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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ASIS INTERNET SERVICES,
Plaintiff,

v.

OPTIN GLOBAL, INC., et al.,
Defendants.

No. C 05-5124 CW

ORDER GRANTING IN
PART DEFENDANTS'
MOTIONS TO
DISMISS AND
DENYING THEM IN
PART

_____ /

Defendants Michael Cuervo and John Terrence Dorland, Quicken Loans (Quicken), and Aegis Lending Corporation (Aegis) each move separately and join each other's motions to dismiss Plaintiff Asis Internet Service's First Amended Complaint (FAC) pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendants Bruce Lerner, Chris Valley, National Fidelity Funding, Inc., Stateside Mortgage, Inc., American Home Equity Corp., and Michael Garcia (Mortgage

1 Defendants) join in the motions to dismiss.¹ Plaintiff opposes
2 these motions. These matters have been submitted on the papers.
3 Having considered all of the papers filed by the parties, the Court
4 grants in part and denies in part Defendants' motions to dismiss
5 and grants Plaintiff leave to file an amended complaint.

6 BACKGROUND

7 Plaintiff Asis Internet Services is a California corporation
8 that provides internet access services. On December 12, 2005,
9 Plaintiff filed a complaint alleging that the Spammer Defendants
10 directed, controlled and participated in "spamming," causing more
11 than 10,000 deceptive and unsolicited commercial electronic
12 messages to be sent to Plaintiff's computer server between October
13 25, 2005 and November 14, 2005. The header information for those
14 emails was falsified, misrepresented or forged in a way that would
15 mislead a reasonable recipient as to the contents and subject
16 matter of the message. The complaint further alleged that several
17 mortgage brokers (the Mortgage Defendants) "conspired with and at
18 all times supported," and benefitted from, the Spammer Defendants'
19 actions. Complaint § 10, 12.

20 The complaint brought claims under the Controlling the Assault
21 of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM
22 Act), 15 U.S.C. § 7701 et seq. and California's Business and
23 Professions Code § 17529 et seq., both of which restrict the use of

24
25 ¹Optin Global, Inc., Vision Media Ltd., Rich Yang and Peonie
26 Pui Tang Chan (collectively, the Spammer Defendants), Leads Limited
27 and Azoogole.com (collectively, the Lead Generator Defendants), and
Francis Prasad and Emerald Home Loan, Inc. (members of the Mortgage
Defendants) do not join in the motions to dismiss. Prasad has not
filed an answer to the First Amended Complaint.

1 unsolicited commercial email. Plaintiff also brought a civil
2 conspiracy claim against all Defendants.

3 Aegis moved pursuant to Federal Rules of Civil Procedure 9(b)
4 and 12(b)(6) to dismiss the complaint against it. Aegis argued (1)
5 that Plaintiff's federal and State anti-spam claims sounded in
6 fraud and that Rule 9(b) therefore required Plaintiff to plead the
7 claims with particularity; (2) that Plaintiff failed to demonstrate
8 that Defendants "initiated" the spam as required by the CAN-SPAM
9 Act; (3) that Plaintiff failed to allege the required elements of
10 the State anti-spam claim; and (4) that Plaintiff failed to allege
11 that Mortgage Defendants intended to aid in the commission of the
12 conspiracy as required by California law. The other Mortgage
13 Defendants named in the original complaint joined the motion to
14 dismiss.

15 The Court granted the motion to dismiss in part and denied it
16 in part, finding that Federal Rule of Civil Procedure 9(b) applied
17 to averments of fraud in Plaintiff's claims under the CAN-SPAM
18 Act, 15 U.S.C. § 7701 et seq. and California Business and
19 Professions Code § 17529 et seq., and that California Business and
20 Professions Code § 17529.5(a) extends liability to anyone who
21 "advertises" in a commercial email containing a misleading header
22 or subject line. The Court further found that the allegations in
23 Plaintiff's complaint were sufficient to allege the civil
24 conspiracy element of entering into an agreement with the intent to
25 commit the underlying violation.

26 Therefore, the Court granted the motion to dismiss in part and
27 granted Plaintiff leave to file an amended complaint. The Court

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1 advised Plaintiff that in its amended complaint it (1) "must state
2 with particularity the nature of the allegedly fraudulent subject
3 lines and the identity of the sender or senders of the alleged
4 spam" to go forward with its claims under either federal or State
5 anti-spam laws and (2) must demonstrate "that Defendants advertised
6 their services in the allegedly fraudulent emails" to go forward
7 with the § 17529.5 claim. June 30, 2006 Order at 19. Further the
8 Court instructed Plaintiff that it "may include . . . its civil
9 conspiracy claim, provided it is able successfully to state an
10 underlying claim under either the federal or State anti-spam laws."

11 Id.

12 Plaintiff filed its First Amended Complaint on July 14, 2006,
13 removing some defendants and adding others. Of particular
14 significance to the instant motions, Plaintiff included two new
15 defendants, Leads Limited, Inc. and Azoogole.com, Inc. (together the
16 Lead Generators). The Lead Generators are described as "Internet
17 marketing companies in the business of generating sales leads by
18 hiring and managing individuals and groups to send emails to
19 perspective [sic] purchasers doing business in the United States."
20 FAC ¶ 9.

21 As in the original complaint, Plaintiff alleges that the
22 Spammer Defendants directed, controlled and participated in
23 "spamming," causing more than 10,000 deceptive and unsolicited
24 commercial electronic messages to be sent to Plaintiff's computer
25 server between October 25, 2005 and November 14, 2005. Plaintiff
26 also alleges that the header information for those emails was
27 falsified, misrepresented or forged in a way that would mislead a

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1 reasonable recipient as to the contents and subject matter of the
2 message.

3 In the FAC, Plaintiff alleges that Spammer Defendants sent
4 these emails while working as employees or agents of the Lead
5 Generator Defendants, who had pre-existing contracts to advertise
6 the Mortgage Defendants' financial services and to deliver sales
7 leads to them. Therefore, Plaintiff alleges that the Mortgage
8 Defendants "conspired with and at all times supported the Lead
9 Generators and Spammers" and "benefitted financially and will
10 continue to benefit from their conspiratorial relationship with
11 Lead Generators and Spammers." FAC ¶ 13, 16. Plaintiff alleges
12 that Mortgage Defendants "knew or consciously avoided knowing" that
13 the Lead Generators' and Spammers' actions were injuring Plaintiff.

14 LEGAL STANDARD

15 As stated in the Court's order regarding the first motion to
16 dismiss, a motion to dismiss for failure to state a claim will be
17 denied unless it is "clear that no relief could be granted under
18 any set of facts that could be proved consistent with the
19 allegations." Falkowski v. Imation Corp., 309 F.3d 1123, 1132 (9th
20 Cir. 2002), citing Swierkiewicz v. Sorema N.A., 534 U.S. 506
21 (2002). Although the court is generally confined to consideration
22 of the allegations in the pleadings, when the complaint is
23 accompanied by attached documents, such documents are deemed part
24 of the complaint and may be considered in evaluating the merits of
25 a Rule 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d
26 1265, 1267 (9th Cir. 1987).

DISCUSSION

I. Response to the Court's Order

Defendants argue that Plaintiff has failed to comply with the Court's order dismissing the original complaint and granting leave to amend to plead averments of fraud with particularity as required by Federal Rule of Civil Procedure 9(b).

A. Nature of the Allegedly Fraudulent Subject Lines

In granting leave to amend the complaint, the Court advised Plaintiff that it "must state with particularity the nature of the allegedly fraudulent subject lines." June 30, 2006 Order at 19. In its FAC, Plaintiff includes examples and states that the subject lines "were clearly intended to get someone to open the email by telling them that their loan was pre-approved ('Pre-approved rate #uzthxvml1') or that a loan was approved ('Notice: Loww Mortgage Ratee Approved')." ² FAC ¶¶ 33, 51.

This statement is similar to Plaintiff's statements regarding the non-existent domain names that this Court already deemed sufficiently particular when considering the original complaint. There the Court found that the complaint "state[d] with particularity how the allegedly fraudulent header information purporting to identify the sender of the email was false, [] explaining that the emails included domain names [] that were registered to unknown and false identities." June 30, 2006 Order at 9. Plaintiff has similarly alleged that the subject lines led

²Plaintiff alleges that the misspellings in the headers are intentionally included to deceive Plaintiff's spam-blocking software. FAC ¶ 33.

1 the recipients to believe that a loan was approved or pre-approved,
2 when in fact the email was sent for the purpose of collecting
3 information for mortgage companies to use in seeking customers.

4 Defendants point to the fact that Plaintiff has only provided
5 two examples of headers, while they seek relief for over 10,000
6 separate emails. However, the examples provided, together with the
7 explanation of the ways in which they were likely to mislead
8 readers, are sufficient to satisfy the pleading requirements of
9 Rule 9(b).

10 Therefore, the Court denies Defendants' motions to dismiss the
11 FAC on the grounds that Plaintiff failed to state with
12 particularity the nature of the allegedly fraudulent subject lines.

13 B. Identity of the Sender(s) of the Spam

14 The Court also advised Plaintiff that it must allege with
15 particularity the sender or senders of the allegedly fraudulent
16 spam. June 30, 2006 Order at 19. However, the Court specifically
17 found that "Plaintiff's averments of fraud do not extend to the
18 initiation of the allegedly fraudulent commercial emails, but only
19 to their content." Id. at 10. The Court therefore found that
20 Plaintiff need not plead with particularity facts surrounding the
21 initiation of the emails.

22 In its FAC, Plaintiff identifies the Spammer Defendants as the
23 individuals who sent the emails, alleging that "Defendants SPAMMERS
24 transmitted, for and in the hire of Defendants LEAD GENERATORS and
25 MORTGAGE BROKERS, in excess of 10,000 deceptive and unsolicited
26 commercial electronic mail advertisements." FAC ¶ 48. Further,
27 Plaintiff indicates, "The sending of these illegal advertisements
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1 was procured, from the SPAMMERS, working as employees or agents of
2 LEAD GENERATORS, under contract for delivery to the MORTGAGE
3 BROKERS." Id.

4 Narrowing the allegations of fraud to those emails that were
5 sent by three identified Spammer Defendants acting as the employees
6 or agents of two identified Lead Generator Defendants together with
7 the existing particularized statements regarding the content of the
8 emails is sufficient to "give defendants notice of the particular
9 misconduct which is alleged to constitute the fraud charged so that
10 they can defend against the charge" as required by Rule 9(b).

11 Semegen, 780 F.2d at 731. Therefore, the Court finds that
12 Plaintiff has identified with sufficient particularity the senders
13 of the allegedly fraudulent spam.

14 However, as Defendants note, Plaintiff only makes the
15 particularized statement with respect to its State anti-spam claim,
16 and continues to allege only that "Defendants sent in excess of
17 10,000 separate items of electronic mail" with respect to its
18 federal anti-spam claim. FAC ¶¶ 31, 48. Therefore, the Court
19 denies Defendants' motion to dismiss Plaintiff's State anti-spam
20 claim but grants the motion to dismiss Plaintiff's federal anti-
21 spam claim. Because both claims are based on the same factual
22 basis, the Court grants Plaintiff leave to amend to include the
23 particularized statement from the State cause of action in the
24 federal cause of action. If Plaintiff does so, the Court will not
25 entertain an additional motion to dismiss.

26 II. The CAN-SPAM Act Claim

27 In deciding the first motion to dismiss, the Court rejected
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1 Defendants' claim that Plaintiff's original complaint failed to
2 state a claim under the CAN-SPAM Act because it failed to allege
3 that Mortgage Defendants initiated the spam in question.
4 Defendants now argue that Plaintiff's FAC fails to allege that
5 Mortgage Defendants initiated the emails because of the addition of
6 the third category of defendants, the Lead Generator Defendants.
7 As this Court previously found, to state a claim against the
8 Mortgage Defendants under the CAN-SPAM Act, Plaintiff must "prove
9 that they paid or induced the Spammer Defendants to initiate
10 commercial email messages and that the Mortgage Defendants acted
11 either with actual knowledge, or by consciously avoiding knowing,
12 that the Spammer Defendants' acts were illegal." June 30, 2006
13 Order at 11.

14 Defendants argue that the inclusion of the Lead Generators
15 removes the potential for liability for the Mortgage Defendants
16 because the FAC alleges that the Lead Generators hired the Spammers
17 and therefore provided the consideration required by the statute.
18 Aegis Motion to Dismiss at 5. Plaintiff counters by arguing that
19 the statute does not require it to plead intent at all. Opposition
20 at 3-4. The Court finds neither position convincing. While the
21 statute clearly requires that the plaintiff demonstrate intent on
22 the part of the defendant, it requires a demonstration of intent
23 "to pay or provide other consideration, or induce, another person
24 to initiate such a message on one's behalf." 15 U.S.C. § 7702(12)
25 (emphasis added). Here, Plaintiff could prove consistent with the
26 allegations in the FAC that, through their contracts with Lead
27 Generator Defendants, Mortgage Defendants knowingly induced Spammer
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1 Defendants to send the illegal email messages.

2 Just as Plaintiff previously alleged that the Mortgage
3 Defendants "approved or ratified" the conduct of the other
4 defendants, Plaintiff now alleges that there existed business
5 relationships between the Mortgage Defendants, the Lead Generator
6 Defendants and the Spammer Defendants. Plaintiff also alleges that
7 those business relationships included contracts between the Lead
8 Generator Defendants and the Mortgage Defendants to "advertise
9 MORTGAGE BROKERS financial services and deliver sales leads" and
10 that "MORTGAGE BROKERS knew, or consciously avoided knowing, at all
11 times that LEAD GENERATORS and SPAMMERS were violating the CAN-SPAM
12 ACT, and California Business and Professions Code § 117529.5
13 resulting in injury to Plaintiff." FAC ¶ 14-15.

14 Because Plaintiff did not allege fraud with respect to the
15 initiation of the emails, the Court found that "Plaintiff need not
16 plead with particularity the circumstances surrounding the
17 initiation of the alleged email" and in particular that "Plaintiff
18 need not plead particular facts showing a business relationship
19 between the Mortgage Defendants and the Spammer Defendants." June
20 30, 2006 Order at 10. Plaintiff could prove consistent with the
21 allegations in the FAC that Mortgage Defendants knowingly induced
22 Spammer Defendants to send the illegal spam through Lead Generator
23 Defendants.

24 Therefore, the Court denies Defendants' motion to dismiss
25 Plaintiff's CAN-SPAM claim for failure to state a claim.

26 III. § 17529.5 Claim

27 The Court advised that, in order to include a § 17529.5 claim
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1 in the FAC, Plaintiff must be able to allege "that Defendants
2 advertised their services in the allegedly fraudulent emails."
3 June 30, 2006 Order at 14. In paragraph 49 of the FAC, Plaintiff
4 quotes a typical email that can be construed as advertising the
5 Mortgage Defendants' services. While it does not name any of the
6 defendants by name, the email does offer "up to 5 quotes from
7 interested lenders." FAC ¶ 49. This clearly demonstrates that the
8 Mortgage Defendant's services are being offered through the
9 allegedly fraudulent emails.

10 Defendants attempt to argue that the FAC identifies only "USA
11 Lenders Network" as advertising its services through the email.
12 However, the email offers quotes from unidentified "interested
13 lenders." FAC ¶ 49. Further, completing the form at the
14 associated website leads to responses from each of the Mortgage
15 Defendants. Although the Mortgage Defendants are not individually
16 named in the email cited in the FAC, their services are clearly
17 referenced. The Court finds that this is sufficient to state a
18 claim under § 17529.5(b). Therefore, the Court denies Defendants'
19 motion to dismiss for failure to state a claim.

20 V. Plaintiff's Civil Conspiracy Claim

21 In its June 30, 2006 Order, the Court denied Defendants'
22 motion to dismiss Plaintiff's claim for civil conspiracy against
23 Mortgage Defendants, subject to Plaintiff's successful statement of
24 at least one underlying claim. Defendants argue that Plaintiff has
25 not successfully stated a claim and that the civil conspiracy claim
26 should therefore be dismissed. However, as discussed above, the
27 Court finds that Plaintiff has stated a claim under both the CAN-

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1 SPAM Act and § 17529.5(b). Therefore, the Court denies Defendants'
2 motion to dismiss Plaintiff's civil conspiracy claim.

3 V. Quicken Loans' Motion Based on Attachment of the Bishop
4 Declaration

5 Defendant Quicken argues that Plaintiff has "pled itself out"
6 of its claim against Quicken because it attached to the FAC the
7 declaration of Amy Bishop, Quicken's Associate Corporate Counsel.
8 Under Federal Rule of Civil Procedure 10(c), "A copy of any written
9 instrument which is an exhibit to a pleading is a part thereof for
10 all purposes." The Ninth Circuit has held that, in considering a
11 motion to dismiss for failure to state a claim, courts "are not
12 required to accept as true conclusory allegations which are
13 contradicted by documents referred to in the complaint." Steckman
14 v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir. 1998).

15 Bishop's declaration states that Quicken requires the
16 companies it works with to agree to Quicken's policies and
17 contractual provisions requiring compliance with the CAN-SPAM Act
18 and related laws. Bishop Decl. at ¶ 3. In particular, the
19 declaration addresses the contract between Quicken and Azoogole.com,
20 a Lead Generator Defendant, stating, "In its contract with Quicken
21 Loans, Azoogole agrees to abide by Quicken Loans' privacy policy for
22 companies with whom Quicken Loans does business and that policy
23 requires compliance with junk email and other applicable laws.
24 Moreover, in its contract with Quicken Loans, Azoogole 'represents
25 and warrants that it has obtained any and all requisite consent
26 from consumers to pass their information to [Quicken.]" Id. at
27 ¶ 6.

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1 Quicken argues that this clearly establishes a lack of
2 knowledge and intent on its part, which "completely contradicts and
3 rebuts Plaintiff's allegations in the [FAC]." Quicken Motion to
4 Dismiss at 6. Citing Northern Indiana Gun & Outdoor Shows, Inc. v.
5 City of South Bend, 163 F.3d 449 (7th Cir. 1998), Plaintiff
6 responds that it attached the declaration to its FAC for the
7 limited purpose of establishing the existence and role of the Lead
8 Generators and that it is not bound by other self-serving
9 statements in the declaration. Opposition to Motion to Dismiss at
10 10-11. Quicken counters by citing Thompson v. Illinois Dept. of
11 Prof. Reg., 300 F.3d 750 (7th Cir. 2002). In Thompson, the Seventh
12 Circuit noted that Northern Indiana Gun "reaffirmed the
13 well-settled rule that when a written instrument contradicts
14 allegations in a complaint to which it is attached, the exhibit
15 trumps the allegations." 300 F.3d at 754. However, the Thompson
16 court characterized Northern Indiana Gun as appropriately
17 "appl[ying] a more flexible approach because the attached exhibit
18 was not at issue in the litigation." Here, the declaration is not
19 at issue in the litigation.

20 Because the declaration is not a written instrument at issue
21 in this litigation, the self-serving statements included therein do
22 not bind Plaintiff. Therefore, the Court finds that the attachment
23 of the Bishop declaration to the FAC does not negate Plaintiff's
24 claims against Quicken.

25 CONCLUSION

26 For the foregoing reasons, the Court grants Defendants'
27 motions to dismiss the FAC (Docket Nos. 87, 91, 99) in part and
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1 denies them in part and grants Plaintiff leave to amend to plead
2 with particularity the identity of the senders of the spam with
3 respect to its federal cause of action.³ The amended complaint
4 must be filed within a week of the date of this order. The case
5 management conference is rescheduled for October 27, 2006 at 1:30
6 in order to allow Defendants Azoogole.com, Inc. and Leads Limited,
7 Inc. to answer the FAC.

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9 IT IS SO ORDERED.

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11 Dated: 9/27/06



12 _____
13 CLAUDIA WILKEN
14 United States District Judge

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27 ³The Court grants Defendant Aegis' and Defendants Dorland and
28 Cuervo's Requests for Judicial Notice (Docket Nos. 90, 96).

29 The Court also strikes from the record exhibits A and B to
30 exhibit 1 of the FAC and orders Plaintiff to file redacted versions
31 of the exhibits omitting identifying information including the
32 names of individuals seeking mortgages, home telephone numbers,
33 personal email addresses and home addresses. Plaintiff need not
34 file unredacted versions under seal.

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