

1 Daniel L. Balsam
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13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **COUNTY OF LOS ANGELES, WEST DISTRICT, SANTA MONICA COURTHOUSE**
15 **SMALL CLAIMS DIVISION**
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18 **DANIEL L. BALSAM**, an Individual,
19 Plaintiff,

20 v.
21

22 **METAREWARD**, a business entity in
23 California
24 Defendant
25
26

Case No.: SM 05A00028

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES RE:
INAPPLICABILITY OF PROPOSITION
64 TO CAL. BUS. & PROF. §17529.5
(ANTI-SPAM LAW)**

Continued Date: Apr. 6, 2005
Time: 9:30 a.m.
Department: F
Complaint Filed: Jan. 6, 2005

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31 **I. INTRODUCTION**

32 Plaintiff Daniel L. Balsam brought this action against Defendant MetaReward (a business
33 entity in San Carlos, California, and a division of Experian Consumer Direct) for sending
34 unsolicited commercial email (UCE, or "spam") in violation of California Business &
35 Professions Code §17529.5, a "standalone" subsection [EXHIBIT A]. Because the UCE
36 contained falsified header information, the Federal CAN-SPAM Act – by its own language –

1 does *not* pre-empt California law. Cal. Bus. & Prof. §17529.5 specifies liquidated damages of
2 \$1,000 per violation and authorizes a private right of action.

3 This case went before the Honorable Judge John Reid in the Santa Monica Courthouse on
4 March 2, 2005. Judge Reid raised the issue of whether Proposition 64 [EXHIBIT B], which was
5 passed by California voters on November 2, 2004, affects Plaintiff's right to bring this action.
6 Plaintiff maintained that by its own language, Proposition 64 does *not* affect Plaintiff's rights per
7 Cal. Bus. & Prof. §17529.5. Judge Reid directed Plaintiff to provide support for Plaintiff's
8 position.

9 As discussed below, this Court should find that Prop 64 does *not* affect Plaintiff's right to
10 sue under Cal. Bus. & Prof. §17529.5 and allow the case to proceed forward on the merits.

11 12 **II. FACTS**

13 In September 2003, the California legislature enacted Cal. Bus. & Prof. §17529, which
14 went into effect on January 1, 2004 and strengthened and replaced the old anti-spam law, Cal.
15 Bus. & Prof. §17538.4. Among the changes were: making it unlawful to send UCE with *falsified*
16 *headers* or misleading subject lines (regardless of whether the recipient ever "opted in" to
17 receive commercial email or not), authorizing a *private right of action*, setting *liquidated*
18 *damages at \$1,000* per violation, and authorizing *attorney's fees* to a prevailing Plaintiff.

19 The California Legislature, in passing Cal. Bus. & Prof. §17529 [EXHIBIT C], found that
20 "According to Ferris Research Inc., a San Francisco consulting group, spam will cost United
21 States organizations more than ten billion dollars (\$10,000,000,000) this year, including lost
22 productivity and the additional equipment, software, and manpower needed to combat the
23 problem. California is 12 percent of the United States population with an emphasis on

1 technology business, and it is therefore estimated that *spam costs California organizations well*
2 *over 1.2 billion dollars (\$1,200,000,000).*” *Cal. Bus. & Prof. §17529 (d) (emphasis added).*

3 “Like junk faxes, *spam imposes a cost on users*, using up valuable storage space in e-mail
4 inboxes, as well as costly computer band width, and on networks and the computer servers that
5 power them, and discourages people from using e-mail.” *Cal. Bus. & Prof. §17529 (e) (emphasis*
6 *added).* “The ‘cost shifting’ from deceptive spammers to Internet business and e-mail users has
7 been likened to sending junk mail with postage due or making telemarketing calls to someone's
8 pay-per-minute cellular phone.” *Cal. Bus. & Prof. §17529 (h).*

9 “The true beneficiaries of spam are the advertisers who benefit from the marketing
10 derived from the advertisements.” *Cal. Bus. & Prof. §17529 (k).*

11 On November 10, 2004, Defendant’s agent sent Plaintiff a UCE advertising
12 ExclusiveRewards.com and naming Defendant “MetaReward, Inc.” (*Plaintiff’s Trial Brief at*
13 *7:9-10 and Exhibit G*). Plaintiff viewed this advertising as the UCE was rendered by Plaintiff’s
14 email program, Yahoo! Mail. (*Plaintiff’s Trial Brief at 7:10-12 and Exhibit G*). Plaintiff never
15 requested or consented to receive UCE from Defendant or any of Defendant’s marketing agents.
16 (*Plaintiff’s Trial Brief at 7:6-8*). This UCE contained several different types of falsified header
17 information, in violation of Cal. Bus. & Prof. §17529.5. (*Plaintiff’s Trial Brief at 7:13-8:2 and*
18 *9:15-10:4 and Exhibits G-H*).

19 California voters approved Prop 64 on November 2, 2004. Prop 64 states that “This
20 state’s unfair competition laws set forth in Sections 17200 and 17500 of the Business and
21 Professions Code are intended to protect California businesses and consumers from unlawful,
22 unfair, and fraudulent business practices.” And, “these unfair competition laws are being
23 misused by some private attorneys who... file lawsuits where no client has been injured in fact

1 [and] file lawsuits for clients who have not used the defendant’s product or service, *viewed the*
2 *defendant’s advertising*, or had any other business dealing with the defendant” (emphasis added).
3 Prop 64 continues, “It is the intent of California voters... to eliminate frivolous unfair
4 competition lawsuits while protecting the right of individuals to retain an attorney and file an
5 action for relief... [and] to prohibit private attorneys from filing lawsuits for unfair competition
6 where they have no client who has been injured in fact...”

7 Prop 64 amended the language of Cal. Bus. & Prof. §§17203, 17204, 17206, 17535, and
8 17536. The new §17535 states that an action for injunctive relief “may be prosecuted by the
9 Attorney General, District Attorney... or by any person who has suffered injury in fact and has
10 lost money or property as a result of a violation of this chapter.” The new §17536 describes the
11 amount of and allocations of penalties *if* a suit is brought by an Attorney General, District
12 Attorney, etc.

14 III. DISCUSSION

15 Prop 64 was intended to reduce the caseload of the courts so that scarce judicial resources
16 could be directed at only those actions where some persons suffered harm. It was intended to
17 prevent attorneys from generating fees by threatening or bringing legal actions when there are *no*
18 *clients* who have been injured, used the defendant’s product or service, viewed the defendant’s
19 advertising, or had any other business dealing with the defendant.

20 Prop 64 does *not* try to eliminate *all* lawsuits under Cal. Bus. & Prof. §17200 or Cal. Bus.
21 & Prof. §17500. The underlying basis of Plaintiff’s lawsuit is *not* a general §17200 claim of
22 unfair competition. In fact, Prop 64 specifically “protects the right of individuals to retain an
23 attorney and file an action for relief...” The point is, *as long as someone has been harmed* –

1 someone like the recipient of an unlawful UCE – that individual can hire an attorney to bring a
2 lawsuit. (An individual can also act in pro per in Small Claims, at much lower time and expense
3 to the legal system.)

4 Plaintiff viewed Defendant’s advertising as Defendant forced the UCE into Plaintiff’s
5 email account and onto Plaintiff’s computer. The Legislature found that *spam shifts costs to*
6 *users*, just like junk-faxes do, and so Plaintiff *has* been injured by Defendant’s UCE. Plaintiff
7 brings this action under a very specific subsection, §17529.5, that prohibits commercial email
8 with falsified headers and *authorizes a private right of action*. It is admittedly difficult to
9 quantify the injury to Plaintiff (or to any recipient of UCE), which is precisely why §17529.5 sets
10 *liquidated damages* at \$1,000 per violation. The California Legislature found that recipients of
11 spam suffer actual damage, but specified liquidated damages so that individual recipients would
12 not have to over and over prove that they suffered damages.

13 Moreover, “[P]enalties are designed to deter as well as compensate. A penalty statute
14 presupposes that its violation produces damage beyond that which is compensable.” *California*
15 *v. City & Cty. of San Francisco* (1979) 94 Cal.App.3d 522; *see also People v. Bestline Products,*
16 *Inc.* (1976) 61 Cal.App.3d 879 (“The reason civil penalties are provided is that some deterrent
17 beyond that of being subject to an injunction and being required to return such ill-gotten gains is
18 deemed necessary to deter fraudulent business practices.”)

19 Another factor to consider is “the extent to which the amount of penalty relates to the
20 amount of profit” Defendant realizes. (*People Ex Rel. State Air Res. BD v. Wilmshurst* (1999) 68
21 Cal.App.4th 1332). Plaintiff suggests that Defendant has been wildly successful in its unlawful
22 email marketing campaigns, as this or similar UCEs were probably sent to thousands or even
23 millions of consumers. Even if Plaintiff has only suffered pennies of harm, it *is* actual harm.

1 This Court should consider whether an efficient pickpocket stealing nickels from passersby
2 would be subject to mere restitution of 5¢ if just one particular passerby files suit, even though
3 the pickpocket makes thousands of dollars as he passes tens of thousands Los Angeles residents
4 in the street every day. Suppose, additionally, that the California Legislature actually passes a
5 law designed to stop such insidious pick-pocketing, and specifies liquidated damages in an effort
6 to encourage enforcement of the law (among other reasons). Would Prop 64 limit the ability of a
7 Plaintiff to enforce a law passed by the California Legislature in such a situation?

8 Prop 64 amended various sections within Cal. Bus. & Prof. §§17200 and 17500, but it did
9 *not* alter the procedure for Cal. Bus. & Prof. §17529.5. *That* is the Prop 64 that the voters of
10 California enacted. By *not* changing §17529.5 even as other sections were changed, it is clear
11 that the authors of Prop 64 had no intention of eliminating or weakening California’s new anti-
12 spam law. No California resident voted to eliminate or weaken §17529.5, no California resident
13 voted to stop protecting recipients of unlawful UCE, and no California resident voted to give free
14 rein to parties that send unlawful UCE, or use agents to send unlawful UCE on their behalf.

15 Nothing in Prop 64, or the new §17535 nor §17536, affects Plaintiff’s rights under
16 §17529.5 from bringing an action in pro per and recovering liquidated damages of \$1,000.

17 18 **IV. CONCLUSION**

19 The California Legislature found that spam is an enormous problem, costing businesses
20 and consumers billions of dollars. Sending UCE with falsified header information is illegal per
21 Cal. Bus. & Prof. §17529.5, and the Federal CAN-SPAM Act itself states that CAN-SPAM does
22 not pre-empt state laws prohibiting falsity or deception in any part of an email or attachments.

1 Prop 64 was intended to stop private attorneys from bringing cases when there are no
2 clients who have been harmed. Prop 64 still allows lawsuits under Cal. Bus. & Prof. §§17200
3 and 17500 when the Plaintiff has suffered injury in fact. The California Legislature recognized
4 the actual harm caused by deceptive spam advertising, and for that reason, the Legislature set
5 liquidated damages in the amount of \$1,000 per incident, and recipients are specifically
6 authorized a private right of action, per Cal. Bus. & Prof. §17529.5.

7 Prop 64 did *not* modify Cal. Bus. & Prof. §17529.5, and California voters did *not* vote to
8 weaken the new anti-spam law when they voted for Prop 64. Therefore, Plaintiff respectfully
9 requests that this Court allow Plaintiff the opportunity to demonstrate Defendant's clear liability
10 through admissible evidence.

11
12 March 21, 2005 at Santa Monica, California

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15 Daniel L. Balsam
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EXHIBIT A
BUSINESS & PROFESSIONS CODE §17529.5

§ 17529.5

- (a) It is unlawful for any person or entity to advertise in a commercial e-mail advertisement either sent from California or sent to a California electronic mail address under any of the following circumstances:
- (1) The e-mail advertisement contains or is accompanied by a third-party's domain name without the permission of the third party.
 - (2) The e-mail advertisement contains or is accompanied by falsified, misrepresented, or forged header information. This paragraph does not apply to truthful information used by a third party who has been lawfully authorized by the advertiser to use that information.
 - (3) The e-mail advertisement has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.
- (b) (1) (A) In addition to any other remedies provided by any other provision of law, the following may bring an action against a person or entity that violates any provision of this section:
- (i) The Attorney General.
 - (ii) An electronic mail service provider.
 - (iii) A recipient of an unsolicited commercial e-mail advertisement, as defined in Section 17529.1.
- (B) A person or entity bringing an action pursuant to subparagraph (A) may recover either or both of the following:
- (i) Actual damages.
 - (ii) Liquidated damages of one thousand dollars (\$1,000) for each unsolicited commercial e-mail advertisement transmitted in violation of this section, up to one million dollars (\$1,000,000) per incident.
- (C) The recipient, an electronic mail service provider, or the Attorney General, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.
- (D) However, there shall not be a cause of action under this section against an electronic mail service provider that is only involved in the routine transmission of the e-mail advertisement over its computer network.
- (2) If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements that are in violation of this section, the court shall reduce the liquidated damages recoverable under paragraph (1) to a maximum of one hundred dollars (\$100) for each unsolicited commercial e-mail advertisement, or a maximum of one hundred thousand dollars (\$100,000) per incident.
- (3) (A) A person who has brought an action against a party under this section shall not bring an action against that party under Section 17529.8 or 17538.45 for the same commercial e-mail advertisement, as defined in subdivision (c) of Section 17529.1.
- (B) A person who has brought an action against a party under Section 17529.8 or 17538.45 shall not bring an action against that party under this section for the same commercial e-mail advertisement, as defined in subdivision (c) of Section 17529.1.

EXHIBIT B
PROPOSITION 64

Proposition 64

This initiative measure is submitted to the people in accordance with the provisions of Section 8 of Article II of the California Constitution.

This initiative measure amends sections of the Business and Professions Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. Findings and Declarations of Purpose

The people of the State of California find and declare that:

(a) This state's unfair competition laws set forth in Sections 17200 and 17500 of the Business and Professions Code are intended to protect California businesses and consumers from unlawful, unfair, and fraudulent business practices.

(b) These unfair competition laws are being misused by some private attorneys who:

(1) File frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit.

(2) File lawsuits where no client has been injured in fact.

(3) File lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant.

(4) File lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision.

(c) Frivolous unfair competition lawsuits clog our courts and cost taxpayers. Such lawsuits cost California jobs and economic prosperity, threatening the survival of small businesses and forcing businesses to raise their prices or to lay off employees to pay lawsuit settlement costs or to relocate to states that do not permit such lawsuits.

(d) It is the intent of California voters in enacting this act to eliminate frivolous unfair competition lawsuits while protecting the right of individuals to retain an attorney and file an action for relief pursuant to Chapter 5 (commencing with Section 17200) of Division 7 of the Business and Professions Code.

(e) It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution.

(f) It is the intent of California voters in enacting this act that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public.

(g) It is the intent of California voters in enacting this act that the Attorney General, district attorneys, county counsels, and city attorneys maintain their public protection authority and capability under the unfair competition laws.

(h) It is the intent of California voters in enacting this act to require that civil penalty payments be used by the Attorney General, district attorneys, county counsels, and city attorneys to strengthen the enforcement of California's unfair competition and consumer protection laws.

SEC. 2. Section 17203 of the Business and Professions Code is amended to read:

17203. *Injunctive Relief—Court Orders*

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. *Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.*

SEC. 3. Section 17204 of the Business and Professions Code is amended to read:

17204. *Actions for Injunctions by Attorney General, District Attorney, County Counsel, and City Attorneys*

Actions for any relief pursuant to this chapter shall be prosecuted exclu-

sively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person ~~acting for the interests of itself, its members or the general public who has suffered injury in fact and has lost money or property as a result of such unfair competition.~~

SEC. 4. Section 17206 of the Business and Professions Code is amended to read:

17206. *Civil Penalty for Violation of Chapter*

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city, or city and county, having a population in excess of 750,000, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, or, with the consent of the district attorney, by a city attorney in any city and county, in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State General Fund. If the action is brought by a district attorney or county counsel, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered. Except as provided in subdivision (d), if the action is brought by a city attorney or city prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered. *The aforementioned funds shall be for the exclusive use by the Attorney General, the district attorney, the county counsel, and the city attorney for the enforcement of consumer protection laws.*

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of any reasonable expenses incurred by the board shall be paid to the state Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the state Treasurer. The amount of any reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county that funds the local agency.

(e) If the action is brought by a city attorney of a city and county, the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment was entered *for the exclusive use by the city attorney for the enforcement of consumer protection laws.* However, if the action is brought by a city attorney of a city and county for the purposes of civil enforcement pursuant to Section 17980 of the Health and Safety Code or Article 3 (commencing with Section 11570) of Chapter 10 of Division 10 of the Health and Safety Code, either the penalty collected shall be paid entirely to the treasurer of the city and county in which the judgment was entered or, upon the request of the city attorney, the court may order that up to one-half of the penalty, under court supervision and approval, be paid for the purpose of restoring, maintaining, or enhancing the premises that were the subject of the action, and that the balance of the penalty be paid to the treasurer of the city and county.

SEC. 5. Section 17535 of the Business and Professions Code is amended to read:

17535. *Obtaining Injunctive Relief*

TEXT OF PROPOSED LAWS

Proposition 64 (cont.)

Any person, corporation, firm, partnership, joint stock company, or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.

Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person ~~acting for the interests of itself, its members or the general public who has suffered injury in fact and has lost money or property as a result of a violation of this chapter. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of this section and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.~~

SEC. 6. Section 17536 of the Business and Professions Code is amended to read:

17536. *Penalty for Violations of Chapter; Proceedings; Disposition of Proceeds*

(a) Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer.

If brought by a district attorney or county counsel, the entire amount of penalty collected shall be paid to the treasurer of the county in which the judgment was entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county and one-half to the city. *The aforementioned funds shall be for the exclusive use by the Attorney General, district attorney, county counsel, and city attorney for the enforcement of consumer protection laws.*

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of such reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund the moneys shall be paid to the State Treasurer. The amount of such reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality which funds the local agency.

(e) As applied to the penalties for acts in violation of Section 17530, the remedies provided by this section and Section 17534 are mutually exclusive.

SEC. 7. In the event that between July 1, 2003, and the effective date of this measure, legislation is enacted that is inconsistent with this measure, said legislation is void and repealed irrespective of the code in which it appears.

SEC. 8. In the event that this measure and another measure or measures relating to unfair competition law shall appear on the same statewide election ballot, the provisions of the other measures shall be deemed to be in conflict with this measure. In the event that this measure shall receive a greater number of affirmative votes, the provisions of this measure shall prevail in their entirety, and the provisions of the other measure relating to unfair competition law shall be null and void.

SEC. 9. If any provision of this act, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining provisions shall not be affected, but shall remain in full force and effect, and to this end the provisions of this act are severable.

Proposition 65

Pursuant to statute, Proposition 65 will appear in a Supplemental Voter Information Guide.

Proposition 66

This initiative measure is submitted to the people in accordance with the provisions of Section 8 of Article II of the California Constitution.

This initiative measure amends sections of the Penal Code and amends a section of the Welfare and Institutions Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

THE THREE STRIKES AND CHILD PROTECTION ACT OF 2004

SECTION 1. Title

This initiative shall be known and may be cited as the Three Strikes and Child Protection Act of 2004.

SEC. 2. Findings and Declarations

The people of the State of California do hereby find and declare that:

(a) Proposition 184 (the "Three Strikes" law) was overwhelmingly approved in 1994 with the intent of protecting law-abiding citizens by enhancing the sentences of repeat offenders who commit serious and/or violent felonies;

(b) Proposition 184 did not set reasonable limits to determine what criminal acts to prosecute as a second and/or third strike; and

(c) Since its enactment, Proposition 184 has been used to enhance the sentences of more than 35,000 persons who did not commit a serious and/or violent crime against another person, at a cost to taxpayers of more than eight hundred million dollars (\$800,000,000) per year.

SEC. 3. Purposes

The people do hereby enact this measure to:

(a) Continue to protect the people from criminals who commit serious and/or violent crimes;

(b) Ensure greater punishment and longer prison sentences for those who have been previously convicted of serious and/or violent felonies, and who commit another serious and/or violent felony;

(c) Require that no more than one strike be prosecuted for each criminal act and to conform the burglary and arson statutes; and

(d) Protect children from dangerous sex offenders and reduce the cost to taxpayers for warehousing offenders who commit crimes that do not qualify for increased punishment according to this act.

EXHIBIT C
BUSINESS & PROFESSIONS CODE §17529

§ 17529. The Legislature hereby finds and declares all of the following:

(a) Roughly 40 percent of all e-mail traffic in the United States is comprised of unsolicited commercial e-mail advertisements (hereafter spam) and industry experts predict that by the end of 2003 half of all e-mail traffic will be comprised of spam.

(b) The increase in spam is not only an annoyance but is also an increasing drain on corporate budgets and possibly a threat to the continued usefulness of the most successful tool of the computer age.

(c) Complaints from irate business and home-computer users regarding spam have skyrocketed, and polls have reported that 74 percent of respondents favor making mass spamming illegal and only 12 percent are opposed, and that 80 percent of respondents consider spam very annoying.

(d) According to Ferris Research Inc., a San Francisco consulting group, spam will cost United States organizations more than ten billion dollars (\$10,000,000,000) this year, including lost productivity and the additional equipment, software, and manpower needed to combat the problem. California is 12 percent of the United States population with an emphasis on technology business, and it is therefore estimated that spam costs California organizations well over 1.2 billion dollars (\$1,200,000,000).

(e) Like junk faxes, spam imposes a cost on users, using up valuable storage space in e-mail inboxes, as well as costly computer band width, and on networks and the computer servers that power them, and discourages people from using e-mail.

(f) Spam filters have not proven effective.

(g) Like traditional paper "junk" mail, spam can be annoying and waste time, but it also causes many additional problems because it is easy and inexpensive to create, but difficult and costly to eliminate.

(h) The "cost shifting" from deceptive spammers to Internet business and e-mail users has been likened to sending junk mail with postage due or making telemarketing calls to someone's pay-per-minute cellular phone.

(i) Many spammers have become so adept at masking their tracks that they are rarely found, and are so technologically sophisticated that they can adjust their systems to counter special filters and other barriers against spam and can even electronically commandeer unprotected computers, turning them into spam-launching weapons of mass production.

(j) There is a need to regulate the advertisers who use spam, as well as the actual spammers, because the actual spammers can be difficult to track down due to some return addresses that show up on the display as "unknown" and many others being obvious fakes and they are often located offshore.

(k) The true beneficiaries of spam are the advertisers who benefit from the marketing derived from the advertisements.

(l) In addition, spam is responsible for virus proliferation that can cause tremendous damage both to individual computers and to business systems.

(m) Because of the above problems, it is necessary that spam be prohibited and that commercial advertising e-mails be regulated as set forth in this article.