

1 William Silverstein

2
3 in propria persona

4
5 CALIFORNIA SUPERIOR COURT
6 COUNTY OF LOS ANGELES

7
8 WILLIAM SILVERSTEIN, an individual,

9 Plaintiff,

10 vs.

11
12 EYEFIVE, INC,
13 GLOBAL WEB PROMOTIONS PTY, LTD, AND
14 DOES 1-19,

15 Defendants.

Case No.: BC300938

**AMENDED VERIFIED
COMPLAINT FOR DAMAGES
AND INJUNCTIVE**

RELIEF for:

- 1. **Trespass to chattels**
- 2. **Negligence**
- 3. **Unlawful advertising practices**
- 4. **Breach of contract**
- 5. **Violation of Business and Professional Code § 17538.45**

Jury Trial Requested

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18
19 **Plaintiff alleges as follows:**

20
21 **THE PARTIES**

22
23 1. Plaintiff William Silverstein is, and at all times relevant was, resident of
24 California, residing in Los Angeles County.

25 2. Plaintiff is informed and believes and thereon alleges that Eyefive, Inc. ("Eye5") is
26 a California Corporation with a physical address of 16742 Stagg St. #101; Van Nuys,
27 California and a registered mailing address of 1940 Westwood Blvd No 270; Los Angeles, CA
28 90025.

1 3. Plaintiff is informed and believes and thereon alleges that Defendant Global Web
2 Promotions Pty Ltd is an Australian Proprietary Company with a Principal Place of Business
3 of 56 Ashdale Blvd, DARCH, WA 6065, Perth Australia..

4 4. Plaintiff is informed and believes and thereon alleges that Defendant Global Web
5 Promotions Pty Ltd (“GlobalWeb”) puts forth to the public that they have an office located at
6 16742 Stagg St. #101; Van Nuys, California.

7 5. Plaintiff is informed and believes and thereon alleges that Defendant Eye5 acts as
8 an agent of GlobalWeb.

9 6. Plaintiff is ignorant of the true names and capacity of Defendants sued herein as
10 DOES 1-19, inclusive, and therefore sue those Defendants by such fictitious names. Plaintiff
11 will amend this complaint to allege their true names and capacities when ascertained.

12 7. Plaintiff is informed and believes that and thereon alleges that Defendant Eye5 at
13 all times relevant acted as an agent of Defendant GlobalWeb.

14 8. Plaintiff is informed and believes and thereon alleges that each of the fictitiously
15 named Defendants is responsible in some manner for the occurrences herein. These
16 occurrences are the proximate cause of damages to Plaintiff.

17 9. Plaintiff is informed and believes and thereupon alleges that at all times relevant,
18 the herein mentioned Defendants were the agents, servants, employees, and the co-
19 conspirators of their the DOE Defendants and Defendant GlobalWeb, and in doing the things
20 hereinafter mentioned were acting within the course and scope of their authority as such
21 agents, servants, and employees with the permission, consent, and encouragement of their co-
22 Defendants.

23 10. Plaintiff is informed and believes and thereupon alleges that at all times relevant,
24 that Eye5 was an agent of GlobalWeb and the DOE defendants for order processing and
25 shipping.

26 11. Plaintiff is informed and believes and thereupon alleges that Eye5 is the supplier of
27 the “Virility Pills VP-RX” to the other co-defendants

28 12. Plaintiff is informed and believes and thereupon alleges that Eye5 has a trademark
in “Virility Pills VP-RX.”

1 going to the domain is being handled by a California e-mail service provider using servers in
2 California that prohibit unsolicited commercial e-mail.

3 23. Restricting the use of the Plaintiff's websites via a referenced "Terms Of Use"
4 page, is a common practice on the internet, a practice that has been embraced by the
5 Defendants for their own website.

6 24. Defendants can automatically determine the location of e-mail server any e-mail
7 address on the server with simple software.

8 25. Commencing on a date unknown, but prior to April 24, 2003, Defendants used
9 Plaintiff's equipment and services to send Plaintiff more than 90 unsolicited commercial e-
10 mails.

11 26. One of e-mail addresses to which Defendants sent spam was available by illegally
12 accessing Plaintiff's web server, as that particular e-mail address was only used for internal
13 website programming.

14 27. Plaintiff is informed and believes, and therefore alleges that another one of the e-
15 mail addresses that Defendants used to sent spam to was only available by illegally accessing
16 whois servers that belong to Go Daddy, Inc., in violations of Go Daddy's Terms of Service.

17 28. Plaintiff is informed and believes and therefore alleges that Defendants' knowingly
18 and willfully transmit e-mail advertisements are done in a manner specifically designed to
19 bypass filters intended to identify and delete e-mail advertising.

20 29. Plaintiff is informed and believes and thereupon alleges that Defendants created
21 and sent e-mails consisting of commercial advertising that is designed to deceive the recipient
22 as to the actual origin and contents, so that the recipient must open, decode, and read the e-
23 mail determine the true nature of the e-mail.

24 30. Defendants used deceptive subject lines in these e-mails giving the appearance that
25 these e-mails were from Plaintiff's friends or acquaintances, requiring the Plaintiff to read the
26 e-mail to determine that these e-mails were in fact solicitations for the Defendants' products.

27 31. Neither Plaintiff nor any registered user of Plaintiff's e-mail services ever
28 explicitly requested any e-mail advertising from the Defendants.

32. Prior to Defendants' sending of e-mails neither Plaintiff nor any registered user of
Plaintiff's e-mail services had any kind pre-existing relationship with the Defendants.

1 33. On July 31, 2003, Plaintiff personally delivered a demand letter to Defendant Eye5
2 that instructed them, and all their co-defendants, to stop sending spam, to identify their agents,
3 and to tender payment to Plaintiff as a settlement for damages incurred by the actions of
4 Defendants.

5 34. In the aforementioned letter, Plaintiff also informed Defendants that the spams
6 were not welcome, that Plaintiff is a California e-mail service provider that has a policy
7 against spam, and that further spam would be subject to the referenced terms of use on
8 Plaintiff's website.

9 35. Defendants used a non-functioning Hotmail e-mail address as a sender-operated e-
10 mail address to request that the sender not to e-mail any further unsolicited documents.

11 36. Plaintiff is informed and believes, and therefore alleges that the Defendants use of
12 a non-function Hotmail e-mail violates trademark law, Microsoft's terms of use, and causes
13 Microsoft additional expense to deal with the Defendants' spam.

14 37. Regularly doing business and having agents in California, Defendant GlobalWeb
15 have a duty to know and follow Business and Professions Code §§ 17538.4, 17538.45, and
16 Penal Code § 502.

17 38. Plaintiff is informed and believes, and therefore alleges that Defendants
18 deliberately violated California Business and Professions Code § 17538.4 by:

- 19 a. failing to include "ADV:" as the first four characters of the subject line,
20 of their e-mails as required by § 17538.4(g); and
- 21 b. not including a functioning toll-free telephone number or a valid
22 sender-operated e-mail address in their e-mails as required under §
23 17538.4 (a); and
- 24 c. not including a toll-free telephone number in the first line of text or a
25 valid sender-operated e-mail address in their e-mails as required under §
26 17538.4 (b); and
- 27 d. failing cease sending the e-mails when requested, as required under §
28 17538.4(c)

 39. Plaintiff is informed and believes, and therefore alleges that Defendants sent these
spams knowing that these spams were not welcome, not wanted, and in violation of the law.

1
2 **FIRST CAUSE OF ACTION**

3 (Trespass to chattels)

4
5 40. Plaintiff hereby incorporates by reference paragraphs 1 through 39, inclusive, as if
6 the same were fully set forth herein.

7 41. Plaintiff is informed and believes and thereupon alleges that Defendants knowingly
8 inserted "Computer contaminants," as defined within Penal Code § 502(b)(10), on at least one
9 of the Plaintiff's computer systems.

10 42. Plaintiff is informed and believes and thereupon alleges that Defendants, after
11 being expressly instructed not to, intentionally exceeded their authorized access as defined by
12 Penal Code § 502(b)(1), on many occasions took control of at least one of Plaintiff's computer
13 processors, hard drives, random access memory, modems, network, and mail servers by
14 sending unsolicited commercial e-mail advertising to the Plaintiff, in violation of Penal Code
15 § 502(c)(3).

16 43. During this unauthorized use, the Defendants intentionally deposited data onto
17 Plaintiff's systems, in violation of Penal Code § 502 (c)(4). This data causes permanent and
18 continuing damage by reducing computer systems responsiveness, increasing maintenance
19 time, decreasing disk storage capacity, and introducing system instability.

20 44. During Defendants' unauthorized possession and control of Plaintiff's computers
21 and e-mail accounts, Plaintiff was unable to send or receive any internet e-mail.

22 45. While attempting to view these unsolicited e-mails, the nature of the e-mails
23 prevented the Plaintiff from using Plaintiff's computer until the e-mail fully displayed.

24 46. The Defendants' unlawful use of Plaintiff's of e-mail servers has the potential of
25 preventing the Plaintiff from receiving desired e-mail communications.

26 47. Defendants' alleged actions requires Plaintiff to perform significantly more
27 computer system maintenance and increased monitoring of Plaintiff's systems to reduce the
28 risk of data loss.

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

1 84. Plaintiff provided the Defendants, on multiple occasions, actual notice that
2 Plaintiff is a California mail service provider using servers in California which prohibits
3 unsolicited commercial e-mail.

4 85. Defendant sent over ninety unsolicited commercial e-mails through Plaintiff's
5 systems mail servers.

6 86. Plaintiff suffered damages as a result of Defendants' wrongful conduct.

7 87. Plaintiff is informed and believes and thereon alleges that Defendants have
8 willfully engaged in, and are willfully engaging in, the acts complained of with oppression,
9 fraud, and malice, and in conscious disregard of the rights of Plaintiff. Plaintiff therefore is
10 entitled to and demands exemplary damages in an amount sufficient to deter the Defendants,
11 and others, from behaving in such egregious behavior.

12 **SIXTH CAUSE OF ACTION**
13 (VIOLATION OF 47 U.S.C. § 227)

14
15 88. Plaintiff hereby incorporates by reference paragraphs 1 through 70, inclusive, as if
16 the same were fully set forth herein.

17 89. The Telephone Consumer Protection Act of 1991, Pub.L. 102-243, § 3(a), added
18 Section 227 to Title 47 of the United States Code. 47 U.S.C. § 227 was last amended in 1994.
19 In pertinent part, 47 U.S.C. § 227(b) provides "It shall be unlawful for any person within the
20 United States . . . to use any telephone facsimile machine, computer, or other device to send an
21 unsolicited advertisement to a telephone facsimile machine[.]"

22 90. Plaintiff's computer system is a telephone facsimile machine as defined under 47
23 U.S.C. § 227 (a)(2).

24 91. Plaintiff have used his computer as a facsimile machine to send and receive
25 facsimiles that have been sent to, and sent from, individuals, corporations, and government
26 agencies.

27 92. Plaintiff is informed and believe and thereupon allege that defendants, either
28 directly or through their agents, defendants used a computer, or other device to send
unsolicited advertisements to a telephone facsimile machine, as defined by U.S.C. § 227
(a)(2), owned by plaintiff.

1 93. Plaintiff further alleges that in each instance defendants did so willfully or
2 knowingly.

3 94. Plaintiff further alleges that Defendants failed to identify the origin of the
4 transmission as required under U.S.C. § 227 (d)(1)(B).

5 95. Defendants' profited from their wrongful conduct.

6 96. Plaintiff suffered damages as a result of Defendants' wrongful conduct

7 Wherefore, the Plaintiff prays for judgment against Defendants, and each of them, as
8 follows:

- 9 a. For general damages in an amount to be determined at trial; and
- 10 b. For special damages in an amount to be determined at trial; and
- 11 c. For disgorgement of profits derived from wrongful conduct; and
- 12 d. For attorney fees pursuant to California Code of Civil Procedure §
- 13 1021.5 and Business & Professions Code § 17538.45 (f)(2); and
- 14 e. For the costs of suit herein incurred; and
- 15 f. For an order of this court enjoining Defendants, and each of them, and
- 16 their agents, servants, and employees, and all persons acting under, in
- 17 concert with, or for them, from transmitting to Plaintiff, or any domain
- 18 that the Plaintiff controls, by e-mail any unlawful commercial
- 19 advertisements forever after; and
- 20 g. For other and further relief as the Court may deem just and proper.

21
22 Dated: _____ By _____

23
24 William Silverstein

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VERIFICATION

The undersigned, for himself, declares:

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

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

Dated: _____ By _____

Attachment 1

Terms of Service and License Terms

- 1 You agree to be bound by these terms of service. Your use of this site signifies your acceptance of these terms.
- 2 You agree to be subject to the jurisdiction of the courts located in either Los Angeles County, California, Suffolk County, Massachusetts, or Middlesex County, Massachusetts. You agree that this selection is by the choice of William Silverstein.
- 3 The use of this site is free for personal and non-commercial use - particularly for those wish to learn about and protect the rights of employees and those who oppose their abuse by employers and large corporations, but there are significant fees charged for certain other uses. More details follow.
- 4 There is no charge for persons using this site in aiding others in asserting their rights. If you, or another, use this site in asserting rights, informing William Silverstein is highly encouraged.
- 5 An attorney, or anyone working, or worked for in the past, on the behalf of Mattel, Microsystems Software, Surf Control, or any related corporation is considered the same as a for profit purpose. This includes persons working for or reporting to the aforementioned legal or licensing departments. Kevin Novak dba Pets Warehouse, or anyone working on his behalf, is also required to pay for access to this site because of his SLAPP activities..
- 6 There is no charge for personal, non-commercial use of this site. There is no charge for individuals at a company to use this site, except those specified in paragraph 5.
- 7 There is no charge to include this into databases, as long as the public is provided access without charge to these databases and the mechanism used to analyze and collect information from the site respects the robots.txt exclusion standards.
- 8 Complying with and respecting the robots.txt exclusion standard is a requirement for free use.
- 9 The license fee to use this site for the persons mentioned in paragraph 5, for profit purposes, for marketing purposes, for email harvesting purposes, not complying with the robots.txt file is \$10,000 per visit. A visit would consist of all accesses to the site that are not separated by a period of more than 10 minutes between accesses and not lasting more than 2 hours. Printing or saving

local copies, excepting caching, is an additional \$100 per page. One year access subscriptions are available at \$30,000 per year, if paid in advance.

- 10 You may not sell any email addresses containing the domain names "sorehands.com," "barbieslapp.com," or "mattelabuse.com." Violation of this clause subjects you to liquidated damages of \$10,000.00 or ten (10) times the amount of money you made selling the address(es), whichever is greater.
- 11 You agree that any email you send which advertises or promotes any product, service or Internet destination, shall be subject to a \$1,500.00 fee for reading and responding appropriately. THIS MEANS SPAM COSTS! Concealing, misrepresenting, or not fully disclosing, the sender's identity increases the fee by \$3,000.00 to compensate for the effort to track down the sender.
- 12 If there are monies due, and legal or collection actions are required to recover them, you agree to pay all costs including attorney fees, costs, expenses, and William Silverstein's time at \$90 per hour in researching and prosecuting any required action.

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