brokers were responsible for the**
7 **emails sent by SPAMMER.**

8 Defendants argue that they did not “initiate” the emails. Defendants argue that Plaintiff
9 did not allege that Defendants intentionally induced another to send SPAM. Plaintiff argues that
10 the terms of 15 *U.S.C.* § 7706(g)(2) “Special Definition of Procure” describes the relationship
11 that allows this action against Defendants. 15 *U.S.C.* § 7706(g)(2) states that when interpreting
12 the definition of procure under 15 *U.S.C.* § 7706(2)(12) that after the word “behalf” the
13 following words be added:

14 “with actual knowledge, or by consciously avoiding knowing,
15 whether such person is engaging, or will engage, in a pattern or
16 practice that violates this chapter.” emphasis added

17 Plaintiff has alleged that the Mortgage Broker Defendants had actual knowledge of the
18 actions of SPAMMERS, and alleged a joint venture and common enterprise. (Comp. ¶14, 41).
19 Plaintiff further pled that the Defendants were responsible for and ratified the actions of
20 SPAMMERS. (Comp. ¶14), and that the “Defendants” actually sent the emails. (Comp. ¶¶15-
21 22). Defendants are simply in error that the complaint, on its face, does not allege they sent the
22 emails. The complaint does not divide the actions of the Defendants into two parties. The
23 complaint alleges that “Defendants” sent the emails.

24 Plaintiff came to this complaint based on the special language allowed an ISP. Therefore,
25 under the special language allowed an Internet Access Provider under 15 *U.S.C.* § 7706(g)(2) if
26 a party actually knew or consciously avoided knowing they were procuring the services of a
27 SPAMMER, then that party is also liable for the violation. Plaintiff so alleged. (Comp. ¶14,
28 41). In addition, as discussed above, Plaintiff will make available to the court in camera,
contracts made by other Defendants in this action who have reached a settlement with Plaintiff

1 and been dismissed. Plaintiff expects to find, through discovery, the same contracts in place
2 between named Defendants and a third party lead generation company. Plaintiff will uncover
3 the link from these contracts to the SPAMMERS in discovery. The linkage to the SPAMMERS
4 has already been exposed in one direction by the name and telephone number provided to the
5 SPAMMER and subsequently used by the MORTGAGE BROKERS.

6 Plaintiff has alleged that there was a joint venture and common enterprise and that
7 Defendants had actual knowledge of the SPAMMERS actions. Therefore, Plaintiff has pled
8 sufficient allegations to meet the requirements of the **CAN SPAM Act**.

9 Defendants argue that Plaintiff has failed to allege violations of the *California Business*
10 *and Professions Code* § 17529.5(a). The actual language of the statute states:

11 “It is unlawful for any person or entity to advertise in a commercial
12 e-mail advertisement either sent from California or sent to a
13 California electronic mail address under any of the following
14 circumstances:”

California Business and Professions Code § 17529.5(a)

15 The law clearly intends to prevent certain email advertisements, and does not require that
16 the party actually send or initiate the advertisement, even though Plaintiff actually alleged this
17 fact as discussed above. The emails that were received by Plaintiff are obviously
18 advertisements. (See Exhibits A and B to Declaration of Nella White). The emails also have
19 used other parties email identities, have false header information, and use misleading subject
20 lines. All in violation of *California Business and Professions Code* § 17529.5(a)(1), (2), and
21 (3). As noted above Plaintiff has alleged a joint venture and common enterprise that caused
22 these emails to be sent.

23 Defendants allege that Plaintiff has not pled facts sufficient to support this claim.
24 However, in a federal pleading a party is not required to plead facts at all, a party is only
25 required to plead allegations. While Defendants appeal to California case law regarding the
26 pleading of *California Business and Professions Code* § 17500 et seq. is an interesting ploy, it
27 does not change the requirements for pleading in federal court. Fact pleading is not required in a
28 federal complaint. A heightened pleading standard is only required in complaints that fall

1 within *FRCP* Rule 9(b) (dealt with separately above). *Empress LLC v. City and County of San*
2 *Francisco* 419 F.3d 1052, 1055 – 1056 (9th Cir. 2005); citing *Swierkiewicz v. Sorema, N.A.*,
3 534 U.S. 506 (2002).

4 Plaintiff, as demonstrated above, has alleged all of the elements of a violation of
5 *California Business and Professions Code* § 17529.5.

6 Defendants references and reliance on *California Business and Professions Code* §
7 17529.1 is unfounded since it is likely, unlike § 17529.5, that the other portions of California’s
8 commercial email laws have been specifically preempted by the *CAN SPAM Act* in 15 *U.S.C.* §
9 7707(b).

10 Therefore, since the heightened pleading standard suggested by Defendant in pleading
11 *California Business and Professions Code* § 17529.5 does not apply, Plaintiff’s complaint is
12 more than sufficient to put Defendant on notice as required by the *FRCP* Rule 8.

13 **7. Plaintiff’s complaint is more than sufficient to state a cause of action for violation of**
14 **California’s common law Civil Conspiracy.**

15 As demonstrated above, Plaintiff has alleged every element of a cause of action for
16 violation of civil conspiracy against Defendant. As discussed above Plaintiff is not required to
17 provide facts or meet a heightened pleading standard other than for actions involving *FRCP*
18 Rule 9(b). Plaintiff’s complaint only needs to provide Defendant with fair notice as prescribed
19 in *FRCP* Rule 8(a). *Empress LLC v. City and County of San Francisco* 419 F.3d 1052, 1055 –
20 1056 (9th Cir. 2005).

21 Plaintiff’s third cause of action for Civil Conspiracy incorporates all previous paragraphs,
22 and therefore incorporates the prior causes of action. (Comp. ¶ 39). Therefore, the causes of
23 action for violation of the *CAN SPAM Act* and *California Business and Professions Code* §
24 17529.5 are incorporated in Plaintiff’s third cause of action. These violations are the underlying
25 unlawful act or wrongful conduct. It would defeat the purpose of *FRCP* Rule 8(a) of providing
26 a “short and plain statement of the claim” to require that the details of the prior two causes of
27 action repeat in the third cause of action. This incorporation therefore puts Defendants on fair
28 notice of what the civil conspiracy entails.

1 Since Plaintiff has provided fair notice, Plaintiff's complaint is sufficient.

2 **8. The question of whether Mortgage Broker Defendants had actual knowledge of the**
3 **involvement of SPAMMERS is an ultimate issue of fact and should be left to a trier**
4 **of fact.**

5 Defendants' Motion to Dismiss is really about whether the MORTGAGE BROKERS in
6 general, and Aegis, AHEC, Quicken, Stateside, Northstar, and NFF, specifically, knew about the
7 SPAMMERS and can be held responsible for the SPAM based on their purchase of sales leads
8 resulting from SPAM. Plaintiff argues that this is an ultimate issue of fact and not an issue of
9 law.

10 Defendants have not argued that the emails received by Plaintiff were not SPAM.
11 Defendants have not argued that Plaintiff does not have a right to bring an action against the
12 parties sending or causing the SPAM to be sent. Defendants have argued that Plaintiff's
13 complaint is not sufficient to claim a cause of action against them. Plaintiff has demonstrated
14 that the complaint is sufficient under federal notice pleading standards. Plaintiff has illustrated
15 the Defendants received the results of the SPAM and acted on the information by their telephone
16 calls to Bruce Wolf. Plaintiff has alleged that there are contractual agreements to receive the
17 information that were in place prior to receiving the Bruce Wolf information. Plaintiff has
18 demonstrated that Defendants stated or implied that they were in receipt of the Bruce Wolf
19 information and that they were the "qualified" brokers described in the SPAM.

20 The *CAN SPAM Act* is clear in that a party who procures others on their "behalf" to
21 provide services and has knowledge or "consciously" avoids knowing that the other party is
22 violating the Act on their behalf is equally in violation of the Act. Plaintiff has provided
23 significant evidence that Defendants should have known that there was at least a possibility that
24 the type of purchases Defendants were making involved a violation of the *CAN SPAM Act*.
25 Whether the Defendants actually knew they were supporting a SPAMMER or were purchasing
26 the product of a SPAMMER is a matter for discovery and therefore an issue of fact.

27 This case will ultimately come down to the credibility of the MORTGAGE BROKER
28 Defendants. Did they know they were dealing with a SPAMMER or were they innocent

1 purchasers for value. The 9th Circuit has defined the standard for dismissal under these
2 circumstances:

3 “Summary judgment under Rule 56(c) is only proper if no genuine
4 issues of material fact exist for trial. *Warren v. City of Carlsbad*, 58
5 F.3d 439, 441 (9th Cir.1995). ‘If under any reasonable construction
6 of the evidence and any acceptable theory of law, one would be
7 entitled to prevail, the summary judgment against him cannot be
8 sustained.’ *Garter-Bare Co. v. Munsingwear, Inc.*, 650 F.2d 975, 980
9 (9th Cir.1980).

10 Issues of credibility, including questions of intent, should be left to
11 the jury. *Lowe v. City of Monrovia*, 775 F.2d 998, 1008 (9th
12 Cir.1985).” (underline added for emphasis); *Harris v. Itzhaki*, 183
13 F.3d 1043 at 1051 (9th Cir.1999).

14 The theory of law involved is a violation of the *CAN SPAM Act* by procuring others on
15 their behalf to violate the *CAN SPAM Act*, with actual knowledge or consciously avoiding that
16 knowledge. The only factual issue that Plaintiff has not been able to demonstrate is whether
17 Defendants actually knew or consciously avoided knowing they were procuring the efforts of
18 SPAMMERS. Plaintiff has alleged this fact and asks the court for leave to discover the facts
19 that will prove or disprove its claim. The holding in *Harris* indicates that Plaintiff should be
20 afforded this opportunity.

21 CONCLUSION

22 Defendants’ motion to dismiss primarily argues that there is a heightened pleading
23 standard required, brought about because the actions sound in fraud or are subject to state
24 pleading requirements. It is unclear if a violation of the *CAN SPAM Act* or the *California*
25 *Business and Professions Code* § 17529.5 fall within the requirements of *FRCP* Rule 9(b).
26 However, if they do, then Plaintiff has alleged facts sufficient to meet this pleading requirement.
27 Other than Rule 9(b) requirements federal complaints are required to provide Defendant with
28 fair notice under *FRCP* Rule 8(a). Plaintiff believes that it has provided Defendants with fair
notice.

Defendants argue that the complaints are not complete because every element is not pled.
Every element of each complaint has been alleged, even though federal notice pleading

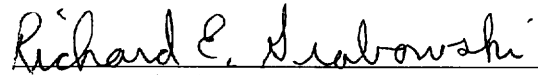
1 standards do not require that Plaintiff allege every element of a cause of action.

2 Defendants argue that Plaintiff does not include them in the first two causes of action, but
3 Defendants fail to recognize Paragraphs 14 through 22 of the Complaint that incorporate all of
4 the Defendants into all of the causes of action in the Complaint.

5 Plaintiff has demonstrated a close connection between the SPAMMERS and
6 MORTGAGE BROKERS in this case. Plaintiff therefore argues, that under the federal notice
7 pleading standards, the court should allow the action to proceed to discovery. Defendants are in
8 control of most of the pertinent information needed for this case, and therefore the court should
9 allow discovery. If, after discovery the complaint appears deficient, then the court should allow
10 Plaintiff to amend the complaint.

11
12 **SINGLETON LAW GROUP**

13
14 Dated: March 14, 2006


15 Jason K. Singleton,
16 Richard E. Grabowski, Attorneys for Plaintiff,
17 **ASIS INTERNET SERVICES**
18
19
20
21
22
23
24
25
26
27
28