

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

ROBERT H. BRAVER	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.: CIV-05-210-T
	)	
NEWPORT INTERNET MARKETING	)	
CORPORATION, and	)	
ROBERT ALAN SOLOWAY,	)	
	)	
Defendants.	)	

**PLAINTIFF’S MOTION FOR DEFAULT JUDGMENT**

The Plaintiff, Robert H. Braver, by and through his counsel, Michael R. McKee (“Plaintiff”), pursuant to Rule 55(b) of the Federal Rules of Civil Procedure, respectfully moves for an entry of default judgment against the defendants, Newport Internet Marketing Corporation and Robert Alan Soloway, for a permanent injunction pursuant to the CAN-SPAM Act of 2003, and for statutory damages in the amount of \$10,075,000.00, which is a sum certain.

**STATEMENT OF FACTS**

This is an action brought under the federal CAN-SPAM Act of 2003, 15 U.S.C. § 7701 et seq (“CAN-SPAM Act”), Title 15, Oklahoma Statutes, §§ 776.1 – 776.4, (“Oklahoma Fraudulent Use of Electronic Mail Statute”), and Title 15, Oklahoma Statutes, §§ 776.5 – 776.7, (“Oklahoma Unsolicited Commercial Electronic Mail Statute”), wherein defendants have sent, caused to be sent, or were responsible for sending numerous illegal e-mail messages through or to Plaintiff’s e-mail servers.

Plaintiff served Defendants via Certified Mail, Restricted Delivery on January 25, 2005 pursuant to Title 12 O.S. § 2004(C)(2) as reflected in Exhibit “C” of *Plaintiff’s Objection, In*

*Part, to Defendants' Motion to Withdraw and Extension of Time* (Docket Entry No. 10). Defendants removed the case to this Court, entered an appearance through counsel, and further waived service of process as reflected in the *Agreed Application for Extension of Time to Answer or Otherwise Plead* filed on February 23, 2005 (Docket Entry No. 4).

Plaintiff filed his Amended Complaint on March 7, 2005, and Defendants' counsel was electronically served through the CM/ECF system. On May 20, 2005, Defendants' counsel moved to withdraw and for an extension of time to answer or otherwise plead. By order of the Court dated May 23, 2005, Defendants' counsel were permitted to withdraw, and the defendants were granted an additional extension until June 10, 2005 to answer or otherwise plead. On June 10, 2005, defendants' former counsel filed a "Notice of Defendants' to Proceed Pro Se," however, defendant Soloway has not subsequently entered an appearance pro se. Furthermore, pursuant to LCvR17.1, defendant Newport Internet Marketing Corporation may not appear pro se.

Mr. Soloway, the sole stockholder, director, and employee of Newport Internet Marketing Corporation, has repeatedly made public representations that he is experienced in litigation and has ample resources and access to attorneys across the country. *See* Plaintiff's Objection, In Part, to Defendants' Motion to Withdraw and Extension of Time (Docket Entry No. 10 and its attached exhibits). Nonetheless, the time for Defendants to file an answer or otherwise plead has not been further extended and has long since lapsed. At the time of the filing of this Motion, no substitute counsel has entered an appearance on behalf of the defendants, no answer or other responsive pleading has been filed by the defendants, nor has the Plaintiff or Plaintiff's counsel been contacted by the Defendants or new counsel purporting to represent the Defendants.

On June 13, 2005, Plaintiff moved for a Clerk's entry of default pursuant to Rule 55(a), which is currently pending. Plaintiff's counsel has been advised by Court staff that Plaintiff should file his Motion for Default Judgment and present his proposed Order to the Court, and the Clerk's entry of default will then be entered.

Therefore, Plaintiff now moves for entry of default judgment against Defendants, based on Defendants' violations of the CAN-SPAM Act of 2003, the Oklahoma Fraudulent Use of Electronic Mail Statute and the Oklahoma Unsolicited Commercial Electronic Mail Statute.

Venue is proper in this Court because Plaintiff's server facilities are located in Cleveland County, Oklahoma. *See* Amended Complaint, ¶6 (Docket Entry No. 7). A substantial part of the events giving rise to the Plaintiff's Complaint and the damages incurred by Plaintiff occurred within the Western District of Oklahoma. *Id.* ¶¶ 5,10. Plaintiff's state law claims relate to acts occurring in the state as a matter of law. *See* Title 15 O.S. § 776.3.

Civil Rule 55(a) provides, "When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person." In addition to the statutory damages provided by law, Plaintiff also seeks injunctive relief.

Defendants' default concedes the truth of the factual allegations of the Amended Complaint necessary to establish Defendants' liability under the CAN-SPAM Act of 2003, the Oklahoma Fraudulent Use of Electronic Mail Statute, and the Oklahoma Unsolicited Commercial Electronic Mail Statute.

**THE COURT SHOULD ENTER DEFAULT JUDGMENT AGAINST DEFENDANTS  
ROBERT ALAN SOLOWAY AND NEWPORT INTERNET MARKETING  
CORPORATION IN THE AMOUNT OF \$10,075,000.00.**

As of March 7, 2005, the date Plaintiff's Amended Complaint was filed, the Plaintiff has identified no fewer than 557 e-mail messages, received on no less than 206 separate dates that were sent or caused to be sent by Defendants that misrepresent or obscure the point of origin and/or transmission path, contain misleading subject lines, false or misleading "from" lines, were sent by use of unauthorized relay through and/or include other obfuscations, omissions, and fraudulent elements in violation of the aforementioned statutes as of their respective effective dates<sup>1</sup>. All of the messages were unsolicited. All of the messages were commercial in that they promoted products, services, or property. *See* Affidavit of Robert H. Braver, attached as Exhibit "A".

Here, Plaintiff's damages can be made certain by computation. Specifically, Oklahoma's Fraudulent Use of Electronic Mail Statute entitles Plaintiff to recover, in lieu of actual damages, "the *greater* of Ten Dollars (\$10.00) for each fraudulent electronic mail message transmitted in violation of this act, *or Twenty-five Thousand Dollars (\$25,000.00) per day.*" Title 15 O.S. § 776.2(C) (*Emphasis added*).

Similarly, Oklahoma's Unsolicited Commercial Electronic Mail Statute provides that the Plaintiff, "may elect, in lieu of actual damages, to recover the *greater* of Ten Dollars (\$10.00) for each and every unsolicited commercial electronic mail message transmitted in violation of this act, *or Twenty-five Thousand Dollars (\$25,000.00) per day.*" Title 15 O.S. § 776.7(C). (*Emphasis added*).

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<sup>1</sup> The Oklahoma Fraudulent Use of Electronic Mail statute went into effect on July 1, 1999. The Oklahoma Unsolicited Commercial Electronic Mail statute went into effect on November 1, 2003. The CAN-SPAM Act of 2003 went into effect on January 1, 2004.

While many of the latter Oklahoma statute's provisions mirror those of the former, the Unsolicited Commercial Electronic Mail Statute also creates new causes of action for commercial electronic mail messages that contain false or misleading information in the subject line (Title 15 O.S. § 776.6(A)(2)) or that "use a third party's internet address or domain name without the third party's consent for the purpose of transmitting electronic mail in a way that makes it appear that the third party was the sender of such mail." (§ 776.6(B)).<sup>2</sup>

As the two Oklahoma statutes each provide their own separate cause of action and provisions for statutory damages, Plaintiff is entitled to recovery under both Oklahoma Statutes, effectively providing for a combined \$50,000.00 minimum statutory damages for each calendar day in which Defendants sent one or more e-mails in violation of both statutes.<sup>3</sup>

Accordingly, the statutory damages can be computed by multiplying the number of calendar days in which one or more violative spams were received from Defendants by \$25,000 for each of the two Oklahoma statutes.

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<sup>2</sup> Additionally, the Unsolicited Commercial Electronic Mail Statute required such e-mails to include "ADV:" as the exact first four characters of the message subject line. (15 O.S. § 776.6(C)). This provision was preempted by the CAN-SPAM Act of 2003 (*see* 15 U.S.C. § 7707(b)) but was in effect during the two-month period between the effective dates of the Oklahoma statute and the CAN-SPAM Act. This is of no consequence in the computation of damages in the instant case, as the emails violative of this provision were also violative as to one or both of the other provisions which were not pre-empted. Under CAN-SPAM, state laws are preempted "except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto." 15 U.S.C. § 7707(b)(1). *See also* Report on S. 877, The CAN-SPAM Act of 2003 (Committee on Commerce, Science, and Transportation) Senate Rpt.108-102: "[...] Thus, a State law requiring some or all commercial e-mail to carry specific types of labels, or to follow a certain format or contain specified content, would be preempted. By contrast, a State law prohibiting fraudulent or deceptive headers, subject lines, or content in commercial e-mail would not be preempted. [...] Statutes that prohibit fraud and deception in e-mail do not raise the same concerns [regarding compliance with various state laws], because they target behavior that a legitimate business trying to comply with relevant laws would not be engaging in anyway."

<sup>3</sup> The Oklahoma Legislature was obviously aware of the existence of the 1999 Fraudulent Use of Electronic Mail Statute when it enacted the Unsolicited Commercial Electronic Mail Statute in 2003, even codifying it in the same section of the Oklahoma Statutes. By not including any exclusionary language or otherwise drafting the newer statute in such a way as to not include duplicate violative acts, the Legislature clearly contemplated the recovery under both statutes for a single e-mail. Although not directly on point as the case at bar involves statutory damages in a private civil action commenced under a remedial statute, Blockburger vs. United States, 284 U.S. 229 (1932) (involving criminal penalties) and Hudson vs. United States, 522 U.S. 93 (1997) (involving civil penalties) may be helpful. Even if the issue of a private recovery of civil damages under both Oklahoma statutes were construed as strictly as a criminal penalty, the "same elements" test as set forth in Blockburger would hold that recovery under both statutes was appropriate, at least as to the additional prohibitions and remedies added by the later Oklahoma law.

The earliest spam used in the computation was received on August 14, 2003. The applicable statute of limitations for an action upon a liability created by statute other than a forfeiture or penalty is three years. 12 O.S. § 95(A)(2). The latest spam used in the computation was received on March 7, 2005, the date of filing of Plaintiff's Amended Complaint.

As enumerated in the Plaintiff's Affidavit and attached exhibits, Plaintiff has demonstrated the receipt of:

- a. one or more of Defendants' e-mails violating the Oklahoma Fraudulent Use of Electronic Mail statute on 206 separate dates, for statutory damages in the amount of \$5,150,000.00.
- b. one or more of Defendants' e-mails violating the Oklahoma Unsolicited Commercial Electronic Mail statute on 197 separate and distinct dates for statutory damages in the amount of \$4,925,000.00.

Accordingly, Plaintiff has demonstrated that he is entitled to statutory damages in the amount of \$10,075,000.00.

**THE COURT SHOULD ENTER A PERMANENT INJUNCTION  
AGAINST DEFENDANTS ROBERT ALAN SOLOWAY AND NEWPORT INTERNET  
MARKETING CORPORATION**

The CAN-SPAM Act of 2003 entitles providers of Internet access service adversely affected by a violation of 15 U.S.C. § 7704(a)(1), (b), or (d), or a pattern or practice that violates paragraph (2), (3), (4), or (5) of § 7704(a) of the Act to enjoin further violation by the defendant *or* seek recovery of monetary damages. 15 U.S.C. § 7706(g)(1). Plaintiff elects to obtain a permanent injunction against Defendants in lieu of damages with respect to the CAN-SPAM Act claims.

When an injunction is specifically authorized by statute, proper discretion usually requires its issuance if the prerequisites for the remedy have been demonstrated and the injunction would fulfill the legislative purpose. United States vs. White, 769 F.2d, 511, 515 (8<sup>th</sup> Cir., 1985); Donovan vs. Brown Equip & Serv. Tools, 666 F.2d 48, 157 (5<sup>th</sup> Cir. 1982) (same).

Courts routinely issue injunctions as part of default judgments, including cases in this District. *See* Interscope Records et al vs. Atai, Case No. CIV-05-96-L. Plaintiff, as a matter of law, is entitled to obtain an injunction to prohibit Defendants from committing further violations of the CAN-SPAM Act as specified at § 7706(g)(1).

While the Plaintiff obviously is prosecuting this case in his own name, he seeks injunctive relief as to Defendants' conduct as a whole, as there is no other practical way to obtain effective injunctive relief.

To this day, Plaintiff continues to receive ongoing spam from Defendants, and complaints from his clients about Defendants' spam. Defendants are known for quickly adding to their mailing list the contact email addresses as well as obvious email address prefixes (e.g. *info*, *webmaster*, *postmaster*, etc.) for new Internet domains shortly after they are registered. Plaintiff, on an ongoing basis, acquires new clients who register new domain names, move hosting and e-mail services from other hosting providers, or has existing clients who register additional domain names. Such new clients and/or additional domain names registered by existing clients typically begin to receive Defendants' spam in short order.

Like many other laws providing remedies for specific abusive practices that have become major public policy issues, CAN-SPAM expressly provides for injunctive relief and specifically contemplates private enforcement by service providers. 15 USC § 7706(g)(1). *See* Erienet, Inc. v. Velocity Net, Inc., 156 F.3d 513 (3rd Cir. 1998). "private enforcement provision [in the

Telephone Consumer Protection Act] puts teeth into the statute ...” The Oklahoma Supreme Court has also recognized the principle of a Private Attorney General. See, e.g. Thiry v. Armstrong World Industries, 661 P.2d 515 (1983 OK 28) “The plaintiff acts as a private attorney general to punish the culpable wrongdoer, thereby encouraging adherence to safety standards that benefit consumers generally.”

In Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) the Supreme Court noted that when a plaintiff obtains an injunction, “he does so not for himself alone, but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.” The Supreme Court also held that, “[t]his and other federal courts have repeatedly held that individual litigants, acting as private attorneys-general, may have standing as “representatives of the public interest.” Flast v. Cohen, 392 U.S. 83, 120 (1968) (Harlan, J. dissenting). This philosophy applies equally to the CAN-SPAM Act. It is not just the named Plaintiff in this case that has suffered at the hands of Defendants’ continued fraudulent spamming. Clearly, millions of e-mail users and their respective service providers have been and will continue to be abused by Defendants’ unlawful spamming practices unless and until they are compelled to stop. The Defendants are clearly undissuaded from this course of continued conduct as shown by the fact that they continue their unlawful transmissions and arrogantly laugh off other judgments obtained against them.

It is fundamental that every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction. National Collegiate Athletic Ass’n v. Owens, 555 P.2d 879 (1976 OK 136), citing Inverarity v. Zumwalt, 97 Okl.Cr. 294, 262 P.2d 725 (1953).

Even if the relief benefits the public much more than the individual, who the primary beneficiary is, is irrelevant:

Congress often takes advantage of individual incentives to advance public policy, relying upon “private attorneys general” to secure enforcement of public rights without the need to establish an independent enforcement bureaucracy. As long as the interests of individual plaintiffs coincide with those of the public, it does not matter whether Congress intended primarily to benefit the individual or primarily to benefit the public.

Evans v. Jeff D., 475 U.S. 717, 752, note 4 (1986).

Defendants do not have any right to engage in conduct that clearly violates the CAN-SPAM Act and numerous other state and federal laws, much less criminal conduct under CAN-SPAM, the Computer Fraud and Abuse Act (18 U.S.C. § 1030), and various other state laws. With that in mind, Defendants deserve to have the plug pulled on their criminal spamming operation. This Court has the discretion to fashion the relief to address the violative pattern of conduct and protect **all** citizens from Defendants’ activities.

The only way to protect the Plaintiff from the rampaging spamming of Defendants is to prohibit Defendants from initiating unsolicited commercial electronic mail messages in violation of the enumerated sections of the CAN-SPAM Act to *any* e-mail address. This is the only sufficient way to properly and *completely* protect the Plaintiff in this case. The Plaintiff here is prosecuting this matter in his own name, and asks for that relief to protect himself, no matter what clients and domain names he provides e-mail service for now, or may serve in the future. Furthermore, Plaintiff should not be required to disclose confidential information as to his clients’ domain names, e-mail addresses or servers to a clearly vicious and vindictive individual and a company who is engaging in criminal and indeed felonious conduct, for no other reason but to allow the Defendants’ to avoid committing their unlawful acts solely with regard to the Plaintiff and Plaintiff’s clients while they merrily blast away at everyone else’s mailboxes. The fact that the public may benefit collaterally is a militating factor in favor of the relief sought, not a ground on which it is premised. It is well settled that an injunction is an appropriate means for

the enforcement of an Act of Congress when it is in the public interest. Hecht Co. v. Bowles, 321 U.S. 321 (1944); Virginia R. Co. v. System Federation No. 40, 300 U.S. 515, 552 (1937).

Put another way, if a man lives downstream from a polluter, and he successfully enjoins the polluter from continuing to pollute the water supply, the fact that the man's unnamed neighbors also benefit from such an injunction does not make the remedy granted to the individual plaintiff improper.

Accordingly, Plaintiff respectfully requests that this Court enter a permanent injunction against defendants Newport Internet Marketing Corporation and Robert Alan Soloway, individually, as to the prohibited acts as enumerated at 15 U.S.C. § 7706(g)(1) and as more specifically set forth in Plaintiff's proposed Order.

Respectfully submitted,

s/Michael R. McKee  
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**ATTORNEY FOR PLAINTIFF**

**CERTIFICATE OF SERVICE**

I hereby certify that on September 12, 2005, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the electronic records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

Michael D. McClintock  
McAfee & Taft A Professional Corporation  
Tenth Floor, Two Leadership Square  
211 N. Robinson Ave.  
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s/Michael R. McKee  
Michael R. McKee