

April 7, 2004

Superior Court of California, County of Los Angeles
1725 Main Street
Santa Monica, CA 90401
Attn: Clerk, Small Claims Division

Re: Daniel L. Balsam vs. IMarketing International Inc. dba Referralware International, SM 04A00268
Trial Date: April 13, 2004

To the Clerk of the Court:

In a letter to this Court dated April 3, 2004, Dean Strickler, CEO of Defendant IMarketing International, raised an objection to venue in Los Angeles County and also requested that the case be dismissed on the grounds that my claim is directed against the wrong party.

I hereby request that the Court deny Defendant's request as timely. Strickler was properly served with the Complaint on March 14, but he did not write his letter until April 3. The earliest the Court could have received the letter is April 4, which is less than 10 days prior to trial. Additionally, Defendant did not put a copy of this letter in the mail to me until April 5, and I received it on April 6, just 7 days before trial.

But even aside from the timeliness issue, Defendant's motion should still be denied for numerous reasons.

First, Strickler is incorrect when he states that "nothing occurred in Santa Monica." The unlawful commercial email (UCE) that is the basis of the lawsuit was received in Santa Monica. California Code of Civil Procedure §395.5 states that "a corporation or association may be sued in the county... where the obligation or liability arises." Defendant is responsible for 15 instances of unlawful UCE that invaded my privacy, trespassed into my email account and onto my computer, and harassed me, in violation of Business & Professions Code §17538.4. Even if the email messages were sent from outside of Los Angeles County, the effects were felt in Los Angeles County, so venue is proper in Los Angeles County.

Second, Strickler admits that IMarketing International uses "a third party marketing firm" to promote his website, thereby admitting an agent-principal relationship. California Civil Code §2338 states that the principal is responsible for the actions of the agent, unless the principal was required by law to utilize that agent, which is not the case here. This Court has consistently found principals responsible for unlawful spamming undertaken by their marketing agents and awarded damages. There is also a published ruling on this topic. In the case *AOL v. National Health Care Discount*, No. C98-4111-PAZ in the U.S. District Court for the Northern District of Iowa, Western Division, 2001, the Court found that the principal, NHCD, was responsible for the unlawful spamming perpetrated on its behalf by third-party agents ("affiliates"). The Court awarded substantial damages, even though NHCD hired those affiliates as "independent contractors."

Third, it is not my obligation to prove a negative. The defendant bears the burden of showing the affirmative defense of consent, and I specifically deny that I ever opted in or requested the email at issue in this action. (Strickler is incorrect about other points of law, as well. Business and Professions Code §17538.4 was not repealed by its own language, but by language in §17529, the 2004 California law banning all spam.)

Furthermore, whether or not the Defendant's marketing firm complied with the CAN-SPAM Act is irrelevant; CAN-SPAM did not take effect until January 1, 2004, and there is no retroactivity language. This lawsuit concerns 15 instances of UCE received in 2003, each of which violated several provisions of California's 2003 anti-spam law.

Strickler claims that I have filed "dozens of lawsuits over being spammed" and accuses me of "taking advantage of the legal system." While "dozens" is an exaggeration, I do admit to having filed multiple lawsuits concerning UCE. I am proud of my small part in cleaning up the Internet and calling spammers and the principals who use spammers

to task for their unlawful activities, and I will continue to do so in the future. However, the *total* number of lawsuits I have filed has absolutely no relevance to the instant matter. The only important thing right now is whether this *particular* Defendant is responsible for the unlawful actions of its marketing agent.

Incidentally, Defendant's business, as shown by the website www.referralware.com, is all about pyramid/multi-level-marketing schemes, which I believe are illegal under California law. In fact, the California Appellate Court in *Ferguson v. Friendfinders, Inc.*, 94 Cal. App. 4th 1255, 115 Cal. Rptr. 2d 258 cited "questionable if not fraudulent business schemes" as one of the primary reasons why §17538.4 is so important:

"Studies indicate that UCE often contains offensive subject matter, is a favored method for pursuing questionable if not fraudulent business schemes, and has been successfully used to spread harmful computer viruses... We find that California has a substantial legitimate interest in protecting its citizens from the harmful effects of deceptive UCE and that section 17538.4 furthers that important interest."

It may also be worth noting that Defendant's corporate status in Nevada has been revoked.

I did send a letter to Defendant requesting compensation of \$15,000 for 15 instances of UCE. The new California law, Business & Professions Code §17529, replaced §17538.4 on January 1, 2004 and specifies damages of \$1,000 per instance, and the language of *this* statute may be interpreted to apply damages retroactively into 2003. California law requires that I request compensation before filing suit, and I did so. Strickler admits that they ignored the letter. Strickler is correct that I blacked out my email address in the letter; I did so in order to prevent Defendant and Defendant's agent from create false evidence of a request to receive email at that address.

This is not a frivolous lawsuit. Spam is a huge and ever-growing problem, so big that recently the Federal government did enact a national law prohibiting spam. Spammers must be held accountable for their unlawful actions. Dismissing this case would not serve justice.

Respectfully Submitted,

Daniel L. Balsam


Cc: Dean Strickler, IMarketing International

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Dean Heller Nevada Secretary of State Corporate Information



Name: IMARKETING INTERNATIONAL, INC.

Type: Corporation	File Number: C6289-2001	State: NEVADA	Incorporated On: March 13, 2001
Status: Revoked		Corp Type: Regular	
Resident Agent:	NEVADA PROCESSING CENTER, INC. (Accepted)		
Address:	3838 RAYMERT DR STE 132		
	LAS VEGAS	NV	89121-
President:	JESSIE G. SELLERS		
Address:	1105 TERMINAL WAY		
	STE 211		
	RENO	NV	89510-
Secretary:	JESSIE G. SELLERS		
Address:	1105 TERMINAL WAY		
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Treasurer:	JESSIE G. SELLERS		
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