

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

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

**PLAINTIFF’S OBJECTION TO
DEFENDANTS’ MOTION TO SET ASIDE DEFAULT JUDGMENT**

The Plaintiff, Robert H. Braver, by and through his counsel, Michael R. McKee (“Plaintiff”), hereby objects to the motion of Defendants Newport Internet Marketing Corporation and Robert Alan Soloway (“Defendants”) to set aside the default judgment previously rendered in this case. In support of his Objection, Plaintiff would show the Court as follows:

1. Plaintiff filed his original Petition in Cleveland County District Court on December 21, 2004. Defendants were served by Certified Mail on January 29, 2005 [Docket Entry Nos 1, 10]. After removing the case to this Court, attorney Michael McClintock entered his appearance on February 22, 2005 [Docket Entry No. 2] and agreed to waive any challenges to the sufficiency of service [Docket Entry No. 4].

2. Plaintiff’s Amended Complaint was filed on March 7, 2005 and was served on Defendants’ counsel electronically [Docket Entry No. 7].

3. Defendants' counsel withdrew from the case, and was ordered to forward documents filed in the case to Defendants. Defendants were clearly aware of the allegations in the Petition and Amended Complaint and repeatedly profess to be sophisticated and resourceful in litigation of this nature. Defendants clearly knew what they were doing when they dismissed their attorney with no answer or other response having been filed and then walking away from the case, all as per the record and Exhibit "A"
4. Defendants' former counsel were diligent in forwarding the notice of Plaintiff's Motion for Default Judgment by multiple means, including email and fax. Copies of successful facsimile transmission logs were attached to the certification filed with the Court. [Docket Entry No. 17].
5. Defendants' allegations, beginning at item 6 of their Motion, are that defendants never had notice of the proceedings until after the hearing of September 22, 2005, and attach thereto Robert Alan Soloway's Affidavit, which Plaintiff will show is "false to the facts" and is a perjured Affidavit.
6. Mr. Soloway claims in his affidavit that he never received the email from his former attorney because his email address "became obsolete," that he had no notice of the default proceedings until one day after the judgment was rendered. Soloway's Motion states that the fax number was outdated because it deposited messages into the now-obsolete email address. [Docket Entry No. 21, ¶ 6]. Defendants, having claimed no notice, go on to cite Rule 55(b)(2) Fed R.Civ.P., and request that the Default Judgment be set aside.
7. In their footnote, Defendants cite Conley v. Gibson, 355 U.S. 41 (1957) and Mullane v. Centrtal Hanover Bank & Trust Co., 339 U.S. 306 (1950), implying that due process

requires a hearing, which is not merely a technicality, but stands as a constitutional safeguard, protecting minimum due process standards by ensuring opposing party receive fair notice of the pleader's claim, the grounds upon which it rests and the nature of any relief sought.

8. Completely overlooking Plaintiff's Amended Complaint, Defendants claim that the original petition seeks an "unspecified amount." While the prayer for relief in Plaintiff's original petition specified monetary damages "in excess of \$10,000¹," Plaintiff's Petition nonetheless clearly puts Defendants on notice that he is seeking statutory damages of \$25,000.00 per day, as an Electronic Mail Service Provider, for multiple dates. Plaintiff further states that the unlawful spamming is "systematic and ongoing." Petition, ¶¶ 1, 6, 9-13. [Docket Entry No. 1]
9. Due to the Defendants' continuing flood of unlawful spam, listing specific dates was impractical in Plaintiff's Amended Complaint. The Amended Complaint, however, does clearly put Defendants on notice that Defendants' violations are numerous and continuing, and that Plaintiff is seeking statutory damages of \$25,000.00 per day for multiple dates, as well as injunctive relief under the CAN-SPAM Act. Amended Complaint, ¶¶ 37, 39, 41-42, 44. [Docket Entry No. 7].
10. Contrary to Defendants' assertion that Plaintiff was awarded an "astronomical" monetary judgment and "extremely broad injunctions," the judgment stands completely supported by the pleadings, law, documentation, and supporting affidavit. Statutory damages are

¹ The Oklahoma Pleading Code states, "[e]very pleading demanding relief for damages in money in excess of Ten Thousand Dollars (\$10,000.00) shall, without demanding any specific amount of money, set forth only that the amount sought as damages is in excess of Ten Thousand Dollars (\$10,000.00), except in actions sounding in contract. [...]" 12 O.S. §2008(A)(2).

easily computed by multiplying the set minimum statutory damages by the number of violation days, and the total amount in the instant case is well in line with damage awards in numerous other cases involving other parties involving mass spamming on this scale. The injunctive relief is strictly limited to the specific CAN-SPAM violations for which a private right of action is available and as plead in the Amended Complaint. Plaintiff did not propose, nor did the Court grant, injunctive relief as to various other provisions of the CAN-SPAM Act for which a private right of action is not available, or for various violations of Oklahoma law, which does not provide for injunctive relief.

11. Assuming, arguendo, that Defendants' email and fax numbers became defunct as alleged, it is clear that the Defendants, who are in the email business, were certainly capable of providing updated fax and/or email contact information to their former counsel if they so desired. At best, defendants deliberately abandoned the case and allowed the Plaintiff to take a default judgment.
12. Moreover, there is ample evidence that Defendants did in fact know about the Motion for Default Judgment and the hearing ordered by this Court more than three days prior to the hearing, as evidenced by Plaintiff's affidavit and web server logs (Exhibits "C," "E," and "F") and online chat with Susan Gunn of The Spamhaus Project (Exhibit "A").
13. Additionally, Mr. Soloway posted numerous messages to the SPAM-L mailing list from the very nim@cyberservices.com email address that supposedly has long-since been "obsolete." (Exhibits "C" and "D," Docket Entry No. 17). Furthermore, the service provider of the email address in question states that the email address was, in fact, not

terminated until September 29, 2005 (Affidavit of Suresh Ramasubramanian of Outblaze Limited, Exhibit “B”)².

14. All matters considered, Defendants had knowledge of all proceedings and hearings, chose not to respond, and perjured their Affidavit with a proposed blanket of responsibility.

WHEREFORE this Court should dismiss defendant's Motion to Set Aside the Default Judgment, and find for the Plaintiff with costs against Defendants and their attorney.

Respectfully submitted,

s/Michael R. McKee
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ATTORNEY FOR PLAINTIFF

² Interestingly, none of the numerous messages posted by Mr. Soloway to both the SPAM-L mailing list and the news.admin.net-abuse.email Usenet newsgroup ever made any claim that Defendants did not receive notice of the default proceedings, although numerous other theories as to why the judgment should be “found invalid” were proffered.

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 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:

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s/Michael R. McKee
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