

1 Timothy J. Walton, Esq. (State Bar No. 184292)
2 407 South California Avenue
3 Suite 8
4 Palo Alto, CA 94306
5 Phone (650) 566-8500
6 Fax: (650) 618-8687
7 Email: silverstein-experienced.internet@netatty.com

ORIGINAL
FILED

JAN 11 2005

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

Attorney for Plaintiff William Silverstein

AND E-FILING

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA (SAN JOSE DIVISION)

10 WILLIAM SILVERSTEIN, an individual,)
11 Plaintiff,)
12 vs.)
13)
14 EXPERIENCED INTERNET.COM, INC., a)
15 Florida corporation,)
16 PATRICIA QUESADA, an individual,)
17 SYLVIA BEDOYA, an individual, and)
18 DOES 1-50,)
19 Defendants.)

Case No.: 05 00160 bvt

COMPLAINT FOR DAMAGES

1. Violation of the CAN-SPAM Act (15 U.S.C. § 7701 et seq.)
2. Violation of California Statute (Cal. Bus. & Prof. § 17529.5)

PLAINTIFF FILES THIS COMPLAINT AND ALLEGES AS FOLLOWS:

The Parties

1. Plaintiff WILLIAM SILVERSTEIN is an individual operating as a sole proprietor under the laws of the State of California and qualified and doing business as "WILLIAM SILVERSTEIN" with a principal place of business in Los Angeles, California. Plaintiff provides

1 registered users the ability to send or receive electronic mail through equipment located in the
2 State of California, and operates equipment that acts as an intermediary in sending and receiving
3 electronic mail.
4

5 2. Plaintiff owns and maintains computers and other equipment that process electronic
6 mail messages and allow for exchange of electronic mail messages by registered users with
7 others. Electronic mail sent to and from Plaintiff's registered users is processed though and stored
8 on equipment located within the State of California. Plaintiff is a provider of "Internet access
9 service" as defined by 15 U.S.C. § 7702(11) and an "electronic mail service provider" as defined
10 by California Business and Professions Code § 17529.1(h). Plaintiff's service allows registered
11 users to exchange electronic mail messages with any other Internet user who has an Internet
12 electronic mail address anywhere in the world.
13

14 3. Plaintiff is informed and believes and thereon alleges that Defendant EXPERIENCED
15 INTERNET.COM, INC. is, at all times relevant hereto, a corporation duly organized and
16 recognized under the laws of the State of Florida and qualified and doing business as
17 "EXPERIENCED INTERNET.COM, INC." with a principal place of business in Miami, Florida.
18

19 4. Plaintiff is informed and believes and thereon alleges that Defendant PATRICIA
20 QUESADA is an individual residing in Miami, Florida.

21 5. Plaintiff is informed and believes and thereon alleges that Defendant SYLVIA
22 BEDOYA is an individual residing in the State of Florida.
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Venue

11. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because substantial amounts of the events giving rise to the claims pled herein occurred in the Northern District of California.

Legal Background

12. The United States Congress, in passing the CAN-SPAM¹ Act of 2003 determined that "[u]nsolicited commercial e-mail, commonly known as 'spam', has quickly become one of the most pervasive intrusions in the lives of Americans." Congress estimated that by the end of 2003, unwanted electronic mail advertising would account for more than 50% of all electronic mail, in sharp contrast to two years earlier, when such electronic mail accounted for only 8% of all electronic mail. Congress has concluded that the rate of increase of such unwanted messages is "reaching critically high levels."

13. In addition to plaguing recipients by its sheer volume, unwanted electronic mail advertising is also notoriously deceptive in form and content. In April 2003, the Federal Trade Commission found that 66% of all unwanted electronic mail advertising contains "some kind of false, fraudulent, or misleading information, either in the e-mail's routing information, its subject line, or the body of its message." In fact, the Federal Trade Commission found that "one-third of all [unwanted electronic mail advertising] contains a fraudulent return e-mail address." Congress

¹ CAN-SPAM is an acronym for "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003", the short title of S. 877 as it was passed by the Senate on November 25, 2003, and agreed to by the House of Representatives on December 8, 2003.

1 found that falsified headers "not only trick ISP's increasingly sophisticated filters", but also "lure
2 consumers into mistakenly opening messages from what appears to be people they know."
3

4 14. Congress also found that senders of unwanted electronic mail advertising use false or
5 misleading "From" information, or false or misleading subject lines, or both. According to
6 Congress, the Federal Trade Commission found that 42% of unwanted electronic mail
7 advertising contains misleading subject lines that "trick the recipient into thinking that the e-mail
8 sender has a personal or business relationship with the recipient."
9

10 15. The economic impact is enormous. Congress noted that a 2001 European union study
11 found that unwanted electronic mail advertising "costs Internet subscribers worldwide \$9.4
12 billion each year." Congress also noted that estimated costs "to United States businesses... will
13 top \$10 billion in 2003."
14

15 16. With these findings as a backdrop, the United States Congress passed the CAN-SPAM
16 Act and the Federal Trade Commission has promulgated regulations covering unwanted
17 electronic mail advertising which contains sexually oriented material.
18

19 17. Beginning at least in March, 2004, and continuing intermittently thereafter, Defendants
20 have used or caused to be used WILLIAM SILVERSTEIN's equipment located in the State of
21 California for the purpose of delivery of unsolicited electronic mail advertisements.
22

23 18. Some of the electronic mail advertisements contained misleading subject lines (e.g.,
24 "RE:Mystuffeye cheergirl6969 would like to meet you online and" and "I wish I could speak to
25 you again oidf[sic]") or sexually explicit subject lines (e.g., "Come loving Jap Teens"
and "Girls taking big dongs all the way up their anus") or both (e.g., "His cokk ripped open her

1 anous she started to scream" and "recursion we cowgirls get kinky"). Defendants failed to prefix
2 the subject line of email messages containing sexually explicit content in the body with
3 "SEXUALLY-EXPLICIT:" as required by 16 C.F.R. Part 316 and 15 U.S.C. § 7705(d)(1)(A).
4

5 19. Plaintiff did not request any electronic mail advertising from the Defendants. Plaintiff
6 does not have any existing business or personal relationship with any of the Defendants.

7 20. Plaintiff is informed and believes and thereon alleges that the Defendants' electronic
8 mail advertising was not solicited by the recipients and that none of the Defendants has any
9 existing business or personal relationship with any of the recipients of the unsolicited electronic
10 mail advertisements sent by Defendants to registered users of Plaintiff.
11

12 21. At least some of the unsolicited electronic mail advertisements were delivered, via
13 Plaintiff's servers, to a personal computer in Santa Clara County, California.

14 22. The unsolicited advertisements consisted of electronic mail messages, the principal
15 purpose of which is to promote, directly or indirectly, the sale or other distribution of goods or
16 services to the recipient.
17

18 23. Plaintiff alerted Defendants to the fact that the Defendant's unsolicited electronic mail
19 advertisements would use or cause to be used WILLIAM SILVERSTEIN's equipment located in
20 the State of California by notices published on his web sites and in Simple Mail Transfer
21 Protocol (SMTP) banners during the electronic "handshake" occurring during the transfer of
22 electronic mail. Plaintiff also alerted Defendants to the unlawful nature of their email advertising
23 by means of certified mail.
24
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1 24. Despite the warnings, Defendants used or caused to be used Plaintiff's equipment
2 located in the State of California for the purpose of sending unwanted electronic mail advertising
3 in violation of state and federal law.
4

5 25. Plaintiff is informed and believes and thereon alleges that his computers are "protected
6 computers" as that term is defined by 18 U.S.C. § 1030(e)(2)(b). Plaintiff is informed and
7 believes and thereon alleges that Defendants used other "protected computers" as that term is
8 defined by 18 U.S.C. § 1030(e)(2)(b), in the scheme to send unwanted electronic mail
9 advertising.
10

11 26. Defendants initiated the transmission to Plaintiff's computers of commercial electronic
12 mail messages that contained, or were accompanied by, header information that was materially
13 false or materially misleading, including header information that was technically accurate but
14 included an originating electronic mail address, domain name, or Internet Protocol address the
15 access to which for purposes of initiating the message was obtained by means of false or
16 fraudulent pretenses or representations; or a "From" line (the line identifying or purporting to
17 identify a person initiating the message) that did not accurately identify the person who initiated
18 the message; or header information that failed to identify accurately a protected computer used to
19 initiate the message because the person initiating the message knowingly used another protected
20 computer to relay or retransmit the message for purposes of disguising its origin; or some
21 combination thereof.
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First Cause of Action
[Violation of the CAN-SPAM Act]
(Against All Defendants)

27. Plaintiff realleges and incorporates the allegations of paragraphs 1 - 26 as though fully set forth herein.

28. Defendants engaged in a pattern or practice of initiating the transmission of commercial electronic mail messages to Plaintiff's computers located in California.

29. Defendants engaged in a pattern or practice of initiating email messages that failed to contain clear and conspicuous notice that they were advertisements.

30. Defendants engaged in a pattern or practice of initiating email messages that failed to contain clear and conspicuous notice that recipients could decline to receive further commercial electronic mail messages from Defendants.

31. Defendants engaged in a pattern or practice of initiating email messages that failed to contain any postal address of the sender.

32. Defendants intentionally used false or misleading header information to impair the ability of Plaintiff and others to identify, locate, or respond to the person who initiated the electronic mail message.

33. Defendants commercial electronic mail messages contained sexually oriented material (as defined by 18 U.S.C. 2256) within the body of the mail, in violation of 15 U.S.C. § 7705(d)(1)(B). Defendants failed to prefix the subject line of each e-mail with "SEXUALLY-EXPLICIT:" as required by 16 C.F.R. Part 316 and 15 U.S.C. § 7705(d)(1)(A).

1 34. Defendants profited from their wrongful conduct.

2
3 35. Plaintiffs suffered damages as a result of Defendants' wrongful conduct.

4 WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, as
5 hereinafter set forth.

6
7 **Second Cause of Action**

8 **[Violation of California Business & Professions Code § 17529.5]**
9 **(Against All Defendants)**

10 36. Plaintiff realleges and incorporates the allegations of paragraphs 1 - 26 as though fully
11 set forth herein.

12 37. Defendants sent commercial electronic mail to California electronic mail addresses,
13 including addresses owned by Plaintiff, containing or accompanied by falsified, misrepresented,
14 obscured, or forged header information.

15 38. Defendants' commercial electronic mail contained subject lines intended to, and likely
16 to, mislead recipients, acting reasonably under the circumstances, about a material fact regarding
17 the contents or subject matter of the message.

18
19 39. Defendants failed to label subject lines of the email messages as required by 16 C.F.R.
20 Part 316 and 15 U.S.C. § 7705(d)(1)(A).

21 40. Defendants profited from their wrongful conduct.

22 41. Plaintiff suffered damages as a result of Defendants' wrongful conduct.

23
24 WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, as
25 hereinafter set forth.

1
2 PRAYER FOR RELIEF

3 WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, as follows:

- 4 a. For general damages in an amount to be determined at trial;
- 5 b. For special damages in an amount to be determined at trial;
- 6 c. For statutory damages under CAN-SPAM in the amount of One Hundred Dollars
- 7 (\$100.00) per electronic mail message in violation of 15 U.S.C. § 7705(a)(1);
- 8 d. For statutory damages under CAN-SPAM in the amount of Twenty Five Dollars
- 9 (\$25.00) per electronic mail message in violation of 15 U.S.C. §§ 7705(a)(5) and
- 10 7705(d);
- 11 e. For liquidated damages in the amount of One Thousand Dollars (\$1,000.00) per
- 12 electronic mail message in violation of California Business and Professions Code §
- 13 17529;
- 14 f. For trebling of the damages award as allowed by law;
- 15 g. For exemplary damages to punish the Defendants and set an example for others;
- 16 h. For attorneys' fees as allowed by law;
- 17 i. For the costs of the suit herein incurred;
- 18 j. For an order of this Court enjoining Defendants, and each of them, and their agents,
- 19 servants, and employees, and all persons acting under, in concert with, or for them, for
- 20 using or causing to be used Plaintiffs equipment located in the State of California to
- 21 deliver unsolicited electronic mail advertisements to Plaintiff's registered users; and
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k. For other and further relief as the Court may deem just and proper.

DATED: _____

INTERNET ATTORNEY

BY: _____

TIMOTHY J. WALTON
Attorney for the Plaintiff

Jury Trial Demand

Plaintiff requests a jury trial for all claims a jury trial is available.

DATED: _____

INTERNET ATTORNEY

BY: _____

TIMOTHY J. WALTON
Attorney for the Plaintiff

1
2 VERIFICATION

3 The undersigned, for himself declares:

4 I am the Plaintiff in the above-entitled action. I have read the forgoing complaint and
5 know the contents thereof. With respect to the causes of action alleged by me, the same is true
6 by my own knowledge, except as to those matters which are therein stated on information and
7 belief, and, as to those matters, I believe them to be true.
8

9 I declare under penalty of perjury under the laws of the United State of America, that the
10 forgoing is true and correct.

11 Date: _____
12

13 WILLIAM SILVERSTEIN
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