

**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.	)	

**AMENDED COMPLAINT**

COMES NOW the Plaintiff, Robert H. Braver, by and through his counsel, Michael R. McKee, and for his cause of action against Newport Internet Marketing Corporation and Robert Alan Soloway (“Defendants”), alleges and states as follows:

**I. INTRODUCTION**

1. This claim for relief is 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, Fraudulent Use of Electronic Mail, and Title 15, Oklahoma Statutes, §§ 776.5 – 776.7, Unsolicited Commercial Electronic Mail, 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 and/or customers.

2. Plaintiff is a provider of “Internet Access Service” as defined by 15 U.S.C. § 7702(11) and an “Electronic Mail Service Provider” as defined under Title 15, Oklahoma Statutes, §§ 776.4 and 776.5.

3. Plaintiff’s e-mail servers are “protected computers” as defined by the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030(e)(2).

## **I. JURISDICTION AND VENUE**

4. Plaintiff restates the above and foregoing as though fully restated herein.

5. The acts complained of herein constitute acts occurring within the State of Oklahoma as a matter of law for the purposes of Plaintiff's state law claims, as set forth at 15 O.S. § 776.3.

6. Plaintiff's server facilities are located in Norman, Oklahoma.

7. Defendants' unilateral, unlawful, and indeed criminal contacts with Plaintiff's server facilities have been systematic and ongoing for a number of years, and Plaintiff's claims arise from these contacts.

8. Defendants have engaged in business activities in and directed to the Western District of Oklahoma, have committed tortious acts within the Western District of Oklahoma, and have purposefully availed themselves of the opportunity to conduct commercial activities in this forum.

9. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1338(a), and supplemental jurisdiction over Plaintiff's state law claims under 28 U.S.C. § 1367.

10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because a substantial part of the pertinent events and the resulting damage to Plaintiff occurred within the Western District of Oklahoma.

## **II. THE PARTIES**

11. Plaintiff restates the above and foregoing as though fully restated herein.

12. Plaintiff Robert H. Braver is an individual residing and conducting business in Norman, Oklahoma.

13. Defendant Robert Alan Soloway is an individual residing in Seattle, Washington who at all times relevant to this case has been the driving force behind the criminal enterprise described herein, and at times has used various Internet domain names in the furtherance of said criminal enterprise for which he was, in his individual capacity, the legal registrant.

14. Defendant Newport Internet Marketing Corporation is a California corporation with its principal place of business in defendant Soloway's apartment residence located in Seattle, Washington.

15. The Defendants named herein are major Internet spammers, and appear on the well-known and respected ROKSO list of the top 200 spammers in the world. In addition to the CAN-SPAM Act and Oklahoma statutes upon which Plaintiff relies on to seek relief herein, the Defendants' acts and activities constitute criminal offenses under the CAN-SPAM Act of 2003, 15 U.S.C. § 7701 et seq; the Electronic Communications Privacy Act, 18 U.S.C. § 2701 et seq; the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 et seq; and various other state and federal laws.

16. Plaintiff is informed and believes, and on that basis alleges, that defendant Soloway is the sole stockholder and employee of Newport Internet Marketing Corporation, and personally directed, participated in, and made all decisions regarding the acts complained of herein.

17. Plaintiff is informed and believes, and on that basis alleges, the actions alleged herein were undertaken by or done with the actual or constructive knowledge of Defendants, were actions that Defendants controlled, directed, or had the ability to authorize, control or direct, and/or were actions Defendants assisted, participated in, conspired in, controlled and/or directed or otherwise encouraged, and are actions for which Defendants are liable.

### **III. THE PLAINTIFF'S SERVER FACILITIES AND OPERATIONS**

18. Plaintiff restates the above and foregoing as though fully restated herein.

19. Plaintiff operated the first and for some time the only public access electronic Bulletin Board System (BBS) in Oklahoma, entitled The United States Electronic Mail Center (often called "USEMC") beginning in 1982. In 1985, Plaintiff discontinued the USEMC upon commencement of operation of a subscription-based, multi-user bulletin board system which operated through approximately 1995. In 1995, Plaintiff commenced operation of Internet server facilities, including what was for a time one of the top-100 USENET transit servers in the world (wilbur.ohww.norman.ok.us) and also provided web and e-mail hosting services to various individuals and organizations. In September 1998, Plaintiff began handling inbound Internet e-mail traffic for a prominent Washington D.C. based law firm. At the present time, Plaintiff's clients include a number of law firms, restaurants, radio personalities, and individuals.

20. As with the rest of the world, the issue of spam, a large proportion of which is mortgage spam, has become a major problem for the Plaintiff. End-users of electronic mail service require effective filtering of spam in order to effectively use e-mail as an important communications tool. Plaintiff therefore established and must maintain various spam remediation efforts.

### **IV. DEFENDANTS' UNLAWFUL CONDUCT**

21. Plaintiff restates the above and foregoing as though fully restated herein.

22. Virtually all spam, including spam sent by the defendants herein, is sent using forged, missing, and/or obfuscated routing and origin information. This is characteristic of all spam because if such messages were transmitted from the IP (Internet Protocol) address space assigned to Defendants, a) their IP address ranges would very quickly be listed on one or more

block lists, resulting in their e-mails being blocked from a large proportion of their intended recipients, and b) their Internet service would be suspended or terminated.

23. Virtually all spam is devoid of any information identifying the responsible mortgage and/or marketing companies and providing a valid physical address as mandated by the CAN-SPAM Act.

24. Virtually all spam is sent with fraudulent techniques to disguise the origin of the messages to make Defendants' e-mails appear to come from random persons, locations and/or the domain names of innocent third parties in a deliberate and transparent attempt to thwart the efforts of Plaintiff and other electronic mail service providers to block traffic from known senders of such unwanted, nuisance messages.

**COUNT I**  
**CAN-SPAM ACT VIOLATIONS (15 U.S.C. § 7704(A)(1))**

25. Plaintiff restates the above and foregoing as though fully restated herein.

26. Defendants initiated the transmission, to protected computers, of commercial e-mail messages that contained, or were accompanied by, header information that is materially false or materially misleading.

27. Defendants' actions were willful and knowing.

28. Plaintiff is informed and believes, and on that basis alleges, that Defendants intentionally paid for or provided other consideration to, or induced, other persons to initiate a commercial electronic mail messages on their behalf with actual knowledge, or by consciously avoiding knowing, whether such persons are engaging, or will be engaging, in a pattern or practice that violates the CAN-SPAM Act.

29. As a result of defendants' actions, Plaintiff has been damaged in an amount to be proven at trial.

30. Defendants' actions violated 15 U.S.C. § 7704(a)(1), and entitles Plaintiff to injunctive relief, statutory damages and aggravated damages because of defendants' willful and knowing violations of the CAN-SPAM Act.

**COUNT II**  
**CAN-SPAM ACT (15 U.S.C. § 7704(a)(2, 3 AND 5))**

31. Plaintiff restates the above and foregoing as though fully restated herein.

32. Defendants engaged in a pattern or practice of initiating, to protected computers, commercial e- mail messages that:

- a. contained subject headings that defendants knew, or reasonably should have known, were likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the messages
- b. failed to contain a functioning return e-mail address or other Internet-based mechanism, clearly and conspicuously displayed, that a recipient could use to submit a reply e-mail message or other form of Internet-based communication requesting not to receive future commercial e- mail messages from that sender at the e- mail address where the message was received; and/or
- c. failed to include a clear and conspicuous identification that the message was an advertisement or solicitation, failed to provide a clear and conspicuous notice of the opportunity to decline to receive further commercial electronic mail messages from the sender; or failed to provide a valid physical postal address of the sender.

33. Plaintiff is informed and believes, and on that basis alleges, that Defendants intentionally paid for or provided other consideration to, or induced, another person to initiate a commercial electronic mail message on its behalf with actual knowledge, or by consciously

avoiding knowing, whether such person is engaging, or will engage, in a pattern or practice that violates the CAN-SPAM Act.

34. As a result of defendants' actions, Plaintiff has been damaged in an amount to be proven at trial.

35. Defendants' actions violated 15 U.S.C. § 7704(a)(2), (a)(3) and (a)(5), and entitle Plaintiff to injunctive relief, statutory damages and aggravated damages because of defendants' willful and knowing violations of the CAN-SPAM Act.

**COUNT III**  
**VIOLATIONS OF THE OKLAHOMA FRAUDULENT USE OF ELECTRONIC MAIL**  
**STATUTES (15 O.S. §§ 776.1 – 776.4)**

36. Plaintiff restates the above and foregoing as though fully restated herein.

37. On numerous occasions during the two years before this suit was commenced and continuing to the present, Defendants, either directly or through their agents, contractors, and/or subcontractors, initiated the transmission of commercial electronic mail messages directed to Plaintiff's server facilities, knowingly or having reason to know were sent,

- a. using techniques designed to misrepresent the point of origin or transmission path of the e-mail messages;
- b. using techniques designed to omit the point of origin or transmission path of the e-mail messages; and/or
- c. containing false or misleading information including the addition of random characters, words, and/or sentences to the e-mail subject lines and/or bodies, and/or obfuscating the nature of the message by misspelling words or substituting various symbols for letters, in a deliberate attempt to thwart Plaintiff's spam filtering mechanisms.

38. Plaintiff is entitled to an award of actual damages based upon the following:

- a. The fraudulent e-mail messages herein listed consumed Plaintiff's finite server and network resources.
- b. Defendants' fraudulent e-mails made it more difficult for Plaintiff and his clients to read and respond to legitimate e-mails by contributing to the clutter of unwanted, unsolicited messages in Plaintiff's and Plaintiff's clients' mailboxes.
- c. Defendants' fraudulent e-mails resulted in complaints by Plaintiff's customers to the Plaintiff, resulting in loss of time and other general damages.
- d. Defendants' fraudulent e-mails consume Plaintiff's and Plaintiff's customers' time to look at and open, resulting in loss of time and other general damages.
- e. Defendants' fraudulent e-mails contribute in large part to what has become a relentless tide of unwanted and unsolicited e-mail messages that burden the electronic mailboxes of the Plaintiff and Plaintiff's customers, up to the point that e-mail service becomes virtually useless.
- f. In an effort to provide some remediation, Plaintiff has been forced to establish e-mail filtering and blocking protocols. Such protocols take time on an ongoing basis to maintain, and consume storage space, additional network traffic, and CPU time.

39. In lieu of actual damages for the fraudulent electronic mail messages listed in Paragraph 6, Plaintiff is entitled to and elects to claim statutory damages of \$25,000.00 per each day pursuant to 15 O.S. § 776.2(C).

**COUNT IV**  
**VIOLATIONS OF THE OKLAHOMA UNSOLICITED COMMERCIAL ELECTRONIC**  
**MAIL STATUTES (15 O.S. §§ 776.5 – 776.7)**

40. Plaintiff restates the above and foregoing as though fully restated herein.

41. On numerous occasions following the enactment of the Oklahoma Unsolicited Commercial Electronic Mail statute on November 1, 2003, Defendants, either directly or through their agents, contractors, and/or subcontractor, transmitted electronic mail messages directed to Plaintiff's server facilities, knowingly or having reason to know were sent:

- a. using techniques designed to falsify the transmission or other routing information for the e-mail messages;
- b. containing false or misleading information in the subject line;
- c. using a third party's internet address or domain name without the third party's consent for the purpose of transmitting e-mail in a way that makes it appear that the third party was the sender of such e-mail;

42. On numerous occasions following the enactment of the Unsolicited Commercial Electronic Mail statute on November 1, 2003 through the time of the enactment of the CAN-SPAM Act on January 1, 2004, Defendants, either directly or through their agents, contractors, and/or subcontractor, transmitted electronic mail messages directed to Plaintiff's server facilities, knowingly or having reason to know were sent:

- a. without the exact characters "ADV:" as the first four characters in the subject line;
- b. without a mechanism allowing recipients to easily and at no cost remove themselves from the sender's address list so that they are not included in future mailings; and/or
- c. without a valid return e-mail address.

43. Plaintiff is entitled to an award of actual damages based upon the following:
- a. The fraudulent e-mail messages herein listed consumed Plaintiff's finite server and network resources.
  - b. Defendants' fraudulent e-mails made it more difficult for Plaintiff and his clients to read and respond to legitimate e-mails by contributing to the clutter of unwanted, unsolicited messages in Plaintiff's and Plaintiff's clients' mailboxes.
  - c. Defendants' fraudulent e-mails resulted in complaints by Plaintiff's customers to the Plaintiff, resulting in loss of time and other general damages.
  - d. Defendants' fraudulent e-mails consume Plaintiff's and Plaintiff's customers' time to look at and open, resulting in loss of time and other general damages.
  - e. Defendants' fraudulent e-mails contribute in large part to what has become a relentless tide of unwanted and unsolicited e-mail messages that burden the electronic mailboxes of the Plaintiff and Plaintiff's customers, up to the point that e-mail service becomes virtually useless.
  - f. In an effort to provide some remediation, Plaintiff has been forced to establish e-mail filtering and blocking protocols. Such protocols take time on an ongoing basis to maintain, and consume storage space, additional network traffic, and CPU time.

44. In lieu of actual damages for the fraudulent unsolicited commercial electronic mail messages, Plaintiff is entitled to and elects to claim minimum statutory damages of \$25,000.00 per day pursuant to 15 O.S. § 776.7(C).

**WHEREFORE**, Plaintiff respectfully requests that the Court find for Plaintiff and against Defendants, jointly and severally, as follows:

1. Temporary and permanent injunctive relief against defendants, and that defendants, their officers, agents, representatives, servants, employees, contractors, successors and assignees, and all others in active concert or participation with defendants, be enjoined and restrained from continuing to violate the CAN-SPAM Act of 2003;
2. Actual damages;
3. Liquidated damages;
4. Statutory damages;
5. Attorney's fees and costs; and
6. Such other or additional relief as is just and proper.

Respectfully submitted,

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

**JURY TRIAL DEMANDED**  
**ATTORNEYS LIEN CLAIMED**

**CERTIFICATE OF SERVICE**

I hereby certify that on March 7, 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  
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s/Michael R. McKee \_\_\_\_\_  
Michael R. McKee