

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, AND
13 DOES 1-20,

14 Defendants.

Case No.:

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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16
17
18 **Plaintiff alleges as follows:**

19
20 **THE PARTIES**

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

23 2. Plaintiff is informed and believes and thereon alleges that Eyefive, Inc. is a
24 California Corporation with a physical address of 16742 Stagg St. #101; Van Nuys, California
and a registered mailing address of 1940 Westwood Blvd No 270; Los Angeles, CA 90025.

25 3. Plaintiff is ignorant of the true names and capacity of Defendants sued herein as
26 DOES 1-20, inclusive, and therefore sue those Defendants by such fictitious names. Plaintiff
will amend this complaint to allege their true names and capacities when ascertained.

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

1 19. Defendants can automatically determine the location of e-mail server any e-mail
2 address on the server with simple software.

3 20. Commencing on a date unknown, but prior to April 24, 2003, Defendants used
4 Plaintiff's equipment and services to send Plaintiff more than 30 unsolicited commercial e-
5 mails.

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

9 22. Plaintiff is informed and believes, and therefore alleges that one of the e-mail
10 addresses that Defendants sent spam to was only available by illegally accessing whois servers
11 that belong to Go Daddy, Inc., in violations of Go Daddy's Terms of Service.

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

15 24. Plaintiff is informed and believes and thereupon alleges that Defendants created
16 and sent e-mails consisting of commercial advertising that is designed to deceive the recipient
17 as to the actual origin and contents, so that the recipient must open, decode, and read the e-
18 mail determine the true nature of the e-mail.

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

22 26. Neither Plaintiff nor any registered user of Plaintiff's e-mail services ever
23 explicitly requested any e-mail advertising from the Defendants.

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

26 28. On July 31, 2003, Plaintiff personally delivered a demand to Defendant Eyefive
27 that instructed them, directly and through their agents, to stop sending spam, to identify their
28 agents, and to tender payment to Plaintiff as a settlement for damages incurred by the actions
of Defendants.

29 In the aforementioned letter, Plaintiff also informed Defendant Eyefive that the
30 spams were not welcome, that Plaintiff is a California e-mail service provider that has a policy
31 against spam, and that further spam would be subject to the referenced terms of use on
32 Plaintiff's website.

33 30. Defendants used a non-functioning Hotmail e-mail address as a sender-operated e-
34 mail address to request that the sender not to e-mail any further unsolicited documents.

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

38 32. As a California corporation, EyeFive has a duty to know and follow Business and
Professions Code §§ 17538.4, 17538.45, and Penal Code § 502.

39 33. Plaintiff is informed and believes, and therefore alleges that Defendants
40 deliberately violated California Business and Professions Code § 17538.4 by:

- 41 a. failing to include "ADV:" as the first four characters of the subject line,
42 of their e-mails as required by § 17538.4(g); and
43

- b. not including a functioning toll-free telephone number or a valid sender-operated e-mail address in their e-mails as required under § 17538.4 (a); and
- c. not including a toll-free telephone number in the first line of text or a valid sender-operated e-mail address in their e-mails as required under § 17538.4 (b); and
- d. failing cease sending the e-mails when requested, as required under § 17538.4(c)

34. 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.

FIRST CAUSE OF ACTION

(Trespass to chattels)

35. Plaintiff hereby incorporates by reference paragraphs 1 through 34, inclusive, as if the same were fully set forth herein.

36. Plaintiff is informed and believes and thereupon alleges that Defendants knowingly inserted “Computer contaminants,” as defined within Penal Code § 502(b)(10), on at least one of the Plaintiff’s computer systems.

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

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

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

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

41. The Defendants’ unlawful use of Plaintiff’s e-mail servers has the potential of preventing the Plaintiff from receiving desired e-mail communications.

42. Defendants’ alleged actions requires Plaintiff to perform significantly more computer system maintenance and increased monitoring of Plaintiff’s systems to reduce the risk of data loss.

43. Plaintiff suffered damages as a result of Defendants’ wrongful conduct.

44. If other parties replicate the Defendants’ unlawful use of the of Plaintiff’s systems, there is a great potential of preventing the Plaintiff from using his computer systems, receiving e-mails, crashing the Plaintiff’s systems, and causing permanent data loss.

45. Plaintiff is informed and believes and thereon alleges that Defendants have willfully engaged in, and are willfully engaging in, the acts complained of with oppression, fraud, and malice, and in conscious disregard of the rights of Plaintiff. Plaintiff therefore is

1 entitled to and demands exemplary damages in an amount sufficient to deter the Defendants,
2 and others, from behaving in such egregious behavior.

3 46. Plaintiff is informed and believes, and therefore alleges that the Defendants
4 trespass intentionally and regularly on many thousands of other systems, in the same way that
5 the Defendants trespasses on the Plaintiff's systems.

6 47. Plaintiff is informed and believes and therefore alleges that the Defendants will
7 continue to trespass on Plaintiff's systems in this unlawful manner unless enjoined by this
8 court. This court has legal authority to issue a permanent injunction because injunction is
9 necessary to prevent a multiplicity of judicial proceedings.

10 Damages are alleged herefore in the Prayer for relief.

11 **SECOND CAUSE OF ACTION**

12 (Negligence)

13 48. Plaintiff hereby incorporate by reference paragraphs 1 though 47, inclusive, as if
14 the same were fully set forth herein.

15 49. At all times herein mentioned, Defendants owed a non-delegable duty to Plaintiff,
16 under the law, to refrain from sending unlawful and unsolicited commercial advertisements by
17 e-mail.

18 50. Plaintiff is informed and believes and thereupon alleges that Defendants breached
19 their duty of care owed to Plaintiff by negligently, carelessly, and recklessly causing e-mail
20 consisting of unlawful and unsolicited commercial advertisements to be sent to Plaintiff.

21 51. Plaintiff is a member of a class of persons meant to be protected by Defendants'
22 alleged intermeddling, without Plaintiff's consent, of Plaintiff's computer systems and is
23 precisely the type of activities that the California Legislature sought to eliminate by the
24 enacting Penal Code § 502, Business and Professions Code §§ 17538.4, 17538.45.

25 52. Defendants' alleged violations of statutes designed to protect the Plaintiff from
26 harm breached the duty of care, as stated above, owed to Plaintiff, therefore constitutes
27 negligence per se.

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

Damages are alleged herefore in the Prayer for relief.

THIRD CAUSE OF ACTION

(Unlawful Advertising Practices)

54. Plaintiff hereby incorporates by reference paragraphs 1 through 53, inclusive, as if
the same were fully set forth herein.

55. Defendants' e-mail transmissions are misleading advertising and members of the
public were likely to be deceived in that the subject lines fail to include "ADV:" as the first
four characters of the subject line, as required by Business and Professions Code § 17538.4(g),
thus giving the appearance that the e-mails were solicited.

1 56. Defendants' advertising states that their product was developed over years by their
2 own team of fourteen doctors.

3 57. Plaintiff is informed and believes and thereupon alleges that the Defendants had no
4 such team of doctors discussed in paragraph 56.

5 58. Defendants state that their order-form is securely encrypted with 128 bit
6 encryption.

7 59. Plaintiff is informed and believe that to have a secure-encrypted order form, as
8 discussed in paragraph 58, would require the Defendants to spend money on the certificate and
9 to be fully identified on their websites.

10 60. Defendants' order forms are not secure or encrypted.

11 61. Plaintiff is informed and believes and thereupon alleges that Defendants profited
12 from their wrongful conduct.

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

14 63. Plaintiff is informed and believes and thereon alleges that Defendants have
15 willfully engaged in, and are willfully engaging in, the acts complained of with oppression,
16 fraud, and malice, and in conscious disregard of the rights of Plaintiff. Plaintiff therefore is
17 entitled to and demands exemplary damages in an amount sufficient to deter the Defendants,
18 and others, from behaving in such egregious behavior.

19 64. Defendants' alleged acts of misleading advertising presents a continuing threat to
20 members of the public and the Defendants will continue to use these false and deceptive
21 marketing methods unless enjoined by this Court.

22 65. Plaintiff is informed and believes, and therefore alleges that the Defendants will
23 continue to advertise in this unlawful manner unless enjoined by this court. This court has
24 jurisdiction to issue a permanent injunction because restraint is necessary to prevent a
25 multiplicity of judicial proceedings.

26 Damages are alleged herefore in the Prayer for relief.

27 **FOURTH CAUSE OF ACTION**
28 **(BREACH OF CONTRACT)**

66. Plaintiff hereby incorporates by reference paragraphs 1 through 65, inclusive, as if
the same were fully set forth herein.

67. Plaintiff's website contains a contract, attached as Exhibit I, that limits the use of
the website, requires payment for the use of the materials on the website, and requires
payments for unsolicited commercial e-mail.

68. Paragraph 11 of the aforementioned contract specifies that there shall be a payment
of \$3,000 per unsolicited commercial e-mail when the sender conceals, misrepresents, or fails
to fully disclose their identity.

69. Defendants agreed to the terms of the contract.

70. Defendants intentionally concealed their identities when sending the unsolicited
commercial e-mails.

71. Plaintiff has performed all his obligations under the aforementioned contract with
Defendants.

72. Defendants received benefits from the Plaintiff as a result of the aforementioned
contract.

1 73. Defendants have failed to perform any of their obligations and thereby breached
2 the parties' contract.

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

4 Damages are alleged herefore in the Prayer for relief.

5 **FIFTH CAUSE OF ACTION**

6 (VIOLATION OF BUSINESS AND PROFESSIONS CODE § 17538.45)

7 75. Plaintiff hereby incorporates by reference paragraphs 1 through 34, inclusive, as if
8 the same were fully set forth herein.

9 76. Plaintiff is a California electronic mail service provider as defined by §
10 17538.45(a)(3) which states:

11 *"Electronic mail service provider" means any business or organization qualified to do*
12 *business in California that provides registered users the ability to send or receive*
13 *electronic mail through equipment located in this state and that is an intermediary in*
14 *sending or receiving electronic mail."*

15 77. Plaintiff has a policy that prohibits the use of Plaintiff's service or equipment for
16 transmission, transport, or storage of unsolicited electronic mail advertisements.

17 78. Plaintiff provided the Defendants, on multiple occasions, actual notice that
18 Plaintiff is a California mail service provider using servers in California which prohibits
19 unsolicited commercial e-mail.

20 79. Defendant sent over thirty unsolicited commercial e-mails through Plaintiff's
21 systems mail servers.

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

23 81. Plaintiff is informed and believes and thereon alleges that Defendants have
24 willfully engaged in, and are willfully engaging in, the acts complained of with oppression,
25 fraud, and malice, and in conscious disregard of the rights of Plaintiff. Plaintiff therefore is
26 entitled to and demands exemplary damages in an amount sufficient to deter the Defendants,
27 and others, from behaving in such egregious behavior.

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

- a. For general damages in an amount to be determined at trial; and
- b. For special damages in an amount to be determined at trial; and
- c. For disgorgement of profits derived from wrongful conduct; and
- d. For attorney fees pursuant to California Code of Civil Procedure § 1021.5 and Business & Professions Code § 17538.45 (f)(2); and
- e. For the costs of suit herein incurred; and
- f. For an order of this court enjoining Defendants, and each of them, and their agents, servants, and employees, and all persons acting under, in concert with, or for them, from transmitting to Plaintiff, or any domain that the Plaintiff controls, by e-mail any unlawful commercial advertisements forever after; and

g. For other and further relief as the Court may deem just and proper.

Dated: _____ By _____

William Silverstein



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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