

1 SCHIFF HARDIN LLP
John S. Worden (State Bar No. 142943)
2 Alex P. Catalona (State Bar No. 200901)
One Market, Spear Street Tower, 32nd Floor
3 San Francisco, CA 94105
Telephone: (415) 901-8700
4 Facsimile: (415) 901-8701

5 WALTON & ROESS LLP
Timothy J. Walton (State Bar No. 184292)
6 407 South California
Suite 8
7 Palo Alto, CA 94306
Telephone: (650) 566-8500
8 Facsimile: (650) 566-8511

9 Attorneys for Plaintiff
DANIEL L. BALSAM

10
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF SANTA CLARA (UNLIMITED JURISDICTION)**

13 DANIEL L. BALSAM,) Case No.: 1-06-CV-066258
14)
Plaintiff,) **NOTICE OF MOTION BY PLAINTIFF**
15) **FOR SUMMARY ADJUDICATION**
vs.)
16) Date: October 2, 2008
SUBSCRIBERBASE, INC., *et al.*,) Time: 9:00 a.m.
17) Dept: 5
Defendants.) Judge: Hon. Mary Jo Levinger
18)
19) Action Commenced: July 28, 2006
20) Trial Date: November 10, 2008
_____))

21 TO EACH PARTY AND THE ATTORNEYS OF RECORD FOR EACH PARTY TO
22 THIS ACTION, PLEASE TAKE NOTICE:
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24

1 YOU ARE HEREBY NOTIFIED THAT on October 2, 2008 at 9:00 a.m. in Department
2 5 of this Court located at 191 N. First Street, San Jose, California, Plaintiff Daniel L. Balsam will
3 move this court for summary adjudication in favor of Balsam and against Defendants
4 SubscriberBase Inc., Subscriberbase Holdings Inc., Consumer Research Corporation, Inc., Free
5 Slide, Inc., and Involve Media, Inc. (collectively “Subscriberbase” or “defendant”), as follows:

6 (1) Subscriberbase sent 804 commercial emails that violated California’s anti-spam law,
7 Business & Professions Code § 17529.5, because they contained misleading email subject lines
8 offering merchandise as “free,” or equivalent language, when it was actually not free;

9 (2) Subscriberbase “affiliates,” third-party marketing agents acting on its behalf, sent an
10 additional 42 commercial emails that violated California’s anti-spam law, Business &
11 Professions Code § 17529.5(a)(3) because they contained misleading email subject lines offering
12 merchandise as “free,” or equivalent language, when it was actually not free;

13 (3) Subscriberbase sent 132 commercial emails that violated California’s anti-spam law,
14 Business & Professions Code § 17529.5(a)(3), because they contained email subject lines which
15 offered products to violate copyright laws which they could not legally provide;

16 (4) Subscriberbase and its affiliates sent 108 commercial emails that violated California’s
17 anti-spam law, Business & Professions Code § 17529.5(a)(3), because they contained email
18 subject lines which advertised “get rich quick” and pyramid schemes;

19 (5) Subscriberbase sent 109 commercial emails that violated California’s anti-spam law,
20 Business & Professions Code § 17529.5(a)(3), because they contained email subject lines which
21 advertised misleading debt reduction schemes;

22 (6) Subscriberbase and its affiliates sent 130 commercial emails that violated California’s
23 anti-spam law, Business & Professions Code § 17529.5(a)(3), because they contained misleading
24

1 email subject lines that were subject to numerous different interpretations and thus did not
2 clearly communicate the contents of the email;

3 (7) Subscriberbase sent 20 commercial emails that violated California’s anti-spam law,
4 Business & Professions Code § 17529.5(a)(3), because they contained misleading subject lines
5 informing recipients that they were “guaranteed” to be approved for credit cards when
6 Subscriberbase had no knowledge or basis to make this guarantee;

7 (8) Subscriberbase sent at least 629 commercial emails that violated California’s anti-
8 spam law, Business & Professions Code § 17529.5 because they misrepresented and concealed
9 the true identity of the sender, Subscriberbase.

10 Said motion will be made upon the ground that there is no triable issue of material fact as
11 to the above issues as a matter of law. The motion will be based upon this notice, the separate
12 statement of undisputed facts, two declarations by Timothy J. Walton, the declaration of Daniel
13 L. Balsam, the memorandum of points and authorities, the proposed order, and the papers,
14 records, and file in this action and such oral and documentary evidence as may be presented at
15 the hearing on the motion.

16
17 SCHIFF HARDIN LLP

18
19 Date: _____

BY: _____

20 ALEX P. CATALONA
21 Attorneys for PLAINTIFF
DANIEL L. BALSAM

22 SF9176594.1

1 SCHIFF HARDIN LLP
John S. Worden (State Bar No. 142943)
2 Alex P. Catalona (State Bar No. 200901)
One Market, Spear Street Tower, 32nd Floor
3 San Francisco, CA 94105
Telephone: (415) 901-8700
4 Facsimile: (415) 901-8701

5 WALTON & ROESS LLP
Timothy J. Walton (State Bar No. 184292)
6 407 South California
Suite 8
7 Palo Alto, CA 94306
Telephone: (650) 566-8500
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DANIEL L. BALSAM
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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF SANTA CLARA (UNLIMITED JURISDICTION)**
13

14 DANIEL L. BALSAM,
15 Plaintiff,

16 vs.

17 SUBSCRIBERBASE MEDIA GROUP INC.,
18 *et al.*,
19 Defendants.

) Case No.: 1-06-CV-066258
)
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **MOTION FOR SUMMARY**
) **ADJUDICATION**
)
) Date: October 2, 2008
) Time: 9:00 a.m.
) Dept: 5
) Judge: Hon. Mary Jo Levinger
)
) Action Commenced: July 28, 2006
) Trial Date: November 10, 2008
)

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1 **I. INTRODUCTION**

2 In 2004, plaintiff Daniel L. Balsam received 3,890 unsolicited commercial emails
3 (“UCE” or “Spam”) from defendants Subscriberbase, Inc., Subscriberbase Holdings, Inc.,
4 Consumer Research Corporation, Inc., Free Slide, Inc., and Involve Media, Inc. (collectively
5 “Subscriberbase” or “defendant”). Eight-hundred-and-four of these emails offered free products
6 in their subject lines. For example:

- 7 • “We are giving away Ipods”
- 8 • “Get a Free XM Radio”
- 9 • “Free LCD Portable Television”
- 10 • “Free Portable DVD Player”
- 11 • “We are giving away Ipods for Free!”
- 12 • “Special Promotion: We are giving away Apple Ipods”
- 13 • “Get the new Ipod for Free!”
- 14 • “Get a free Kodak Digital Camera!”

15 Defendant placed no conditions in its subject lines for any of these offers and did not give
16 any indication that the products being offered for “free” were other than 100% free. However,
17 when plaintiff opened each email, it was clear that these products and services were not actually
18 free. As Subscriberbase explained,

19 Subscriberbase and its subsidiaries (collectively Subscriberbase) perform
20 direct marketing through online media. Subscriberbase serves its
21 advertising clients primarily through website promotions that allow
22 consumers *the opportunity to earn free gifts* or other incentives *in return*
23 *for completing* transactions with Subscriberbase’s clients.

24 (Declaration of Timothy J. Walton (“Walton Dec.”), Exh. E, p. 7, lines 4-7 (emphasis added).)
Had Subscriberbase told email recipients that these so-called “free” products were merely an

1 “opportunity to earn free gifts in return for completing transactions” or even “free subject to
2 terms and conditions,” consumers may not have wasted time opening and reading hundreds of
3 spam advertisements. Business and Professionals Code (“B&P”) section 17529.5 imposes a
4 \$1000 liquidated damages award for sending an email advertisement with a “subject line” that is
5 “likely to mislead a recipient.”

6 The e-mail advertisement has a subject line that a person knows would be
7 likely to mislead a recipient, acting reasonably under the circumstances,
8 about a material fact regarding the contents or subject matter of the
9 message.

9 (B&P § 17529.5(a)(3).) Subscriberbase may argue that they are permitted to add qualifications
10 to their “free” offers in the body of the email or in several internet “links” inserted in the email,
11 but that misses the point of the California law which prohibits misleading “subject lines.” Under
12 California law, a misleading “subject line” creates liability in and of itself.

13 In addition to these emails, Subscriberbase sent 491 emails with subject lines that
14 contained other kinds of misrepresentation. Finally, at least 629 of the emails misrepresented
15 and concealed the identity of the sender, Subscriberbase. By disguising its identify,
16 Subscriberbase (1) misled consumers into reading emails that they would have otherwise deleted,
17 (2) prevented recipients from blocking spam emails, and (3) thwarted software designed to
18 intercept spam. These emails separately violated the statute because they contained
19 misrepresented header information: the email “from” line misrepresented the identity of the
20 email sender.

21 Plaintiff has brought suit under the California unsolicited email statute and meets all
22 criteria to prevail and collect statutory damages. Based upon undisputed material evidence, the
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24

1 Court should summarily adjudicate plaintiff's B&P § 17529.5 claims in favor of plaintiff and
2 against Subscriberbase as a matter of law.

3 **II. STATEMENT OF FACTS**

4 Subscriberbase advertised in 3,890 spams that plaintiff received at his California email
5 addresses from January through September, 2004. (Declaration of Daniel L. Balsam ("Balsam
6 Dec.") at p. 2, lines 6-9, and 12-20.) From January 1 – March 21, 2004, Subscriberbase sent 30-
7 60 spams per day, every single day. (Balsam Dec., at p. 2, lines 8-9.) Plaintiff also received
8 another 65 spams from 2004-2007 advertising Subscriberbase, sent by its third-party marketing
9 agents. (*Id.*, at p. 2, lines 10-11.)

10 **A. Misleading Offers Of "Free" Merchandise In Email Subject Lines**

11 Subscriberbase sent 804 emails with subject lines advertising products and/or services as
12 "free," "complimentary," "giveaways" or other similar terms. (*Id.*, at p. 3, lines 9-15, and Exhs.
13 A-B.) Defendant's third-party marketing agents (also known as "affiliates") sent an additional
14 42 emails on its behalf that made similar offers of "free" merchandise. (*Id.*, p. 3, lines 19-21, and
15 Exhs. A-B.) For example, many email subject lines announced free Ipods, flat-screen
16 televisions, digital cameras and other high-priced items. (*Id.*, Exh. B.)

17 Subscriberbase has explained that it advertises "website promotions that allow consumers
18 *the opportunity to earn free gifts or other incentives in return for completing transactions with*
19 *Subscriberbase's clients.*" (Walton Dec., Exh. E, p. 7, lines 4-7, p. 14, lines 16-18 (emphasis
20 added).) In a December 2004 article in the *New York Times*, Subscriberbase Chief Operating
21 Officer Brian Benenhaley stated that its marketing programs are

22 "not for everybody," he said, adding that consumers do have to spend
23 money to participate. "The question the user has to answer is: do they
24 think the service they're paying for is worth it?"

1 (*Id.*, Exh. F, p. 5.) Subscriberbase has admitted in response to a Request For Admission that it
2 “advertised products as ‘free’ which have significant conditions attached to them, including
3 signing up for various ‘offers’ that require consumers to spend money.” (*Id.*, Exh. C, p. 7, lines
4 2-4, and 16.)

5 Importantly, none of defendant’s email subject lines disclosed that recipients would only
6 have the “opportunity to earn free gifts . . . in return for completing transactions” or that the
7 recipient must meet “terms and conditions” before obtaining the “free” merchandise. (Walton
8 Dec., Exh. E, p. 7, lines 4-7, p. 14, lines 16-18; Balsam Dec., p. 3, ¶¶ 13-16, and Exhs. A-B.)
9 None of the subject lines indicated there were any conditions at all. (*Ibid.*) When recipients
10 opened and read the emails, only then did they learn that the so-called “free” products were not
11 free at all but were subject to terms and conditions not disclosed in the subject lines. (*Ibid.*)

12 In order to lure consumers to its promotions, Subscriberbase did not disclose that the
13 “free” products it advertises were, in reality, not free. (*Ibid.*) As a result of these bait-and-switch
14 tactics, Subscriberbase recently entered a consent decree after being sued by the Washington
15 Attorney General. (Walton Dec., Exhs. G and H.) Subscriberbase must pay Washington
16 residents restitution and has been permanently enjoined from offering any “free” product to
17 anyone in the State of Washington. (*Id.*, Exh. G, p. 4, lines 9-16, and p. 5, line 7 through p. 8,
18 line 19.) Washington’s Senior Counsel, Paula Selis, explained that Subscriberbase “advertised
19 products as ‘free,’ but consumers had to spend \$2000-\$3,000 dollars.” (*Id.*, Exh. H, p. 2, ¶ 2.)

20 The Federal Trade Commission (“FTC”) provides guidelines for the use of “free” and
21 similar terms such as “gift” in advertising. (Walton Dec., Exh. I.) The FTC states that whenever
22 free offers are conditional, the conditions “should be set forth clearly and conspicuously at the
23 outset of the offer so as to leave no reasonable probability that the terms of the offer might be
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1 misunderstood.” (Walton Dec., Exh. I, section 251.1(c).) “Stated differently, all of the terms,
2 conditions and obligations should appear in close conjunction with the offer of ‘Free’
3 merchandise or service.” (*Ibid.*)

4 Here, plaintiff has sued Subscriberbase under California’s anti-spam statute, which
5 specifically prohibits misleading email “subject lines.” (B&P § 17529.5(a)(3).) Under
6 California law, email advertisers are liable for misleading subject lines regardless of whether
7 they later qualify their misleading statements in the body of the email, or in various links which
8 must by “clicked” to reveal hidden costs. (*Ibid.*)

9 **B. Other Violations Of B&P § 17529.5**

10 Beyond subject lines which stated products or services were “free,” Subscriberbase also
11 sent emails with subject lines that were misleading because they offered products that they could
12 not legally provide. Subscriberbase sent 132 emails with subject lines advertising products to
13 make pirated copies of copyrighted media, most often video games for the Sony Playstation II
14 (e.g., “Copy PS2 Games and DVD Movies to CD-R.”) (Balsam Dec., p. 4, lines 4-6, and Exh.
15 A.) Subscriberbase and its affiliates sent 108 emails that advertised “get rich quick” and pyramid
16 schemes (e.g., “we are looking for 100 people to make rich”) and 109 emails that advertised
17 misleading debt reduction claims (e.g., “eliminate your credit card balance without making a
18 payment.”) (Balsam Dec., p. 4, lines 7-13, and Exh. A.) Subscriberbase and one of its agents
19 sent 130 emails with misleading subject lines that were subject to numerous interpretations and
20 thus did not clearly communicate the contents of the email. (Balsam Dec., p. 4, lines 18-21, and
21 Exh. A.) Subscriberbase sent 20 emails with subject lines that were misleading because they
22 “guaranteed” recipients approval for credit cards when Subscriberbase had no knowledge or
23 basis to make such a guarantee (e.g., “NEW! Guaranteed Approval Platinum Card.”) (Balsam
24 Dec., p. 4, lines 14-17, and Exh. A).

1 Beyond misleading subject lines, Subscriberbase sent at least 629 emails that
2 misrepresented and concealed the true identity of the sender, Subscriberbase. (Balsam Dec., p. 5,
3 lines 1-3, Exh. A.) Business and Professions Code § 17529.5(a)(2) separately prohibits sending
4 emails with “misrepresented, or forged header information” including email “from” lines.
5 “The e-mail advertisement contains or is accompanied by falsified, misrepresented, or forged
6 header information.” (B&P § 17529.5(a)(2).) By disguising its identity, Subscriberbase misled
7 consumers into reading emails that they would have otherwise deleted, prevented consumers
8 from blocking its unsolicited commercial emails, and thwarted software designed to intercept
9 spam.

10 Plaintiff moves for summary adjudication of each statutory violation in his favor and
11 against Subscriberbase.

12 III. ARGUMENT

13 A. Subscriberbase Violated Section 17529.5 When It Advertised Incentive Programs As 14 Simply “Free” Product Giveaways In Email Subject Lines.

15 California Business & Professions Code section 17529.5 states:

16 It is unlawful for any person or entity to advertise in a commercial e-mail
17 advertisement either sent from California or sent to a California electronic mail
18 address under any of the following circumstances: . . . (3) The email
19 advertisement has a subject line that a person knows would be likely to mislead a
20 recipient, acting reasonably under the circumstances, about a material fact
21 regarding the contents or subject matter of the message.

22 Plaintiff is entitled to summary adjudication if there is undisputed evidence that supports a cause
23 of action as a matter of law. (Code of Civil Procedure § 437c.) The Court should grant
24 plaintiff’s motion based on proof that (1) an email was sent to plaintiff’s California email
address, and (2) the email subject line was likely to mislead a reasonable recipient about a
material fact regarding the contents or subject matter of the message.

1 In *People ex rel. DMV v. Cars 4 Causes* (2006) 139 Cal.App.4th 1006, the Court of
2 Appeal discussed the deceptive use of conditional “free” offers in advertising. Defendant Cars 4
3 Causes was a non-profit charity that promised “free towing” to induce plaintiffs to donate their
4 cars that were then sold with the proceeds going to charity. (*Id.*, 139 Cal.App.4th at p. 1016.)
5 Cars 4 Causes concealed that the cost of towing was actually deducted from the proceeds that
6 were given to charity.

7 Advertising free towing when, in fact, the cost will be deducted from the
8 charitable contribution is *necessarily deceptive*. Respondent argues that, if a
9 donor specifically asks respondent to explain the free towing representation,
10 respondent will inform the donor that towing charges are incurred and deducted
11 from the proceeds of sale. This explanation *does not remove the deception*.

12 (*Id.*, at p. 1017 (emphasis added).) The Court therefore held that even though defendant’s
13 towing services were actually free to the consumer who donated his car, they were misleading
14 because they were conditioned upon the charity paying for the cost of towing. This “hidden
15 condition” was “necessarily deceptive” because the advertised services were not entirely free.
16 Defendant could not cure its initial deception by clearly explaining the terms of its “free” offer in
17 subsequent communications — “this explanation does not remove the deception.” (*Ibid.*)

18 Here, there is no dispute that Subscriberbase advertised product promotions where
19 consumers would get a “free” product in exchange for buying other products: “Subscriberbase
20 serves its advertising clients primarily through website promotions that allow consumers *the*
21 *opportunity to earn free gifts or other incentives in return for completing transactions with*
22 *Subscriberbase’s clients.*” (Walton Dec., Exh. E, p. 7, lines 4-7, p. 14, lines 16-18.) However,
23 there is also no dispute that the subject lines of defendant’s 804 emails — and the 42 emails of
24 its affiliates — advertised these products and services as “free” without revealing that they would
require “completing transactions with Subscriberbase’s clients.” (*Ibid.*) Defendant’s email
subject lines are misleading in the same sense as the advertising the Court found to be

1 “necessarily deceptive” in *Cars 4 Causes*. The subject lines advertise “free” products which are
2 in reality “free . . . subject to terms and conditions” in order to induce consumers to open the
3 emails and enter into monetary transactions.

4 Because defendant’s email subject lines were likely to “mislead” a reasonable person
5 who received the email — and in particular were likely to mislead consumers into opening the
6 emails — defendant should be assessed statutory damages as required by law.

7 **B. Other Violations Of B&P § 17529.5**

8 Subscriberbase also sent emails with subject lines that were misleading because they
9 offered products that they could not legally provide. Subscriberbase sent 132 emails with subject
10 lines advertising products to make pirated copies of copyrighted media, most often video games
11 for the Sony Playstation II (e.g., “Copy PS2 Games and DVD Movies to CD-R.”) (Balsam Dec.,
12 p. 4, lines 4-6, Exhs. A-B.) Subscriberbase and its affiliates sent 108 emails that advertised “get
13 rich quick” and pyramid schemes (e.g., “we are looking for 100 people to make rich,”) and 109
14 emails that advertised unwarranted debt reduction claims (e.g., “eliminate your credit card
15 balance without making a payment.”) (Balsam Dec., p. 4, lines 7-13, Exh. A.) Subscriberbase
16 and one of its affiliates sent 130 emails that contain misleading subject lines that were subject to
17 numerous interpretations and thus did not clearly communicate the contents of the email.

18 (Balsam Dec., p. 4, lines 18-21, Exh. A.) Subscriberbase sent 20 emails with subject lines that
19 were misleading because they “guaranteed” recipients approval for credit cards when
20 Subscriberbase had no knowledge or basis to make such a guarantee (e.g., “NEW! Guaranteed
21 Approval Platinum Card.”) (Balsam Dec., p. 4, lines 14-17, and Exh. A.)

22 Beyond misleading subject lines, Subscriberbase sent at least 629 emails that
23 misrepresented and concealed the true identity of the sender, Subscriberbase. (Balsam Dec., p. 5,
24 lines 1-3, Exh. A.) Business and Professions Code § 17529.5(a)(2) separately prohibits sending

1 emails with “misrepresented, or forged header information” including email “from” lines. By
2 disguising its identity, Subscriberbase misled consumers into reading spam emails that they
3 otherwise would have deleted, prevented consumers from blocking spam emails, and thwarted
4 software designed to intercept spam.

5 **C. California Law Requires The Imposition Of Liquidated Damages Against**
6 **Subscriberbase For Each UCE That Violated The Statute.**

7 As required by Business & Professions Code § 17529.5(b)(1)(B)(ii), plaintiff respectfully
8 requests that the Court impose a \$1000 award of liquidated damages against Subscriberbase for
9 each UCE it sent that violated the statute. For example, in a case remarkably similar to this one,
10 plaintiff Daniel L. Balsam obtained a judgment of \$200,167.00 on February 28, 2008 in the
11 Superior Court of San Francisco, against a different spam defendant for approximately 200
12 emails that violated the same statute at issue in this case. (Walton Dec., Exh. L.) In that case,
13 the Court stated: “The Court finds that commercial email subject lines that advertise
14 goods/services as being free without clearly disclosing in the subject lines that there are
15 conditions attached are deceptive and violate Cal. Bus. & Prof. Code § 17529.5(a)(3)” (*Id.*,
16 Exh. L, p. 1, ¶ 4.)

17 Here, Subscriberbase violated California’s anti-spam law for the exact same reason,
18 because “commercial email subject lines that advertise goods/services as being free without
19 clearly disclosing in the subject lines that there are conditions attached are deceptive.” (*Ibid.*)
20 As a result of these violations, the Court should calculate damages against Subscriberbase based
21 on the total number of UCE which violated the statute as required by law. The total number of
22 emails sent by Subscriberbase and its affiliates that violate Business & Professions Code §
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1 17529.5(a)(3) is 1345 emails. The Court should therefore enter judgment in plaintiff's favor in
2 the amount of \$1,345,000.00 pursuant to Business & Professions Code § 17529.5(b)(1)(B)(ii).¹

3
4 **IV. CONCLUSION**

5 There is no dispute about the content of these emails nor is there a dispute about the fact
6 that they were sent by Subscriberbase and its affiliates and received by Daniel Balsam in the
7 State of California. Under Code of Civil Procedure section 437c, the plaintiff respectfully
8 requests that the Court grant summary adjudication in plaintiff's favor and against
9 Subscriberbase as to these claims in the amount of \$1,345,000.00.

10
11 SCHIFF HARDIN LLP

12
13 Date: _____

14 BY: _____

15 ALEX P. CATALONA

16 Attorneys for plaintiff

17 DANIEL L. BALSAM

18 SF9121495.1

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20 _____
21 ¹ This number does not include the 629 emails that contained misrepresented header information
22 because these violations partially overlap with the 1345 emails that contain misleading subject
23 lines.
24

1 SCHIFF HARDIN LLP
2 John S. Worden (State Bar No. 142943)
3 Alex P. Catalona (State Bar No. 200901)
4 One Market, Spear Street Tower, 32nd Floor
5 San Francisco, CA 94105
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15 Attorneys for Plaintiff
16 DANIEL L. BALSAM

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18 **SUPERIOR COURT OF CALIFORNIA**
19 **COUNTY OF SANTA CLARA (UNLIMITED JURISDICTION)**
20

21 DANIEL L. BALSAM,
22 Plaintiff,

23 vs.

24 SUBSCRIBERBASE, INC., *et al.*,

25 Defendants.

) Case No.: 1-06-CV-066258
)
) **SEPARATE STATEMENT OF**
) **MATERIAL UNDISPUTED FACTS IN**
) **SUPPORT OF PLAINTIFF'S MOTION**
) **FOR SUMMARY JUDGMENT**
) **ADJUDICATION OF ISSUES**
)
) Date: October 2, 2008
) Time: 9:00 a.m.
) Dept: 5
) Judge: Hon. Mary Jo Levinger
)
) Action Commenced: July 28, 2006
) Trial Date: November 10, 2008

Pursuant to Code of Civil Procedure § 437c(b) and California Rule of Court 3.1350(h), Plaintiff submits this separate statement in support of his motion for summary adjudication of issues.

I. Subscriberbase Sent 804 Emails That Violated California’s Anti-Spam Law, Business & Professions Code § 17529.5(a)(3), Because They Contained Misleading Email Subject Lines Offering Merchandise As “Free” When It Was Actually Not Free.

| <u>UNDISPUTED MATERIAL FACTS</u> | <u>SUPPORTING EVIDENCE</u> |
|--|---|
| 1. Subscriberbase advertised in 3890 spams that plaintiff received at his California email addresses from January through September, 2004. | 1. Declaration of Daniel L. Balsam. (Declaration of Daniel L. Balsam (“Balsam Dec.”) at p. 2, lines 6-9, and 12-20.) |
| 2. As part of this litigation, the parties agreed that “Defendants Subscriberbase, Inc., Subscriberbase Holdings, Inc., Consumer Research Corporation, Inc., Free Slide, Inc., and Involve Media, Inc. are, for purposes of this litigation only, to be treated as one entity.” These defendants are referred to as (“defendant” or “Subscriberbase.”) | 2. Declaration of Timothy J. Walton. (Declaration of Timothy J. Walton (“Walton Dec.”), Exh. A, p. 2, lines 5-7.) |
| 3. “Subscriberbase and its subsidiaries (collectively “Subscriberbase”) perform direct marketing through online media.” | 3. Declaration of Timothy J. Walton. (Walton Dec., Exh. E, p. 7, lines 3-9.) |
| 4. From January 1 – March 21, 2004, Subscriberbase sent 30-60 spams per day, every single day. | 4. Declaration of Daniel L. Balsam. (Balsam Dec., at p. 2, lines 8-9.) |
| 5. Plaintiff also received another 65 spams from 2004-2007 advertising Subscriberbase, sent by its third-party marketing agents. | 5. Declaration of Daniel L. Balsam. (<i>Id.</i> , at p. 2, lines 10-11.) |

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| 6. Plaintiff received all of these emails at three California email addresses. | 6. Declaration of Daniel L. Balsam. <i>(Id., p. 2, lines 12-20.)</i> |
| 7. Plaintiff received all of these UCEs on computers located within the State of California. | 7. Declaration of Daniel L. Balsam. <i>(Id., p. 2, line 12.)</i> |
| 8. The UCE plaintiff received from Subscriberbase were addressed to plaintiff at his email address. | 8. Declaration of Daniel L. Balsam. <i>(Id., p. 2, lines 13-14.)</i> |
| 9. All three of the email addresses where plaintiff received UCEs from Subscriberbase were at all times accessed from a computer located in California. | 9. Declaration of Daniel L. Balsam. <i>(Id., p. 2, lines 15-17.)</i> |
| 10. At all times from January 1, 2004 up to the date of this declaration, plaintiff has been a resident of California. | 10. Declaration of Daniel L. Balsam. <i>(Id., p. 2, lines 17-18.)</i> |
| 11. All three of the email address where plaintiff received UCEs from Subscriberbase were furnished to him while he was a resident of California. | 11. Declaration of Daniel L. Balsam. <i>(Id., p. 2, lines 18-20.)</i> |
| 12. The body of each of these UCEs identified Subscriberbase as the advertiser. | 12. Declaration of Daniel L. Balsam. <i>(Id., p. 2, line 21.)</i> |
| 13. These emails either specifically identified one of the Subscriberbase companies by name, or contained links to websites owned and operated by Subscriberbase. | 13. Declaration of Daniel L. Balsam. <i>(Id., p. 2, lines 21-23.)</i> |

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| 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 | <p>14. Plaintiff neither consented to nor requested to receive any UCE from Subscriberbase.</p> <p>15. Excluding litigation, plaintiff has no business or personal relationship with Subscriberbase.</p> <p>16. All of the emails were commercial in nature because the UCE attempted to promote the sale of goods and/or services.</p> <p>17. Subscriberbase sent 804 email messages with subject lines that advertised products and/or services as “free,” “complimentary,” “giveaways” or other similar terms.</p> <p>18. For example, many email subject lines announced free Ipods, flat-screen televisions, digital cameras and other high-priced items.</p> <p>19. Recipients of these emails would have to spend hundreds if not thousands of dollars in order to get a “free” item.</p> <p>20. Subscriberbase has explained that it advertises “website promotions that allow consumers <i>the opportunity to earn free gifts or other incentives in return for completing transactions</i> with Subscriberbase’s clients.”</p> | <p>14. Declaration of Daniel L. Balsam. (<i>Id.</i>, p. 3, line 1.)</p> <p>15. Declaration of Daniel L. Balsam. (<i>Id.</i>, p. 3, line 2.)</p> <p>16. Declaration of Daniel L. Balsam. (<i>Id.</i>, p. 3, lines 3-4.)</p> <p>17. Declaration of Daniel L. Balsam. (<i>Id.</i>, at p. 3, lines 9-15, and Exhs. A-B.)</p> <p>18. Declaration of Daniel L. Balsam. (<i>Id.</i>, p. 3, lines 10-15, and Exh. B.)</p> <p>19. Declarations of Daniel L. Balsam and Timothy J. Walton. (Balsam Dec., p. 3, lines 16-17; Walton Dec., Exh. C, p. 7, lines 2-4, & 16.)</p> <p>20. Declaration of Timothy J. Walton. (Walton Dec., Exh. E, p. 7, lines 4-7, p. 14, lines 16-18 (emphasis added).)</p> |
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| 21. In a December 2004 article in the <i>New York Times</i> , Subscriberbase Chief Operating Officer Brian Benenhaley stated that its marketing programs are “not for everybody,” he said, adding that consumers do have to spend money to participate. “The question the user has to answer is: do they think the service they’re paying for is worth it?.” | 21. Declaration of Timothy J. Walton. (<i>Id.</i> , Exh. F, p. 5.) |
| 22. Subscriberbase has admitted in response to a Request For Admission that that it “advertised products as ‘free’ which have significant conditions attached to them, including signing up for various ‘offers’ that require consumers to spend money.” | 22. Declaration of Timothy J. Walton. (<i>Id.</i> , Exh. C, p. 7, lines 2-4 & 16.) |
| 23. Importantly, none of defendant’s email subject lines disclosed that recipients would only have the opportunity to earn free gifts in return for completing transactions or that the recipient must meet “terms and conditions” before obtaining the “free” merchandise. | 23. Declarations of Timothy J. Walton and Daniel L. Balsam. (Walton Dec., Exh. E, p. 7, lines 3-7, p. 14, lines 16-18; Balsam Dec., p. 3, lines 5-18, and Exhs. A-B.) |
| 24. None of the email subject lines indicated there were any conditions at all. | 24. Declarations of Timothy J. Walton and Daniel L. Balsam. (Walton Dec., Exh. E, p. 7, lines 3-7, p. 14, lines 16-18; Balsam Dec., p. 3, lines 5-18, and Exhs. A-B.) |
| 25. When these emails were opened and read, it was then disclosed that so-called “free” products were not free at all but required recipients to meet terms and conditions not disclosed in the subject lines. | 25. Declarations of Timothy J. Walton and Daniel L. Balsam. (Walton Dec., Exh. E, p. 7, lines 3-7, p. 14, lines 16-18; Balsam Dec., p. 3, lines 5-18, and Exhs. A-B.) |

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2 26. In order to lure consumers to its promotions,
3 Subscriberbase did not disclose that the “free”
4 products it advertises were, in reality, not free.

26. Declarations of Timothy J.
Walton and Daniel L. Balsam.

(Walton Dec., Exh. E, p. 7, lines
3-7, p. 14, lines 16-18; Balsam
Dec., p. 3, lines 5-18, and Exhs.
A-B.)

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6 27. As a result of these bait-and-switch tactics,
7 Subscriberbase recently entered a consent
8 decree after being sued by the Washington
9 Attorney General.

27. Declaration of Timothy J.
Walton.

(Walton Dec., Exhs. G and H.)

10 28. Subscriberbase must pay Washington residents
11 restitution and it has been permanently
12 enjoined from offering any “free” product to
13 anyone in the State of Washington.

28. Declaration of Timothy J.
Walton.

(*Id.*, Exh. G, p. 4, lines 9-16, and
p. 5, line 7 through p. 8, line
19.)

14 29. Washington’s Senior Counsel Paula Selis,
15 explained that Subscriberbase “advertised
16 products as ‘free,’ but consumers had to spend
17 \$2000-\$3,000 dollars.”

29. Declaration of Timothy J.
Walton.

(*Id.*, Exh. H, p. 2, ¶ 2.)

18 30. The Federal Trade Commission (“FTC”)
19 provides guidelines for the use of “free” and
20 similar terms such as “gift” in advertising.

30. Declaration of Timothy J.
Walton.

(Walton Dec., Exh. I.)

21 31. The FTC states that whenever free offers are
22 conditional, the conditions “should be set forth
23 clearly and conspicuously at the outset of the
24 offer so as to leave no reasonable probability
25 that the terms of the offer might be
26 misunderstood.”

31. Declaration of Timothy J.
Walton.

(Walton Dec., Exh. I, section
251.1(c).)

27 32. The FTC further provides: “[s]tated
28 differently, all of the terms, conditions and
obligations should appear in close conjunction
with the offer of ‘Free’ merchandise or
service.” (*Ibid.*)

32. Declaration of Timothy J.
Walton.

(Walton Dec., Exh. I, section
251.1(c).)

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| 33. Here, plaintiff has sued Subscriberbase under California’s anti-spam statute, which specifically prohibits misleading email “subject lines.” | 33. California Business And Professions Code (“B&P”) § 17529.5(a)(3). |
| 34. Under California law, email advertisers are liable for misleading subject lines regardless of whether they later qualify their misleading statements in the body of the email, or in various links which must be “clicked” to reveal hidden costs. | 34. California Business And Professions Code (“B&P”) § 17529.5(a)(3). |
| 35. Plaintiff attached all emails that are the subject of this motion, and a spreadsheet which summarizes these emails, and the particular subject lines and “from” lines of the emails. | 35. Declaration of Daniel L. Balsam. (Balsam Dec., p. 3, lines 5-8, p. 4, lines 11-13, and Exh. A and the “Balsam Emails” compact disc (“CD”).) |
| 36. Plaintiff has claimed liquidated damages in the amount of One Thousand Dollars (\$1000.00) for each unlawful email message, as authorized by California Business & Professions Code § 17529.5(b)(1)(B)(ii). | 36. Declaration of Daniel L. Balsam. (Balsam Dec., p. 5, lines 10-12.) |
| 37. Plaintiff obtained a judgment of \$200,167.00 on February 28, 2008 in the Superior Court of San Francisco, against a different spam defendant for violating the California spam statute based on emails which offer “free” merchandise in misleading email subject lines. | 37. Declaration of Timothy J. Walton. (Walton Dec., Exh. L.) |
| 38. In that case, the Court stated: “The Court finds that commercial email subject lines that advertise goods/services as being free without clearly disclosing in the subject lines that there are conditions attached are deceptive and violate Cal. Bus. & Prof. Code § 17529.5(a)(3)” | 38. Declaration of Timothy J. Walton. (Walton Dec., Exh. L, p. 1, lines 21-25.) |
| 39. In response to plaintiff’s discovery request for “ALL DOCUMENTS covering YOUR internal policies or procedures for EMAIL list management, including unsubscribe or ‘opt out’ requests,” Subscriberbase responded “No documents exist.” | 39. Declaration of Timothy J. Walton. (Walton Dec., Exh. M, p. 2, lines 27-28, p. 4, line 17.) |

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| 40. In response to plaintiff’s discovery request for “ALL DOCUMENTS showing YOUR policies with regard to complaints about EMAIL advertising,” Subscriberbase responded “No documents exist.” | 40. Declaration of Timothy J. Walton. (Walton Dec., Exh. M, p. 4, lines 22-23, and p. 5, line 13.) |
| 41. On October 10, 2003, Judge William G. Barkley entered a civil judgment against Subscriberbase for violations of Virginia’s anti-spam statute because (1) plaintiff Serge Egelman never permitted Subscriberbase to send spam to his email address, and (2) Subscriberbase continued to send plaintiff spam “after the Plaintiff notified the Defendant on April 10, 2003, of their violation of the statute.” | 41. Declaration of Timothy J. Walton. (Walton Dec., Exh. J, pp. 1-2.) |
| 42. On April 3, 2006, the Superior Court in the County of San Francisco entered judgment pursuant to stipulation against Subscriberbase and in favor of plaintiff Dan Balsam in a different lawsuit arising from UCE sent to plaintiff Daniel L. Balsam by Subscriberbase. | 42. Declaration of Timothy J. Walton. (Walton Dec., Exh. K, and p. 3, lines 17-22.) |

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II. Subscriberbase “Affiliates,” Its Third-Party Marketing Agents, Sent An Additional 42 Emails That Violated California’s Anti-Spam Law, Business & Professions Code § 17529.5(a)(3) Because They Contained Misleading Email Subject Lines Offering Merchandise As “Free” When It Was Actually Not Free.

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| <u>UNDISPUTED MATERIAL FACTS</u> | <u>SUPPORTING EVIDENCE</u> |
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| 43. Plaintiff incorporates Undisputed Material Facts 1-42. | 43. Undisputed Material Facts 1-42. |
| 44. Subscriberbase’s affiliates, third-party marketing agents, sent an additional 42 emails which advertised products or services as free (or equivalent language) in the subject line. | 44. Declaration of Daniel L. Balsam. (Balsam Dec., p. 3, lines 19-21, & Exhs. A-B.) |

1 45. Again, these products were actually not free 45. Declaration of Daniel L. Balsam.
2 because they were subject to terms and
3 conditions which were not identified in the (Balsam Dec., p. 3, lines 21-23
4 email subject lines. & Exhs. A-B.)

5 46. The third-party companies that sent these 46. Declaration of Daniel L.
6 emails identified Subscriberbase as the Balsam.
7 advertiser. (Balsam Dec., p. 2, lines 21-23,
8 p. 3, lines 19-23 & Exhs. A-B.)

9 **III. Subscriberbase Sent 132 Emails That Violated California’s Anti-Spam Law,**
10 **Business & Professions Code § 17529.5(a)(3), Because They Advertised Products To**
11 **Illegally Copy Copyrighted Media Which They Could Not Legally Provide.**

| <u>UNDISPUTED MATERIAL FACTS</u> | <u>SUPPORTING EVIDENCE</u> |
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12 47. Plaintiff incorporates Undisputed Material 47. Undisputed Material Facts 1-42.
13 Facts 1-42.

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16 48. Subscriberbase sent 132 emails with subject 48. Declaration of Daniel L. Balsam.
17 lines advertising products to make pirated (Balsam Dec., p. 4, lines 4-6,
18 copies of copyrighted media, most often video and Exh. A.)
19 PS2 Games and DVD Movies to CD-R.”)

20 **IV. Subscriberbase And Its Affiliates Sent 108 Emails That Violated California’s Anti-**
21 **Spam Law, Business & Professions Code § 17529.5(a)(3), Because They Contained**
22 **Email Subject Lines Which Advertised “Get Rich Quick” And Pyramid Schemes.**

| <u>UNDISPUTED MATERIAL FACTS</u> | <u>SUPPORTING EVIDENCE</u> |
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24 49. Plaintiff incorporates Undisputed Material Facts 49. Undisputed Material Facts 1-42.
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50. Subscriberbase and its affiliates sent 108 emails that advertised “get rich quick” and pyramid schemes (e.g., “we are looking for 100 people to make rich,”) 50. Declaration of Daniel L. Balsam. (Balsam Dec., p. 4, lines 7-10, and Exh. A.)

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V. Subscriberbase Sent 109 Emails That Violated California’s Anti-Spam Law, Business & Professions Code § 17529.5(a)(3), Because They Contained Email Subject Lines Which Advertised Misleading Debt Reduction Claims.

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| | <u>UNDISPUTED MATERIAL FACTS</u> | | <u>SUPPORTING EVIDENCE</u> |
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51. Plaintiff incorporates Undisputed Material Facts 1-42. 51. Undisputed Material Facts 1-42.

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52. Subscriberbase sent 109 emails that contain subject lines advertising misleading debt reduction claims, (e.g., “eliminate your credit card balance without making a payment.”) 52. Declaration of Daniel L. Balsam. (Balsam Dec., p. 4, lines 11-13, and Exh. A.)

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VI. Subscriberbase Sent 20 Emails That Violated California’s Anti-Spam Law, Business & Professions Code § 17529.5(a)(3) Because They “Guaranteed” Recipients Approval For Credit Cards When Subscriberbase Had No Knowledge Or Basis To Make Such A Guarantee.

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| | <u>UNDISPUTED MATERIAL FACTS</u> | | <u>SUPPORTING EVIDENCE</u> |
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53. Plaintiff incorporates Undisputed Material Facts 1-42. 53. Undisputed Material Facts 1-42.

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54. Subscriberbase sent 20 emails with subject lines that were misleading because they “guaranteed” recipients approval for credit cards when Subscriberbase had no knowledge or basis to make such a guarantee (e.g., “NEW! Guaranteed Approval Platinum Card.”) 54. Declaration of Daniel L. Balsam. (Balsam Dec., p. 4, lines 14-17, and Exh. A.)

1 **VII. Subscriberbase And Its Affiliates Sent 130 Emails That Violated California’s Anti-**
 2 **Spam Law, Business & Professions Code § 17529.5(a)(3) Because They Contained**
 3 **Email Subject Lines Subject To Numerous Different Interpretations And Thus Did**
 4 **Not Clearly Communicate The Contents Of The Email.**

| <u>UNDISPUTED MATERIAL FACTS</u> | <u>SUPPORTING EVIDENCE</u> |
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 6 55. Plaintiff incorporates Undisputed Material Facts 1-42. 55. Undisputed Material Facts 1-42.
 7 1-42.

8
 9 56. Subscriberbase and its affiliates sent 130 emails 56. Declaration of Daniel L. Balsam.
 10 that contained misleading subject lines that were (Balsam Dec., p. 4, lines 18-21, and
 11 subject to numerous interpretations and thus did Exh. A.)
 12 not clearly communicate the contents of the email.

13 **VIII. Subscriberbase Sent At Least 629 Emails That Violated California’s Anti-Spam**
 14 **Law, Business & Professions Code § 17529.5(a)(2) Because They Misrepresented**
 15 **And Concealed The True Identity Of The Sender, Subscriberbase.**

| <u>UNDISPUTED MATERIAL FACTS</u> | <u>SUPPORTING EVIDENCE</u> |
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 17 57. Plaintiff incorporates Undisputed Material Facts 1-42. 57. Undisputed Material Facts 1-42.
 18 1-42.

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 20 58. The header information in at least 629 of the 58. Declaration of Daniel L. Balsam.
 21 emails sent by Subscriberbase is misrepresented (Balsam Dec., p. 5, lines 1-3, and
 22 and concealed the true identity of the sender, Exh. A.)
 23 Subscriberbase, because the “From” line of these
 24 emails identifies entities other than
 25 Subscriberbase.

26 59. Business and Professions Code § 17529.5(a)(2) 59. Business & Professions Code §
 27 separately prohibits sending emails with 17529.5(a)(2).
 28 “misrepresented, or forged header information”
 including email “from” lines.

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60. By disguising its identity, Subscriberbase misled consumers into reading emails that they would have otherwise deleted, prevented consumers from blocking its unsolicited commercial emails, and thwarted software designed to intercept spam.

60. Declaration of Daniel L. Balsam.
(Balsam Dec., p. 5, lines 1-3, and Exh. A.)

SCHIFF HARDIN LLP

Dated: _____

By _____
Alex P. Catalona
Attorneys for Plaintiff
DANIEL L. BALSAM

SF9176830.1

1 SCHIFF HARDIN LLP
John S. Worden (State Bar No. 142943)
2 Alex P. Catalona (State Bar No. 200901)
One Market, Spear Street Tower, 32nd Floor
3 San Francisco, CA 94105
Telephone: (415) 901-8700
4 Facsimile: (415) 901-8701

5 WALTON & ROESS LLP
Timothy J. Walton (State Bar No. 184292)
6 407 South California
Suite 8
7 Palo Alto, CA 94306
Telephone: (650) 566-8500
8 Facsimile: (650) 566-8511

9 Attorneys for Plaintiff
DANIEL L. BALSAM

10
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF SANTA CLARA (UNLIMITED JURISDICTION)**
13

14 DANIEL L. BALSAM,) Case No.: 1-06-CV-066258
15 Plaintiff,)
16 vs.) **DECLARATION OF DANIEL L.**
) **BALSAM IN SUPPORT OF MOTION**
) **FOR SUMMARY ADJUDICATION**
17 SUBSCRIBERBASE, INC., *et al.*,) Date: October 2, 2008
18 Defendants.) Time: 9:00 a.m.
) Dept: 5
19) Judge: Hon. Mary Jo Levinger
)
20) Action Commenced: July 28, 2006
) Trial Date: November 10, 2008
21)
22)
)

1 I, Daniel L. Balsam, declare:

2 1. I am over eighteen years of age and am a resident of San Francisco, California. I am the
3 Plaintiff in the above-captioned action.

4 2. I make this declaration based upon personal knowledge, except where indicated. I
5 could and would testify as to the facts herein if called upon to do so.

6 3. Defendants Subscriberbase Inc., Subscriberbase Holdings Inc., and Consumer Research
7 Corporation, Inc., Free Slide Inc., and Involve Media Inc. (collectively “defendant” or
8 “Subscriberbase”) sent to me 3,890 unsolicited commercial emails (“UCE”) in 2004. From
9 January 1, 2004 to March 21, 2004, Subscriberbase sent me 30-60 emails every single day.

10 4. I received another 65 UCEs sent by third-party marketing agents on behalf of
11 Subscriberbase from 2004-2007.

12 5. I received all of these UCEs on computers located within the State of California.

13 6. The UCEs that I received advertising SubscriberBase were addressed to me at my email
14 addresses.

15 7. The email addresses at which I received the UCEs are California email addresses. All
16 three of the email addresses where I received UCEs from Subscriberbase were at all times
17 accessed from a computer located in California. At all times from January 1, 2004 up to the date
18 of this declaration, I have been a resident of California. All three of the email addresses where I
19 received UCEs from Subscriberbase were furnished to me while I have been a resident of
20 California.

21 8. The body of each of these UCEs identified Subscriberbase as the advertiser. These
22 emails either specifically identified one of the Subscriberbase companies by name, or contained
23 links to websites owned and operated by Subscriberbase.

1 9. I neither consented to nor requested any UCE received from Subscriberbase.

2 10. Excluding litigation, I have no business or personal relationship with Subscriberbase.

3 11. All of the UCEs were commercial in nature because Subscriberbase advertised in each
4 of the emails and the UCEs attempted to promote the sale of goods and/or services.

5 12. Attached as Exhibit A is a true and correct copy of a spreadsheet which I created. This
6 document lists and summarizes the UCE I received advertising Subscriberbase since 2004. This
7 spreadsheet charts out the emails by category of deceptive subject lines and how each category is
8 misleading as more fully described below.

9 13. As shown by Exhibit A, Subscriberbase sent 804 emails which advertised products or
10 services in the subject line as “free,” “complimentary,” “on us,” “giveaways,” etc. For example,
11 “We are giving away Ipods,” “Get a Free XM Radio,” “Free LCD Portable Television,” “Free
12 Portable DVD Player,” “We are giving away Ipods for Free!,” “Special Promotion: We are
13 giving away Apple Ipods,” “Get the new Ipod for Free!,” “Get a free Kodak Digital Camera!” In
14 actuality, these products were not free. When these emails were opened, they revealed that they
15 were each subject to terms and conditions that were not disclosed in the email subject lines.

16 14. My understanding is that any recipient of these emails would have to spend hundreds if
17 not thousands of dollars in order to get a “free” item.

18 15. I have attached examples of these emails as Exhibit B.

19 16. As shown by Exhibit A, Subscriberbase’s affiliates, third-party marketing agents, sent
20 an additional 42 emails on behalf of Subscriberbase which advertised products or services in the
21 subject line as “free,” “complimentary,” “on us,” “giveaway,” etc. Again, these products were
22 actually not free because they were subject to terms and conditions which were not identified in
23 the email subject lines.

1 17. Beyond email subject lines which stated products or services were “free,”
2 Subscriberbase’s email subject lines were also misleading because they offered products and/or
3 services that they could not legally provide.

4 18. As shown by Exhibit A, Subscriberbase sent 132 emails with subject lines that
5 advertised products to illegally copy copyrighted media, most often video games for Sony
6 Playstation 2 (e.g., “Copy PS2 Games and DVD Movies to CD-R.”)

7 19. As shown by Exhibit A, Subscriberbase sent 104 emails with subject lines advertising
8 “get rich quick” and pyramid schemes (e.g., “we are looking for 100 people to make rich.”) Its
9 affiliates sent an additional 4 of these particular kinds of UCE for a total of 108 email subject
10 lines advertising “get rich quick” and pyramid schemes.

11 20. As shown by Exhibit A, Subscriberbase sent 109 emails with subject lines advertising
12 misleading debt reduction claims (e.g., “eliminate your credit card balance without making a
13 payment.”)

14 21. As shown by Exhibit A, Subscriberbase also sent 20 emails with subject lines that were
15 misleading because they “guaranteed” recipients approval for credit cards when Subscriberbase
16 had no knowledge or basis to make such a guarantee (e.g., “NEW! Guaranteed Approval
17 Platinum Card.”)

18 22. In addition, as shown by Exhibit A, Subscriberbase sent 129 emails that contain
19 misleading subject lines that were subject to numerous interpretations and thus did not clearly
20 communicate the contents of the email. One of its affiliates sent an additional email of this type
21 for a total of 130 emails with misleading subject lines subject to multiple interpretations.

22 23. All of these misleading subject lines are noted in Exhibit A.
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1 24. In addition, the header information in at least 629 of the emails sent by Subscriberbase
2 are misrepresented because the "From" line of these emails identifies entities other than
3 Subscriberbase.

4 25. I have also downloaded electronic versions of the actual emails onto a CD which has
5 been labeled "Balsam Emails." I have not attached hard copies of these emails because they
6 would total several thousand pages. As I understand it, this CD, "Balsam Emails," is being
7 submitted separately under seal.

8 26. I elect recovery of liquidated damages for unlawful email messages sent by
9 SubscriberBase.

10 27. I claim liquidated damages in the amount of One Thousand Dollars (\$1000.00) for each
11 unlawful email message, as authorized by California Business & Professions Code §
12 17529.5(b)(1)(B)(ii).

13 I declare under penalty of perjury under the laws of the State of California that the
14 foregoing is true and correct. Executed this _____ day of July, 2008, at San Francisco,
15 California.

16
17
18 _____
Daniel L. Balsam

19 SF9175465.1

1 SCHIFF HARDIN LLP
John S. Worden (State Bar No. 142943)
2 Alex P. Catalona (State Bar No. 200901)
One Market, Spear Street Tower, 32nd Floor
3 San Francisco, CA 94105
Telephone: (415) 901-8700
4 Facsimile: (415) 901-8701

5 WALTON & ROESS LLP
Timothy J. Walton (State Bar No. 184292)
6 407 South California
Suite 8
7 Palo Alto, CA 94306
Telephone: (650) 566-8500
8 Facsimile: (650) 566-8511

9 Attorneys for Plaintiff
DANIEL L. BALSAM
10
11

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **COUNTY OF SANTA CLARA (UNLIMITED JURISDICTION)**

14 DANIEL L. BALSAM,) Case No.: 1-06-CV-066258
)
15 Plaintiff,) **DECLARATION OF TIMOTHY J.**
) **WALTON IN SUPPORT OF MOTION**
16 vs.) **FOR SUMMARY ADJUDICATION**
)
17 SUBSCRIBERBASE, INC., *et al.*,) Date: October 2, 2008
) Time: 9:00 a.m.
18 Defendants.) Dept: 5
) Judge: Hon. Mary Jo Levinger
19)
) Action Commenced: July 28, 2006
20) Trial Date: November 10, 2008
)
21 _____)

22 I, Timothy J. Walton, declare:

23 1. I am an attorney duly licensed to practice law in all courts of the State of California.
24

- 1 2. I am one of plaintiff Daniel L. Balsam’s attorneys of record in this lawsuit.
- 2 3. I make this declaration based upon personal knowledge, except as indicated. If called upon
3 to do so, I could and would testify to the truth of the facts stated in this declaration.
- 4 4. Attached as Exhibit A is a true and correct copy of a signed Stipulation As To Facts signed
5 by counsel for plaintiff and several defendants in which it has been agreed that “Defendants
6 Subscriberbase, Inc., Subscriberbase Holdings, Inc., Consumer Research Corporation, Inc.,
7 Free Slide, Inc., and Involve Media, Inc. are, for purposes of this litigation only, to be treated
8 as one entity.” These defendants are referred to in this declaration as (“defendant” or
9 “Subscriberbase.”)
- 10 5. I served requests for production of documents, requests for admissions, and judicial council
11 form interrogatories to Subscriberbase in this lawsuit.
- 12 6. Attached as Exhibit “B” to this declaration is a true and correct copy of defendant’s initial
13 responses to plaintiff’s first set of requests for admissions.
- 14 7. Attached as Exhibit “C” to this declaration is a true and correct copy of defendant’s
15 supplemental responses to plaintiff’s first set of requests for admissions.
- 16 8. Attached as Exhibit “D” to this declaration is a true and correct copy of defendant’s initial
17 responses to plaintiff’s first set of judicial council form interrogatories.
- 18 9. Attached as Exhibit “E” to this declaration is a true and correct copy of Defendants’
19 supplemental responses to plaintiff’s first set of judicial council form interrogatories.
- 20 10. Attached as Exhibit “F” to this declaration is a true and correct copy of an article published
21 by the *New York Times* entitled “Sunday Money: Spending: A Web Offer Too Good to Be
22 True? Read the Fine Print,” which is dated December 26, 2004. This article was printed
23
24

1 from the *New York Times* website and contains statements made by Brian Benenhaley, Chief
2 Operating Officer of Subscriberbase.

3 11. Attached as Exhibit “G” to this declaration is a true and correct copy of consent decree
4 entered into between SUBSCRIBERBASE, INC. and the State of Washington related to
5 *State of Washington v. Subscriberbase Holdings, Inc., et al.*, No. 08-2-14566-2SEA, (Super.
6 Ct. Wash. King County Apr. 30, 2008.)

7 12. Attached as Exhibit “H” to this declaration is a true and correct copy of an official press
8 release by the Washington State Attorney General’s Office about this consent decree. This
9 press release and the consent decree were printed from the Washington State Attorney
10 General’s Office Website at: <http://www.atg.wa.gov/pressrelease.aspx?id=19674>

11 13. Attached as Exhibit “I” to this declaration is a true and correct copy of 16 Code of Federal
12 Regulations § 251.1 “Guide Concerning Use of the Word ‘Free’ and Similar
13 Representations,” issued by the Federal Trade Commission.

14 14. Attached as Exhibit “J” to this declaration is a true and correct copy of the Virginia Circuit
15 Court’s judgment/order in the matter of *Egelman v. Subscriberbase, Inc.* No. CG03002632-
16 00 (Va. Circ. Ct. Charlottesville Gen. Dist. Oct. 10, 2003.)

17 15. Attached as Exhibit “K” to this declaration is a true and correct copy of a stipulated judgment
18 entered into by Subscriberbase in another matter involving plaintiff Daniel Balsam – *Balsam*
19 *v. Sourceout Inc., et al.*, No. CGC-05-441627 (Super Ct. Cal. Cty. Of San Francisco Apr. 3,
20 2006.) The claims against Subscriberbase arose from unsolicited commercial emails,
21 separate and apart from those at issue in this case, that were sent by Subscriberbase in
22 violation of California’s laws relating to unsolicited commercial email advertising.
23
24

1 16. Attached as Exhibit "L" is a true and correct copy of a February 28, 2008 judgment filed in
2 *Balsam v. DSG Direct, Inc., et al.*, No. 441630 (Super Ct. Cal. Cty. Of San Francisco
3 February 28, 2008.)

4 17. Attached as Exhibit "M" is a true and correct copy of defendant's further amended responses
5 to plaintiff's request for production of documents.
6

7 I declare under penalty of perjury under the laws of the State of California that the
8 foregoing is true and correct. Executed this ____ day of July, 2008, at Palo Alto, California.
9

10 _____
11 Timothy J. Walton

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EXHIBIT A

1 Timothy J. Walton (State Bar No. 184292)
WALTON & ROESS LLP
2 407 South California, Suite 8
Palo Alto, CA 93406
3 Telephone 650-566-855
Facsimile 650-566-8511

4 Attorneys for Plaintiff

5 STROOCK & STROOCK & LAVAN LLP
6 STEPHEN J. NEWMAN (State Bar No. 181570)
MARIAN K. SELVAGGIO (State Bar No. 224072)
7 2029 Century Park East, Suite 1800
Los Angeles, California 90067-3086
8 Telephone: 310-556-5800
Facsimile: 310-556-5959

9 Attorneys for Defendants
10 SUBSCRIBERBASE, INC.,
SUBSCRIBERBASE HOLDINGS, INC.,
11 CONSUMER RESEARCH CORPORATION, INC.,
FREE SLIDE INC., and INVOLVE MEDIA, INC.

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **FOR THE COUNTY OF SANTA CLARA (UNLIMITED JURISDICTION)**

15 DANIEL L. BALSAM, an Individual,)
16)
Plaintiff,)
17)
v.)

Case No. 106CV-066258
Case Management Judge: The Honorable
Mary Jo Levinger

18)
SUBSCRIBERBASE, INC., a South Carolina)
19 corporation; SUBSCRIBERBASE HOLDINGS,)
INC., a South Carolina corporation;)
20 CONSUMER RESEARCH CORPORATION,)
INC., a South Carolina corporation; FREE)
21 SLIDE, INC., a South Carolina corporation;)
INVOLVE MEDIA, INC., a South Carolina)
22 corporation; E-TRACK MEDIA CORP., a)
Florida corporation; REMEDY MEDIA, LLC, a)
23 Delaware limited liability corporation; S-)
INFOTECH, INC., a Florida corporation;)
24 ARBCDA.COM, a business entity of unknown)
organization; DQ MEDIA, a business entity of)
25 unknown organization; SMALL CAP)
INVESTOR, a business entity of unknown)
26 organization; and DOES 1-100.)

STIPULATION AS TO FACTS
Action Filed: June 27, 2006
Trial Date: None set

27 Defendants.)
28)

1 Upon the request by Plaintiff, the Parties in the above-captioned lawsuit by and through
2 their attorneys, agree that the following facts are to be accepted as true for purposes of the above-
3 entitled litigation only and for no other purpose.

4 **IT IS AGREED THAT:**

5 1. Defendants SubscriberBASE, Inc., SubscriberBASE Holdings, Inc., Consumer
6 Research Corporation, Inc., Free Slide, Inc., and Involve Media, Inc. are, for purposes of this
7 litigation only, to be treated as one entity.

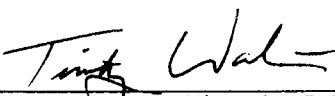
8 2. Defendants SubscriberBASE, Inc., SubscriberBASE Holdings, Inc., Consumer
9 Research Corporation, Inc., Free Slide, Inc., and Involve Media, Inc. sent or caused to be sent more
10 than one commercial email advertisement to Plaintiff Daniel L. Balsam.

11 3. At least two of the commercial email advertisements sent by Defendants
12 SubscriberBASE, Inc., SubscriberBASE Holdings, Inc., Consumer Research Corporation, Inc.,
13 Free Slide, Inc., and Involve Media, Inc. to Plaintiff Daniel L. Balsam were sent directly to Plaintiff
14 from Defendants' own servers.

15 4. At least two of the commercial email advertisements at issue in the litigation were
16 sent by persons other than Defendants SubscriberBASE, Inc., SubscriberBASE Holdings, Inc.,
17 Consumer Research Corporation, Inc., Free Slide, Inc., and Involve Media, Inc.

18 Dated: March 12, 2008

19 WALTON AND ROESS LLP
20 TIMOTHY J. WALTON

21 By: 
22 Timothy J. Walton
23 Attorneys for Plaintiff

24 Dated: March 7, 2008

25 STROOCK & STROOCK & LAVAN LLP
26 STEPHEN J. NEWMAN
27 MARIAN K. SELVAGGIO

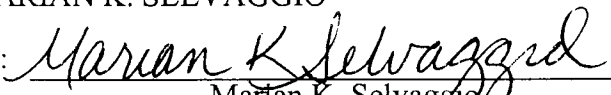
28 By: 
Marian K. Selvaggio
Attorneys for Defendants

EXHIBIT B

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT F

December 26, 2004

SPENDING

A Web Offer Too Good to Be True? Read the Fine Print

By BARBARA WHITAKER

THE e-mail messages are tantalizing: "Join now and receive a free [I.B.M.](#) laptop." "Your complimentary iPod with free shipping is waiting."

These offers and similar ones on the Internet promise gifts for buying products or services. Are they for real? At best, yes, but they can also be riddled with problems. Participants may have to spend a lot to qualify or may not get the reward if they fail to follow what can be complicated rules. Ultimately, they may end up with nothing more than a big increase in spam as their e-mail address and other information is passed along or sold.

Complaint sites are filled with messages from consumers who say they participated in such programs only to come up empty-handed.

One person, Vic of Northport, N.Y., participated in a deal and was disappointed in the experience. On a message board on [RipOffReport.com](#), he wrote: "The lesson is that the only thing on this earth that is truly free is your mother's love. Everything else has a string or catch attached."

Behind the offers are marketing companies whose goal is to generate customers for a wide range of businesses. They offer incentives - money or products - to people who sign up for items like credit cards, CD clubs or newspaper subscriptions. In return, the marketing company receives a fee, or bounty, for every customer it signs up.

Although the marketing companies will not divulge what they are paid per person, those familiar with the business say it averages \$40 to \$60.

This type of marketing is not new. But where companies once offered gifts like coffee mugs or beach towels in return for, say, signing up for a credit card, the Internet is making it possible for marketers to make more money by bringing multiple offers and consumers together. In return, they offer pricier enticements.

Paul Bresson, a spokesman for the Federal Bureau of Investigation, said no reports of fraud involving such operations had been made to the bureau's Internet Fraud Complaint Center (www.ifccfbi.gov). But he recommended that consumers examine such offers carefully.

"The thing to know about this is that anybody can do it," said Gary Stein, a senior analyst at Jupiter Research, an Internet consultancy. "They can be fraudulent, real or somewhere in between."

The marketers operate in numerous ways.

Gratis Internet, a Web marketer based in Washington, has developed a system in which it buys pricey products like iPods - www.freeipods.com - and gives them away. To receive the iPod, participants are asked to sign up for one of about 10 different offers and to persuade five others to do the same. They have developed similar programs giving out \$700 desktop computers (freedesktoppc.com), \$800 flat-screen televisions (freeflatscreens.com) and high-end designer handbags (freehandbags.com). The main difference between the offers is how many others must be signed up for the main participant to receive the "free" merchandise. Its customers include [Time Warner's AOL](#); [BMG Music Service](#), a CD club owned by Bertelsmann; and [USA Today](#), which is owned by the [Gannett Company](#).

Rob Jewell, co-founder of Gratis, says the company gives away 500 iPods a week. It posted revenue of nearly \$5 million in 2003 and expects that to hit \$15 million for 2004, he said.

"It's a very cost-effective way for advertisers to attract new customers," said Mr. Jewell, who is 27, "and it's good for consumers as well because they're getting a piece of that."

Mr. Jewell and his friend and business partner, Peter Martin, 28, started their operation with freecondoms.com, on which participants get points for purchases or signing up for programs, and the points can be redeemed for condoms.

Then they realized if they incorporated more people into the process they could offer a bigger prize, which led to the iPod giveaway.

They say they do not sell information about their users, and to receive promotional information participants must check a box.

The company provided the names and e-mail addresses of about two dozen people who had received free iPods.

One of those people was Jacob Snyder, a 27-year-old Manhattan resident who works for an architectural development firm in Newark. He said, "I did a lot of research because I didn't trust it."

But after finding what he deemed to be legitimate success stories, he decided to make a run at a free iPod. He signed up for a 45-day free offer for AOL 9.0, which he discontinued after a short

trial, and he also convinced five of his friends to participate in one of the offers. Within a month, he received his iPod.

"I think it's pretty cool," he said, adding that he is now participating in two other Gratis programs. "The hardest part was getting other people to sign up."

In contrast, the Consumer Research Corporation has a system where those who become members must acquire six points, one for every service they sign up for.

One of its sites, RetailReportCard.com, offers "free money to shop" when participants register. After providing basic information like name, address, phone number, age and e-mail address, participants are asked whether they are interested in programs ranging from receiving a free mortgage quote to lowering a student loan. Then they are told that to qualify for gift cards they must complete six offers.

RipOffReport.com lists dozens of complaints from participants in that program and others run by Consumer Research.

Brian Benenhaley, chief operating officer at SubscriberBase, of Columbia, S.C., which owns Consumer Research, said when the company receives a complaint, it is typically because a person has not familiarized themselves with the requirements before signing up.

"It's not for everybody," he said, adding that consumers do have to spend money to participate. "The question the user has to answer is: do they think the service they're paying for is worth it?"

Citing competitive reasons, Mr. Benenhaley declined to discuss how many members SubscriberBase had and what rewards it had given out. Although he said he would ask satisfied participants to discuss the program, no contacts were provided.

Some consumers found through Internet sources did not have kind words for Consumer Research.

Stephen Paquin of Charlton, Mass., said he had been attracted to ProductTestPanel.com, a Consumer Research site offering him a camera valued at \$1,299 if he volunteered to be a product tester. Mr. Paquin said he signed up for several offerings on the site, but was unable to complete the process because the site stopped working. Although he went back to the site, he was unable to pick up where he had left off in the ordering process.

Susan Grant, director of the National Fraud Information Center, a project of the National Consumers League, said "free" offers on the Internet should be examined closely for underlying costs. Typically, a business will need to cover the amount of the prize and such offers will be followed by an onslaught of solicitations. "I don't think a lot of people would really stop to think about the implications," she said.

John Morgan, 51, owner of a truck brokerage service in Columbia, S.C., said the onslaught of e-mail messages that he had received after filling out forms related to a Consumer Research offering overwhelmed the computer he used to run his business.

RANDOM spam filled the in-box he relies on for orders, and legitimate e-mail messages got lost, he said. The situation worsened when he tried to use the "unsubscribe" option on a spam note. He said his computer locked up, and after it was restarted, files began opening 50 to 60 times in row and the computer ran at a crawl.

Although ultimately the company assisted him in efforts to eradicate the spam, he said, it has remained a problem. "Once it gets put into all these systems, there's nothing on God's green earth that will stop it," he said.

EXHIBIT G

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2008 APR 30 PM 2:18

KING COUNTY
SUPERIOR COURT

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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff,

v.

SubscriberBASE Holdings, Inc.,
SubscriberBase, Inc., their wholly-
owned subsidiaries, and their d/b/a's,

Defendants.

NO. **08-2-14566-2SEA**
CONSENT DECREE

I. DECREE SUMMARY

- 1.1. Decree Creditor: State of Washington
- 1.2. Decree Debtors: SubscriberBASE Holdings, Inc., SubscriberBASE, Inc., their wholly-owned subsidiaries, and all entities under whose names they do business
- 1.3. Principal Decree Amount:
 - a. Civil Penalties: \$350,000.00, provided that \$55,000.00 shall be payable and \$295,000.00 suspended on condition of compliance with all of the terms of this Consent Decree
 - b. Restitution: See Section IV.
 - c. Costs and Attorneys' Fees: \$69,365.50

CONSENT DECREE

ATTORNEY GENERAL OF WASHINGTON
Consumer Protection Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7745

COPY

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1.4. Total Decree Amount: \$419,365.50, with \$295,000.00 suspended pursuant to Section V.

1.5. Attorney for Decree Creditor: Paula Selis, Senior Council

1.6. Attorney for Decree Debtors: Lisa Jose Fales, Gilead I. Light, J. Douglas Baldrige of Venable LLP

Plaintiff, State of Washington, having commenced this action on April 30, 2008, pursuant to the Unfair Business Practices—Consumer Protection Act (“Consumer Protection Act”), chapter 19.86 RCW; and

Defendants, SubscriberBASE Holdings, Inc., SubscriberBASE, Inc., their wholly-owned subsidiaries, and all entities under whose names they do business having been served with a Summons and Complaint filed in this matter or having waived service; and

Plaintiff appearing by and through its attorneys, Robert M. McKenna, Attorney General; and Paula Selis, Senior Council and Defendants appearing through their attorneys Lisa Jose Fales; Gilead I. Light, and J. Douglas Baldrige of Venable LLP; and

Plaintiff and Defendants having agreed on a basis for the settlement of the matters alleged in the Complaint, and to the entry of this Consent Decree against Defendants without the need for trial or adjudication of any issue of law or fact; and

Plaintiff and Defendants having agreed that this Consent Decree does not constitute evidence or an admission regarding the existence or non-existence of any issue, fact, or violation of any law alleged by Plaintiff; and

Defendants recognize and state that this Consent Decree is entered into voluntarily and that no promises or threats have been made by the Attorney General’s Office or any member, officer, agent or representative thereof to induce them to enter into this Consent Decree, except as provided herein; and

Defendants waive any right they may have to appeal from this Consent Decree; and

1 Defendants further agree that they will not oppose the entry of this Consent Decree on
2 the grounds the Consent Decree fails to comply with Rule 65(d) of the Rules of Civil
3 Procedure, and hereby waive any objections based thereon; and

4 Defendants further agree that this Court shall retain jurisdiction of this action for the
5 purpose of implementing and enforcing the terms and conditions of the Consent Decree and for
6 all other purposes; and

7 The Court finding no just reason for delay;

8 NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, AND DECREED as
9 follows:

10 II. GENERAL

11 2.1. Jurisdiction. This Court has jurisdiction of the subject matter of this action and
12 of the parties. Plaintiff's Complaint in this matter states claims upon which relief may be
13 granted under the provisions of the Consumer Protection Act, Chapter 19.86 RCW.

14 2.2. Definitions.

15 a. "Defendants" means SubscriberBASE Holdings, Inc., SubscriberBASE, Inc.,
16 their wholly-owned subsidiaries, and any and all entities under whose names they do business.

17 b. "Promotional Offer" means an advertising offer or campaign, created and/or
18 operated by Defendants on Defendants' websites, where a consumer may earn a "free" gift
19 item, prize, award, premium or similarly-denominated item in exchange for completing Third
20 Party Sponsor Offers.

21 c. "Landing Page" means, in online marketing, a specific web page that a visitor
22 reaches after clicking a link or advertisement in an e-mail or banner ad. This page usually
23 showcases content that is an extension of the link or ad.

24 d. "Third Party Sponsor Offer" means goods or services offered by a third party
25 and promoted on Defendants' Promotional Offer websites.
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3 **III. INJUNCTIONS**

4 3.1. Application of Injunctions. The injunctive provisions of this Consent Decree
5 shall apply to Defendants, and Defendants' successors, assigns, officers, agents, servants, and
6 employees, and all other persons or entities in active concert or participation with Defendants.

7 3.2. Notice. Defendants shall immediately inform all successors, assigns, officers,
8 agents, servants, employees, and all other persons or entities in active concert or participation
9 with Defendants of the terms and conditions of this Consent Decree.

10 3.3. Injunctions. Defendants and their successors, assigns, officers, agents,
11 servants, employees, and all other persons or entities in active concert or participation with
12 Defendants are hereby enjoined and restrained from, in the context of a Promotional Offer,
13 advertising, offering, selling, promoting, marketing or delivering any products or services,
14 prizes, premiums, "free" or similarly-denominated items, trial offers, memberships,
15 promotional items, or sweepstakes by any means whatsoever, to consumers resident in the
16 State of Washington.

17 3.4. Defendants and their successors, assigns, officers, agents, servants, employees,
18 and all other persons or entities in active concert or participation with Defendants shall:

19 a. Ensure that those consumers identifying themselves as Washington residents are
20 prevented from participating in any Promotional Offer, and

21 b. Include a clear and conspicuous disclosure on the Landing Page of Defendants'
22 Promotional Offer websites stating that the Promotional Offer is not valid to Washington
23 residents.

24 3.5. Defendants and their successors, assigns, officers, agents, servants, employees,
25 and all other persons or entities in active concert or participation with Defendants are, in the
26 context of Promotional Offers, hereby enjoined and restrained from:

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f. The email and letter notification text should read:

“Dear (Defendants fill in consumer’s name):

Our records indicate that between 2004 and 2007, you responded to a promotional offer for a “free” (Defendants fill in item promoted, i.e., HDTV, digital camera, etc.) from (Defendants fill in domain on which item was promoted, i.e., www.retailreportcard.com). In order to be eligible to obtain the “free” (Defendants fill in item promoted), you accepted one or more trial subscriptions or other offers. The offer(s) you accepted was/were for (Defendants identify offer(s) accepted, i.e. 4 posters for \$2, movie subscription, etc.).

Pursuant to a settlement agreement reached between our company and the Washington State Attorney General’s Office, you are eligible to receive a refund for the offers you accepted and paid for. Our company has a record of which offers you accepted. Your refund is limited to all amounts required to be paid to receive the product or service originally advertised in the offer so as to qualify for the free gift, usually a one-month payment and/or minimum purchase plus handling and shipping charges. You will also be eligible to receive an additional refund limited to one additional month’s payment for the product or service if you verify in the attached sworn statement that your attempts at cancelling the product or service within the time required to avoid extra payment were unsuccessful.

To receive your refund, please complete the attached form and either mail it to: [Defendants insert postal address] or email it to: [Defendants insert email address] no later than 60 days from the date of this email. To learn more about the refund program, please call the Washington State Attorney General’s Office’s Consumerline toll-free at 1-800-692-5082 or locally at 206-464-6811. You may also visit the Web site for the Washington State Attorney General’s Office at www.atg.wa.gov.”

If the notification is the letter sent via U. S. mail by Defendants pursuant to Paragraph 4.1(d), the deadline for sending the consumer’s response shall be thirty days from the date of the letter and the notification shall be modified accordingly.

g. The email and U.S. mail notifications sent by Defendants in compliance with 4.1 shall not include any advertising or information other than what is required herein.

4.2. The refund form referred to in 4.1(f) should require the consumer to identify his or her name, email and physical address, and must state that if the consumer paid more the Qualifying Amount and seeks to be refunded for these additional payments, that he or she must

1 swear to and sign the following statement (which shall be included in the form) in order to
2 receive the additional refund provided for in 4.1(b):

3
4 "I declare under penalty of perjury under the laws of the state in which I reside
5 that I attempted unsuccessfully to contact (consumer must fill in name of bank,
6 credit card company, merchant, or other entity contacted) in order to cancel the
7 offer I accepted for (consumer should fill in product or service accepted) within
8 the time required to avoid extra payment over the minimum purchase required,
9 but I was nonetheless charged the extra payment. I further declare that I have
not already been reimbursed for the extra payment by the merchant, my credit
card company, bank, SubscriberBASE, Inc. or any other entity. I hereby
authorize SubscriberBASE, Inc. to contact this bank, credit card company,
merchant or other entity and verify my transactions."

10 A line for the consumer's signature and the date must follow the statement.

11 4.3. Any consumers who completed the terms of a Promotional Offer and received a
12 free gift from Defendants shall be ineligible to receive any refunds. Any consumer who
13 previously contacted Defendants and to whom Defendants provided gifts, cash or merchandise
14 in response to the consumer contact, shall be ineligible to participate in the refund program
15 described herein.

16 4.4. Within ninety (90) days of the date the email notification provided for in 4.1 (a)
17 is sent, Defendants shall mail refund checks to all eligible Washington consumers from whom
18 Defendants received refund request forms as described in 4.1 and 4.2.

19 4.5. Within one hundred and ten (110) days of the date the email notification
20 provided for in 4.1 (a) is sent, Defendants shall provide to Plaintiff a report identifying the
21 names, physical addresses, email addresses, amounts and dates of refunds made to all
22 Washington consumers.

23 4.6. Defendants shall attest to the accuracy of the report and to the accuracy of all of
24 the records upon which they relied in order to issue the refunds. Defendants shall retain copies
25 of all transmissions and correspondences to and from the consumers they contact and shall
26 produce them upon the request of Plaintiff.

1 **V. CIVIL PENALTIES**

2 5.1. Pursuant to RCW 19.86.140, Plaintiff shall have and recover, and Defendants
3 shall be liable for and shall pay, civil penalties of \$350,000.00. However, \$295,000.00 of the
4 civil penalties are suspended conditioned upon Defendants' full compliance with the terms of
5 this Consent Decree.

6 5.2. Payment owing under 5.1 shall be in the form of a valid check paid to the order
7 of the "Attorney General—State of Washington" with \$55,000.00 due and owing immediately
8 upon entry of the Consent Decree. Payment shall be sent to the Office of the Attorney
9 General, Attention: Cynthia Lockridge, Administrative Office Manager, 800 Fifth Avenue,
10 Suite 2000, Seattle, Washington, 98104-3188.

11 **VI. ATTORNEY COSTS AND FEES**

12 6.1. Pursuant to RCW 19.86.080, Plaintiff shall recover and Defendants shall pay
13 the costs and reasonable attorneys' fees incurred by the Plaintiff in pursuing this matter in the
14 amount of \$69,365.50.

15 6.2. Payment owing under 6.1 shall be in the form of a valid check paid to the order
16 of the "Attorney General—State of Washington" and shall be due and owing upon entry of the
17 Consent Decree. Payment shall be sent to the Office of the Attorney General, Attention:
18 Cynthia Lockridge, Administrative Office Manager, 800 Fifth Avenue, Suite 2000, Seattle,
19 Washington, 98104-3188.

20 **VII. ENFORCEMENT**

21 7.1. Violation of any of the terms contained in this Consent Decree shall subject
22 Defendants to a civil penalty of up to \$25,000.00 per violation pursuant to RCW 19.86.140. In
23 the event the Attorney General believes that Defendants may have violated any terms of this
24 Decree, representatives of the Office of the Attorney General shall give written notice via
25 certified mail to Defendants and to Defendants' counsel, designated by Defendants as Lisa Jose
26 Fales of Venable LLP, of the specific alleged violation(s) and allow Defendants fourteen (14)

1 days to respond to the notice and to cure the alleged violation(s) prior to bringing an
2 enforcement action pursuant to this paragraph. Such notice shall not be required in those cases
3 where an Attorney General concludes that because of an alleged violation, a threat of
4 immediate and irreparable consumer harm requires immediate action.

5 7.2. In any action to enforce the terms of this Decree, Plaintiff may seek additional
6 remedies, including, but not limited to, restitution, injunctive relief, and reasonable attorneys'
7 fees and costs, in addition to any other remedies permitted by law.

8 7.3. This Consent Decree is entered pursuant to RCW 19.86.080. Jurisdiction is
9 retained for the purpose of enabling any party to this Consent Decree with or without the prior
10 consent of the other party to apply to the Court at any time for enforcement of compliance with
11 this Consent Decree, to punish violations thereof, or to modify or clarify this Consent Decree.

12 7.4. Representatives of the Office of the Attorney General shall be permitted to
13 access, inspect and/or copy all business records or documents under control of Defendants
14 solely in order to monitor compliance with this Consent Decree within fourteen (14) days of
15 written request to Defendants, provided that the inspection and copying shall be done in such a
16 way as to avoid disruption of Defendants' business activities. All records accessed, inspected,
17 or copied by the Washington Attorney General's Office shall be kept confidential pursuant to
18 the terms of RCW 19.86.110 and used solely for enforcement of this Consent Decree. Failure
19 to comply with this section will be considered a violation of the terms of this Consent Decree.

20 7.5. Representatives of the Office of the Attorney General may be permitted to
21 question Defendants, or any officer, agent, or employee of any business organization affiliated
22 with Defendants, in the form of a deposition, pursuant to the provisions and notice
23 requirements of CR 30, and to issue interrogatories and requests for production of documents,
24 pursuant to the provisions and notice requirements of CR 33 and CR 34, in order to monitor
25 compliance with this Consent Decree.
26

1 7.6. Nothing in this Consent Decree shall be construed as to limit or bar any other
2 governmental entity or consumer from pursuing other available remedies against Defendants.

3 7.7. Under no circumstances shall this Consent Decree or the name of the State of
4 Washington, the Office of the Attorney General, Consumer Protection Division, or any of their
5 employees or representatives be used by Defendants in connection with any selling,
6 advertising, or promotion of products or services, or as an endorsement or approval of
7 Defendants' acts, practices or conduct of business.

8 7.8. This Consent Decree resolves all issues raised by the Attorney General under
9 the Consumer Protection Act pertaining to the acts or omissions addressed in the Complaint
10 filed in this matter.

11 **VIII. DISMISSAL AND WAIVER OF CLAIMS**

12 8.1. Upon entry of this Consent Decree, all claims in this matter not otherwise
13 addressed by this Consent Decree are dismissed.

14 DONE IN OPEN COURT this ____ day of _____, 2008.

15 **APR 30 2008**


16 **D. Bruce Gardiner**

JUDGE/COURT COMMISSIONER

17 Approved for entry and presented by:

Approved for Entry, Notice of
Presentation Waived:

18 ROBERT M. MCKENNA
19 Attorney General

20 
21 PAULA SELIS, WSBA#12823
22 Attorneys for Plaintiff
23 State of Washington

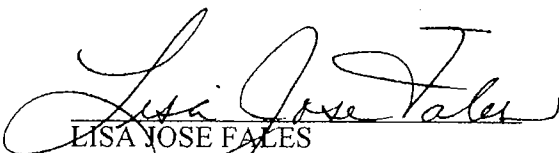
24 
25 LISA JOSE FALES
26 GILEAD I. LIGHT
J. DOUGLAS BALDRIDGE, WSBA# 37247
Venable, LLP
575 7th St. NW
Washington, DC 20004
202-344-8300
Attorneys for Defendants

EXHIBIT H



FOR IMMEDIATE RELEASE

April 30, 2008

Promoters of online freebies agree to stop selling in Washington

SEATTLE – Two online companies that promised consumers “free” big-ticket items but required them to pay for trial offers and subscriptions must pay \$55,000 in civil penalties under a settlement announced today by the Washington Attorney General’s Office. Under the terms of the [settlement](#), SubscriberBASE Holdings, Inc., of Columbia, S.C., and SubscriberBASE, Inc., can no longer offer such promotions to Washington residents. The companies also agreed to refund more than 35,000 Washington consumers who paid for products and services in order to qualify for the so-called “free” items.

“There’s a reason why folks say ‘there’s no such thing as a free lunch,’” said Attorney General Rob McKenna. “SubscriberBASE offered ‘free’ items such as high-definition televisions, digital cameras and laptops, but consumers had to pay more than the items were worth in order to receive them.

“We alleged SubscriberBASE misled consumers into believing that they would be shipped ‘free’ items worth thousands of dollars, but they first had to provide personal information which the defendants then leased to other online marketers. Consumers were then presented with a series of offers that required increasingly more expensive purchases in order to qualify for the ‘free’ item. The vast majority dropped out of the qualification process, but only after they had spent significant money.

“The companies’ main intent was to collect and sell consumers’ personal information to marketers. Under our settlement, the defendants can no longer advertise ‘free’ gift promotions

to Washington residents and cannot use, sell or lease the personal information of Washington consumers in its databases,” McKenna said.

The Attorney General’s Office alleged the companies’ practices violated Washington’s Consumer Protection Act. Under the settlement filed today in King County Superior Court, the defendants didn’t admit any wrongdoing but agreed to pay the \$55,000 in civil penalties, plus \$69,365 in attorneys’ fees and costs. An additional \$295,000 in civil penalties were suspended provided they comply with injunctive provisions included in the settlement and issue refunds to eligible consumers. Restitution could amount to more than \$2 million, depending on the number of consumers who respond to refund offer.

The state’s [complaint](#), also filed today in court, alleges SubscriberBASE attracted consumers with e-mail messages and online ads for a “[New Member Incentive Promotion](#).” Consumers interested in receiving the free products clicked on a Web link. They were then led through a series of steps in which they were asked to provide information or sign up for a service or product.

First, consumers were instructed to fill out an online form asking for their “shipping details” including name, mailing and e-mail addresses, birth date and phone number.

Next, they were asked to fill out a survey seeking further information about their buying preferences and interests. The survey also included links to advertisements for various products and services.

After completing the survey, consumers were instructed to select from various “Top” offers such as a membership to rent DVDs or receive monthly shipments of coffee. After choosing two “Top” offers, consumers were told they must select, accept and pay for two “Prime” offers and, finally, two “Premium” offers.” Unlike the earlier promotions, the “Premium” offers required consumers to spend thousands of dollars for items such children’s furniture, Rail Europe passes or Web site hosting.

“Businesses that market products or services online must be up front and truthful with their promotional offers,” said Senior Counsel Paula Selis, an assistant attorney general who heads up the Attorney General’s Consumer Protection High-Tech Unit. “The defendants named in our suit advertised products as ‘free,’ but consumers had to spend \$2,000-\$3,000 dollars. Under the

state’s Consumer Protection Act, an item can’t be advertised for free if there’s a significant undisclosed cost.”

SubscriberBASE will send e-mail messages and follow-up letters to Washington consumers who paid for offers as a result of its promotions and offer them refunds. Eligible consumers should check their inbox for a message within the next 30 days and respond immediately. The deadline to submit claims is 60 days from receipt of the e-mail. Washington consumers who have questions about the settlement can contact the Attorney General’s Consumer Resource Center at 1-800-551-4636 between 10 a.m. and 3 p.m. weekdays.

DOCUMENTS:

[SubscriberBASE et al complaint](#)

[SubscriberBASE et al consent decree](#)

Graphics: [Screenshots](#), [Database Ad](#)

- 30 -

Media Contacts: Kristin Alexander, Media Relations Manager, (206) 464-6322, (206) 437-2654
Paula Selis, Senior Counsel, (206) 464-7662

EXHIBIT I

FTC GUIDE CONCERNING USE OF THE WORD "FREE" AND SIMILAR REPRESENTATIONS

§251.1 The guide.

(a) General. (1) The offer of "Free" merchandise or service is a promotional device frequently used to attract customers. Providing such merchandise or service with the purchase of some other article or service has often been found to be a useful and valuable marketing tool.

(2) Because the purchasing public continually searches for the best buy, and regards the offer of "Free" merchandise or service to be a special bargain, all such offers must be made with extreme care so as to avoid any possibility that consumers will be misled or deceived. Representative of the language frequently used in such offers are "Free", "Buy 1-Get 1 Free", "2-for-1 Sale", "50% off with purchase of Two", "1 Sale", etc. (Related representations that raise many of the same questions include "XX Cents-Off", "Half-Price Sale", "1/2 Off", etc. See the Commission's "Fair Packaging and Labeling Regulation Regarding 'Cents-Off' and Guides Against Deceptive Pricing.")

(b) Meaning of "Free". (1) The public understands that, except in the case of introductory offers in connection with the sale of a product or service (See paragraph (f) of this section), an offer of "Free" merchandise or service is based upon a regular price for the merchandise or service which must be purchased by consumers in order to avail themselves of that which is represented to be "Free". In other words, when the purchaser is told that an article is "Free" to him if another article is purchased, the word "Free" indicates that he is paying nothing for that article and no more than the regular price for the other. Thus, a purchaser has a right to believe that the merchant will not directly and immediately recover, in whole or in part, the cost of the free merchandise or service by marking up the price of the article which must be purchased, by the substitution of inferior merchandise or service, or otherwise.

(2) The term regular when used with the term price, means the price, in the same quantity, quality and with the same service, at which the seller or advertiser of the product or service has openly and actively sold the product or service in the geographic market or trade area in which he is making a "Free" or similar offer in the most recent and regular course of business, for a reasonably substantial period of time, i.e., a 30-day period. For consumer products or services which fluctuate in price, the "regular" price shall be the lowest price at which any substantial sales were made during the aforesaid 30-day period. Except in the case of introductory offers, if no substantial sales were made, in fact, at the "regular" price, a "Free" or similar offer would not be proper.

(c) Disclosure of conditions. When making "Free" or similar offers all the terms, conditions and obligations upon which receipt and retention of the "Free" item are contingent should be set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood. Stated differently, all of the terms, conditions and obligations should appear in close conjunction with the offer of "Free" merchandise or service. For example, disclosure of the terms of the offer set forth in a footnote of an advertisement to which reference is

made by an asterisk or other symbol placed next to the offer, is not regarded as making disclosure at the outset. However, mere notice of the existence of a "Free" offer on the main display panel of a label or package is not precluded provided that (1) the notice does not constitute an offer or identify the item being offered "Free", (2) the notice informs the customer of the location, elsewhere on the package or label, where the disclosures required by this section may be found, (3) no purchase or other such material affirmative act is required in order to discover the terms and conditions of the offer, and (4) the notice and the offer are not otherwise deceptive.

(d) Supplier's responsibilities. Nothing in this section should be construed as authorizing or condoning the illegal setting or policing of retail prices by a supplier. However, if the supplier knows, or should know, that a "Free" offer he is promoting is not being passed on by a reseller, or otherwise is being used by a reseller as an instrumentality for deception, it is improper for the supplier to continue to offer the product as promoted to such reseller. He should take appropriate steps to bring an end to the deception, including the withdrawal of the "Free" offer.

(e) Resellers' participation in supplier's offers. Prior to advertising a "Free" promotion, a supplier should offer the product as promoted to all competing resellers as provided for in the Commission's "Guides for Advertising Allowances and Other Merchandising Payments and Services." In advertising the "Free" promotion, the supplier should identify those areas in which the offer is not available if the advertising is likely to be seen in such areas, and should clearly state that it is available only through participating resellers, indicating the extent of participation by the use of such terms as "some", "all", "a majority", or "a few", as the case may be.

(f) Introductory offers. (1) No "Free" offer should be made in connection with the introduction of a new product or service offered for sale at a specified price unless the offeror expects, in good faith, to discontinue the offer after a limited time and to commence selling the product or service promoted, separately, at the same price at which it was promoted with the "Free" offer.

(2) In such offers, no representation may be made that the price is for one item and that the other is "Free" unless the offeror expects, in good faith, to discontinue the offer after a limited time and to commence selling the product or service promoted, separately, at the same price at which it was promoted with a "Free" offer.

(g) Negotiated sales. If a product or service usually is sold at a price arrived at through bargaining, rather than at a regular price, it is improper to represent that another product or service is being offered "Free" with the sale. The same representation is also improper where there may be a regular price, but where other material factors such as quantity, quality, or size are arrived at through bargaining.

(h) Frequency of offers. So that a "Free" offer will be special and meaningful, a single size of a product or a single kind of service should not be advertised with a "Free" offer in a trade area for more than 6 months in any 12-month period. At least 30 days should elapse before another such offer is promoted in the same trade area. No more than three such offers should be made in the same area in any 12-month period. In such period, the offeror's sale in that area of the product in the size promoted with a "Free" offer should not exceed 50 percent of the total volume of his sales of the product, in the same size, in

the area.

(i) Similar terms. Offers of "Free" merchandise or services which may be deceptive for failure to meet the provisions of this section may not be corrected by the substitution of such similar words and terms as "gift", "given without charge", "bonus", or other words or terms which tend to convey the impression to the consuming public that an article of merchandise or service is "Free".

(38 Stat. 717, as amended; 15 U.S.C. 41 - 58)
[36 FR 21517, Nov. 10, 1971]

EXHIBIT J

Virginia Courts Case Information

[Name List](#)
[Main Menu](#)
[Logoff](#)

Charlottesville General District (Prepayable)

Case Details

| | | |
|-----------------------------------|---------------------------------|-----------------------------------|
| Case Number: GV03002362-00 | Filed: 06/03/03 | Case Type: Warrant in Debt |
| Debt Type: | Number of Plaintiffs: 01 | Number of Defendants: 01 |
| Possession: | | |

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|----------------------------------|
| Plaintiff #1 Information: |
| Name: EGELMAN, SERGE |
| Trading As: |
| Judgment: Plaintiff |

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| Defendant #1 Information: |
| Name: SUBSCRIBER BASE INC |
| Trading As: |
| Judgment: Plaintiff |

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| Attorneys |
| Plaintiff Attorney: JAMES W. GARRETT |
| Defendant Attorney: BRYAN D. WRIGHT |

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|----------------------------------|
| Defendant #2 Information: |
| Name: |
| Trading As: |
| Judgment: |

| Hearings | | | | |
|----------|----------|-------|-----------|------|
| Number | Date | Time | Result | Type |
| 01 | 07/15/03 | 0230P | Continued | |
| 02 | 09/12/03 | 0130P | Continued | |
| 03 | 10/03/03 | 0130P | Continued | |
| 04 | 10/16/03 | 0130P | Judgment | |

| | |
|---|--|
| Judgment: Plaintiff | Judgment Amount: \$470.00 |
| Other Amount: \$.00 | Interest Award: 9 % FROM 10/16/03 |
| Cost: \$50.00 | Attorney Fees: \$5,000.00 |
| Is Judgment Satisfied: Yes Date Satisfied: 03/24/04 | |
| Homestead Exemption Waived: | |
| Other: | |

[Name List](#)
[Main Menu](#)
[Logoff](#)

Commonwealth of Virginia



WILLIAM G. BARKLEY, JUDGE
CIVIL DIVISION
971-3382

SIXTEENTH JUDICIAL DISTRICT
CHARLOTTESVILLE GENERAL DISTRICT COURT
606 EAST MARKET STREET
CHARLOTTESVILLE, VIRGINIA 22901

W. C. CALK, CLERK
CRIMINAL AND TRAFFIC
971-3385

James W. Garrett, Esquire
Lloyd J. Snook, III, Esquire
P.O. Box 2486
Charlottesville, Virginia 22902

October 10, 2003

Bryan D. Wright, Esquire
Brian Benenhaley, Esquire
Enterprise Center
401 East Market Street, Suite 101
Charlottesville, Virginia 22902-5264

Gentlemen:

The Court has now had the opportunity to further review and reflect on the testimony presented at the trial of this case on October 3, 2003, as well as the arguments of counsel.

The Court finds that the Defendant did violate Virginia Code Section 18.2-152.4(A)7 in regards to its transmission of 47 emails to Plaintiff. Both sides presented evidence that the primary difference between bulk emailing and spam is permission. The Plaintiff denied that he had given Defendant permission to make any transmissions to him. He further testified that he only registered with companies that agreed not to sell his address and he denied any co-registration. The Defendant, through its President Jeff French, argued that Plaintiff had given permission through co-registration but Defendant failed to present any evidence to support that allegation. The evidence admitted at trial showed that the transmissions by Defendant to Plaintiff were unsolicited.

The Court specifically finds that the Defendant provided false routing information of unsolicited bulk mail to Plaintiff. It is of special concern to the Court that 25 of the transmissions occurred after the Plaintiff notified the Defendant on April 10, 2003, of their violation of the statute.

Pursuant to Virginia Code Section 18.2-152.12 the Court finds that Plaintiff is entitled to statutory damages of \$10 per transmission. The Court further finds that Plaintiff is entitled to an award for attorney fees as provided for in the statute. The amount of attorney fees should be appropriate to the complexity of the case and not solely tied to the amount of the statutory damages assessed by the Court.

For the reasons set forth above the Court will award Plaintiff the sum of \$470 in damages as well as \$5000 in attorney fees as well as the filing fee of \$50. Plaintiffs claim for fees and costs in excess of these amounts is denied. Defendants claim for attorney fees and costs is denied.

Since the parties are being advised of this decision by mail it will not be formally entered until October 14, 2003. Each sides right to appeal this decision shall run from that date.

The Court commends counsel for both sides on their efforts in presenting the evidence and arguments of their respective clients.

Very truly yours,

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

William G. Barkley

EXHIBIT K

ORIGINAL

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FILED
San Francisco County Superior Court

APR - 3 2006

GORDON PARK-LI, Clerk
BY: Maura Celina Ramirez
Deputy Clerk

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO**

DANIEL L. BALSAM, an Individual,
Plaintiff,

v.

SOURCEOUT, INC., a California corporation;
et al.
Defendants.

) Case No. CGC-05-441627

) *ml clerk's*
) ~~PROPOSED~~ FINAL JUDGMENT AS TO
) SUBSCRIBERBASE, INC.,
) SUBSCRIBERBASE HOLDINGS, INC.
) AND CONSUMER RESEARCH
) CORPORATION, INC. PURSUANT TO
) COMPROMISE OF PENDING ACTION
) (Code of Civil Procedure Section 998)

) Action Filed: May 25, 2005
) Trial Date: None set

) [Original Offer to Compromise Pursuant to
) Code of Civil Procedure Section 998 and
) Original Acceptance of Offer to
) Compromise Pursuant to Code of Civil
) Procedure Section 998 filed concurrently]

50319346v1

[PROPOSED] FINAL JUDGMENT AS TO SUBSCRIBERBASE, INC., SUBSCRIBERBASE HOLDINGS, INC. AND CONSUMER RESEARCH CORPORATION, INC. PURSUANT TO COMPROMISE OF PENDING ACTION

1 Pursuant to Defendants SubscriberBASE, Inc., SubscriberBASE Holdings, Inc. and
2 Consumer Research Corporation, Inc.'s (collectively, "SubscriberBASE") Offer To Compromise
3 Pursuant to Code of Civil Procedure Section 998 and Plaintiff Daniel L. Balsam's acceptance of
4 said compromise, filed concurrently herewith, IT IS HEREBY ORDERED, ADJUDGED AND
5 DECREED THAT:

6 The compromise of action is approved. nd ~~Final~~ ^{clerk's} judgment is hereby entered in favor of
7 Plaintiff in the amount of \$5,000.00 (Five Thousand Dollars and No Cents), which includes
8 Plaintiff's costs and attorneys fees.

9
10
11 Dated: APR 03 2006

Maura Roming
~~San Francisco Superior Court Judge~~ nd
Deputy Clerk

12
13
14
15 Submitted by:

16 STROOCK & STROOCK & LAVAN LLP
17 STEPHEN J. NEWMAN
18 MARIAN K. SELVAGGIO

19 By: Marian K. Selvaggio
20 Marian K. Selvaggio

21 Attorneys for Defendants
22 SUBSCRIBERBASE HOLDINGS, INC. and
23 CONSUMER RESEARCH CORPORATION,
24 INC.
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PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss

I am employed in the County of Los Angeles, State of California, over the age of eighteen years, and not a party to the within action. My business address is: 2029 Century Park East, Suite 1800, Los Angeles, California 90067-3086.

On March 28, 2006, I served the foregoing document(s) described as: **[PROPOSED] FINAL JUDGMENT AS TO SUBSCRIBERBASE, INC., SUBSCRIBERBASE HOLDINGS, INC. AND CONSUMER RESEARCH CORPORATION, INC. PURSUANT TO COMPROMISE OF PENDING ACTION (Code of Civil Procedure Section 998)** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

[PLEASE SEE ATTACHED SERVICE LIST]

(VIA PERSONAL SERVICE) By causing to be delivered the document(s) listed above to the person(s) at the address(es) set forth above.

(VIA U.S. MAIL) In accordance with the regular mailing collection and processing practices of this office, with which I am readily familiar, by means of which mail is deposited with the United States Postal Service at Los Angeles, California that same day in the ordinary course of business, I deposited such sealed envelope, with postage thereon fully prepaid, for collection and mailing on this same date following ordinary business practices, addressed as set forth below.

(VIA FACSIMILE) By causing such document to be delivered to the office of the addressee via facsimile.

(VIA OVERNIGHT DELIVERY) By causing such envelope to be delivered to the office of the addressee(s) at the address(es) set forth above by overnight delivery via Federal Express or by a similar overnight delivery service.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 28, 2006, at Los Angeles, California.

Juliana Sepko
[Type or Print Name]


[Signature]

SERVICE LIST

For Daniel L. Balsam:

Timothy J. Walton
Walton & Roess LLP
407 South California Avenue, Suite 8
Palo Alto, CA 94306

**For Bruce J. Frisch d/b/a
Intelligent Resources**

Bruce J. Frisch
106 Pasatiempo Drive
Santa Cruz, CA 95060

For Adams Acres Marketing, Inc.:

Thomas A. Emerton
Bradley, Elsbernd, Emerton
& Andersen, P.C.
202 West Third
P.O. Box 639
Grand Island, NE 68802-0639

For Expedite Media Group, Inc.:

Joshua S. Levenberg, Attorney
Liner Yankelevitz Sunshine
& Regenstreif, LLP
199 Fremont Street, Suite 2000
San Francisco, CA 94105

For Expedite Media Group, Inc.

Stuart Smith
Gordon & Glickson
444 N. Michigan Avenue, Suite 3600
Chicago, IL 60611-3903

For Seven Investment Group, LLC

Mohammad Reza Sahranavard
2313 South Santa Fe Avenue
Los Angeles, CA 90058

For Secure Call Management, Inc.

Robert Klayman
4401 Wilshire Boulevard, Second Floor
Los Angeles, CA 90010

STROOCK & STROOCK & LAVAN LLP
2029 Century Park East, Suite 1800
Los Angeles, California 90067-3086

CERTIFICATE OF SERVICE BY MAIL

I, MAURA RAMIREZ, a deputy clerk of the Superior Court for the County of San Francisco, hereby certify that:

I am not a party to this action.

On the date appearing below, I served the attached

CLERK'S JUDGMENT (CCP §998) AND NOTICE OF ENTRY OF JUDGMENT

By placing a copy thereof in a sealed envelope, addressed as follows:

TIMOTHY J. WALTON
WALTON & ROESS LLP
407 SOUTH CALIFORNIA AVE, STE 8
PALO ALTO, CA 94306

MARIAN K. SELVAGGIO
STROOCK & STROOCK & LAVAN LLP
2029 CENTURY PARK EAST, STE 1800
LOS ANGELES, CA 90067-3086

and,

I then placed the sealed envelope in the outgoing mail at 400 McAllister Street, San Francisco, CA, 94102 on the date indicated below for collection, attachment of required postage and mailing on that date, following standard court practices.

DATE: April 3, 2006

GORDON PARK-LI, Clerk

By: 
Maura Ramirez, Deputy Clerk

EXHIBIT L

1 Timothy J. Walton (State Bar No. 184292)
2 WALTON & ROESS LLP
3 407 South California
Suite 8
4 Palo Alto, CA 94306

5 Phone (650) 566-8500
6 Fax: (650) 618-8687

7 Attorneys for Plaintiff
8 DANIEL L. BALSAM

FILED
San Francisco County Superior Court

FEB 28 2008

GORDON PARK-LI, Clerk

BY: [Signature]
Clerk

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF SAN FRANCISCO (UNLIMITED JURISDICTION)**

11 DANIEL L. BALSAM,) Case No.: 441630
12)
Plaintiff,) **JUDGMENT OF COURT**
13 vs.)
14 DSG DIRECT, INC., et al.,)
15 Defendants.)

- 16 1. Defendants DSG DIRECT, INC., YOUR-INFO, INC. and DIABETIC PLUS, INC. were
17 each properly served with a copy of the summons and complaint.
18
19 2. Defendants DSG DIRECT, INC., YOUR-INFO, INC. and DIABETIC PLUS, INC., filed
20 an answer but failed to appear at trial call.
21
22 3. The Court considered Plaintiff's oral testimony, heard on February 25, 2008.
23
24 4. The Court finds that commercial email subject lines that advertise goods/services as
25 being free without clearly disclosing in the subject lines that there are conditions attached
26 are deceptive and violate Cal. Bus. & Prof. Code § 17529.5(a)(3) and the Consumers
27 Legal Remedies Act (Civil Code § 1750 *et seq.*)

1 5. The Court finds that a domain name is analogous to an identity on the Internet. The
2 Court finds that sending commercial emails from multiple domain names, when there is
3 no justifiable business rationale for doing so: 1) is a deceptive means for the sender to
4 portray itself as if it were actually multiple entities, and 2) is a deceptive means of
5 evading spam filters, and therefore 3) violates Cal. Bus. & Prof. Code § 17529.5(a)(2).
6

7 6. Judgment is entered as follows by the Court:

8 7. Judgment is for Plaintiff DANIEL L. BALSAM and against Defendants DSG DIRECT,
9 INC., YOUR-INFO, INC. and DIABETIC PLUS, INC.

10 8. Defendants DSG DIRECT, INC. and YOUR-INFO, INC. are jointly and severally liable
11 to Plaintiff on the complaint: \$169,167.00 in damages, \$26,000.00 in attorneys' fees, and
12 \$4,000.00 in costs, for a total ~~money judgment of \$200,167.00.~~
of \$199,167

13 *In addition JRG.*
14 ~~9.~~ Defendant DIABETIC PLUS, INC. is liable to Plaintiff on the complaint: \$1,000.00 in
15 *JRG.* damages, for a total money judgment of ~~\$1,000.00.~~
JRG. \$200,167.00

16 ~~10.~~ Defendants DSG DIRECT, INC., YOUR-INFO, INC. and DIABETIC PLUS, INC. and
17 each of them, are prohibited from sending unlawful commercial email advertising either
18 directly or through agents, servants, and employees. All persons acting under, in concert
19 with, or for Defendants DSG DIRECT, INC., YOUR-INFO, INC. and DIABETIC PLUS,
20 INC. are similarly prohibited from sending unlawful commercial email advertising.
21

22
23 IT IS SO ORDERED:

24 Date: *2-27-08*

William R. Gargano

Judge of the Superior Court

25 **WILLIAM R. GARGANO**
26 **Commissioner**
27

EXHIBIT M

1 SCHIFF HARDIN LLP
John S. Worden (State Bar No. 142943)
2 Alex P. Catalona (State Bar No. 200901)
One Market, Spear Street Tower, 32nd Floor
3 San Francisco, CA 94105
Telephone: (415) 901-8700
4 Facsimile: (415) 901-8701

5 WALTON & ROESS LLP
Timothy J. Walton (State Bar No. 184292)
6 407 South California
Suite 8
7 Palo Alto, CA 94306
Telephone: (650) 566-8500
8 Facsimile: (650) 566-8511

9 Attorneys for Plaintiff
DANIEL L. BALSAM
10

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF SANTA CLARA (UNLIMITED JURISDICTION)**

13 DANIEL L. BALSAM,) Case No.: 1-06-CV-066258
14)
Plaintiff,) **[PROPOSED] ORDER GRANTING**
15) **PLAINTIFF’S MOTION FOR SUMMARY**
vs.) **ADJUDICATION**
16)
SUBSCRIBERBASE, INC., *et al.*,) Date: October 2, 2008
17) Time: 9:00 a.m.
Defendants.) Dept: 5
18) Judge: Hon. Mary Jo Levinger
19)
20) Action Commenced: July 28, 2006
21) Trial Date: November 10, 2008
22)
23)
24)

Plaintiff’s motion for summary judgment came on regularly for hearing before the Court on October 2, 2008, in Department 5, in the Superior Court of Santa Clara County. The parties appeared through their counsel of record.

1 After full consideration of the evidence and separate statements of each party, as well as
2 oral argument by counsel, the Court finds there is no triable issue of material fact in this action
3 and that the moving party is entitled to summary adjudication as a matter of law as to the
4 following:

5 (1) The Court [___ GRANTS ___ DENIES] summary adjudication on the ground that
6 Subscriberbase sent 804 emails that violated California’s anti-spam law, Business & Professions
7 Code § 17529.5(a)(3), because they contained misleading email subject lines offering
8 merchandise as “free,” or equivalent language, when it was actually not free;

9 (2) The Court [___ GRANTS ___ DENIES] summary adjudication on the ground that
10 Subscriberbase “affiliates,” third-party marketing agents acting on its behalf, sent an additional
11 42 emails that violated California’s anti-spam law, Business & Professions Code § 17529.5(a)(3)
12 because they contained misleading email subject lines offering merchandise as “free,” or
13 equivalent language, when it was actually not free;

14 (3) The Court [___ GRANTS ___ DENIES] summary adjudication on the ground that
15 Subscriberbase sent 132 emails that violated California’s anti-spam law, Business & Professions
16 Code § 17529.5(a)(3), because they contained misleading email subject lines which offered
17 products to violate copyright laws which they could not legally provide;

18 (4) The Court [___ GRANTS ___ DENIES] summary adjudication on the ground that
19 Subscriberbase and its third-party marketing agents, sent 108 emails that violated California’s
20 anti-spam law, Business & Professions Code § 17529.5(a)(3), because they contained misleading
21 email subject lines which advertised “get rich quick” and pyramid schemes;

22 (5) The Court [___ GRANTS ___ DENIES] summary adjudication on the ground that
23 Subscriberbase sent 109 emails that violated California’s anti-spam law, Business & Professions
24

1 Code § 17529.5(a)(3), because they contained misleading email subject lines which advertised
2 deceptive debt reduction schemes;

3 (6) The Court [___ GRANTS ___ DENIES] summary adjudication on the ground that
4 Subscriberbase and its third-party marketing agents sent 130 emails that violated California’s
5 anti-spam law, Business & Professions Code § 17529.5(a)(3), because they contained misleading
6 email subject lines subject to numerous different interpretations and thus did not clearly
7 communicate the contents of the email;

8 (7) The Court [___ GRANTS – DENIES] summary adjudication on the ground that
9 Subscriberbase sent 20 emails that violated California’s anti-spam law, Business & Professions
10 Code § 17529.5(a)(3), because they contained misleading subject lines that informed recipients
11 they were “guaranteed” to be approved for credit cards when Subscriberbase had no knowledge
12 or basis to make such a guarantee;

13 (8) The Court [___ GRANTS ___ DENIES] summary adjudication on the ground that
14 Subscriberbase sent at least 629 emails that violated California’s anti-spam law, Business &
15 Professions Code § 17529.5(a)(2) because they misrepresented and concealed the true identity of
16 the sender, Subscriberbase.

17 **IT IS THEREFORE ORDERED** that the said motion for summary adjudication is
18 **GRANTED** as to these issues. Subscriberbase has not provided evidence that it established and
19 implemented, with due care, practices and procedures reasonably designed to effectively prevent
20 the above unsolicited commercial e-mail advertisements that were in violation of this section.

21 As provided by Business & Professions Code section 17529.5(b)(B)(ii), plaintiff is awarded
22 liquidated damages of \$1000 for each of the above emails in violation of section 17529.5.

23 Adding these violations together, plaintiff shall be awarded \$_____. The
24

1 Court does not in this order decide issues of attorneys' fees pursuant to Business and Professions
2 Code § 17529.5(b)(1)(C), costs, or any claims regarding liability or damages not raised in
3 plaintiff's motion for summary adjudication.

4 **IT IS SO ORDERED.**

5
6 Dated: _____

7 THE HONORABLE MARY JO LEVINGER,
8 JUDGE OF THE SUPERIOR COURT

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