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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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Case No. CV 06-3391-RGK (JCx) Date February 27, 2007
Title MYSPEACE, INC. v. THE GLOBE.COM, INC.

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:
Not Present

Attorneys Present for Defendants:
Not Present

Proceedings: (IN CHAMBERS) Plaintiff's Motion for Summary Adjudication of Counts 1, 3, and 4 of the Complaint (DE 36) and Defendant's Motion for Partial Summary Judgment (DE 32)

I. INTRODUCTION

MySpace, Inc. ("Plaintiff" or "MySpace") filed the current action against The Globe.com, Inc. ("Defendant" or "TheGlobe"). Plaintiff's Complaint alleges: (1) Violations of the CAN-SPAM Act, 15 U.S.C. §§ 7701, et seq.; (2) Violations of the Lanham Act, 15 U.S.C. §§ 1051, et seq.; (3) Violations of California Business and Professions Code Section 17529.5 ("Section 17529.5"); (4) Trademark Infringement under California Business and Professions Code Section 14200, et seq.; (5) False Advertising under California Business and Professions Code Section 17500, et seq.; (6) Breach of Contract; (7) Breach of the Covenant of Good Faith and Fair Dealing; (8) Unfair Competition under California Business and Professions Code Section 17200, et seq.; and (9) Common Law Unfair Competition.

Presently before this Court are cross-motions for partial summary judgment. Both Plaintiff and Defendant seek summary judgment as to Counts I (Violation of CAN-SPAM), III (Violation of Section 17529.5) and VI (Breach of Contract).

II. FACTUAL BACKGROUND

The following facts are alleged by the parties:

Plaintiff is an online social networking service that allows members to create personal profiles in order to find and communicate with other people. Members of MySpace have access to the MySpace.com website, the MySpace.com Internet Messaging service, and the MySpace.com Mail service, where users can send and receive electronic mail messages ("MySpace e-messages").

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To become a MySpace member, a person must set up an account on MySpace.com by creating a profile. The profile includes the user's name, country, zip code, birth date, and gender. The user must also create a password and provide an alternate email address to which confirmations and notifications will be sent. To set up an account, the user must assent to the MySpace Terms of Service Contract ("TOS Contract") by checking a box agreeing to the terms of the TOS Contract, and inputting a verification code. The TOS Contract prohibits spamming, automated use of its system, use of MySpace's service for commercial endeavors, and promotion of information known to be false or misleading.

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A MySpace member accesses his e-message account on the internet, at the MySpace.com website. To send a MySpace e-message, the user may either click on a link for "Mail," or go directly to the recipient's unique URL assigned to each individual account.

Defendant is a public company that provides internet-based communications services ("TGLO Products"). Defendant operates one or more websites under various domain names, including glochat.com, tglophone.com, glotalk.com and digitalvoiceglo.com.

Beginning January 2006, Defendant set up at least 95 identical or virtually identical "dummy" MySpace profiles, with corresponding e-message accounts. Defendant used these accounts to send almost 400,000 unsolicited commercial e-messages marketing TGLO Products to MySpace users via scripts.¹ On February 6, 2006, Plaintiff sent a cease and desist letter to Defendant, demanding that Defendant stop sending its commercial e-messages to MySpace members. Thereafter, Defendant ceased its transmission of e-messages. However, the transmissions later resumed and continued through May 2006.

On June 1, 2006, Plaintiff filed the current action against Defendant. In its Complaint, Plaintiff alleges that Defendant's activities violated both federal and state statutory laws, as well as state common laws. By way of its action, Plaintiff seeks an order enjoining Defendants from the conduct giving rise to Plaintiff's claims. Plaintiff also seeks actual damages, liquidated damages, punitive damages, and attorney's fees and costs.

II. JUDICIAL STANDARD

Summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Upon such a showing, the Court may grant summary judgment as to "all or any part thereof." Fed. R. Civ. P. 56(a), (b).

To prevail on a summary judgment motion, the moving party must show there are no triable issues of fact as to matters upon which it has the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). On issues where the moving party does not have the burden of proof at trial, the moving party is required only to show that there is an absence of evidence to support the nonmoving party's case. *Id.* at 326.

¹ A script is a computer programming language used to automate simple, repeated actions.

To defeat a summary judgment, the non-moving party may not merely rely on its pleadings or on conclusory statements. Fed. R. Civ. P. 56(e). Nor may the non-moving party merely attack or discredit the moving party's evidence. *Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). The non-moving party must affirmatively present specific admissible evidence sufficient to create a genuine issue of material fact for trial. *See Celotex Corp v. Catrett*, 477 U.S. at 324.

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III. DISCUSSION

At issue in these cross-motions are Count I (Violation of CAN-SPAM), Count III (Violation of Section 17529.5) and Count VI (Breach of Contract).

According to Plaintiff, there is no triable issue as to the following alleged facts: Defendant obtained 95 or more MySpace e-message accounts to circumvent MySpace's daily mail limitations. To obtain these accounts, Defendant set up almost 100 separate email accounts at sites such as hotmail.com to fulfill MySpace's requirement of providing an alternate email address. Then, Defendant used false information to set up the MySpace accounts with deceptive display names, and purported to use them for personal purposes. In fact, the accounts were used to initiate (via a script) 399,481 unsolicited commercial email messages to MySpace.com users to promote its TGLO Products. Plaintiff asserts that, as a result of this conduct, partial summary judgment should be granted in its favor as to all three counts.

Defendant contends that: (1) Plaintiff has no standing under CAN-SPAM because it is not an ISP; (2) the messages sent over its private messaging system are not e-mail, and therefore neither CAN-SPAM nor Section 17529.5 apply; and (3) the TOS Contract, in general, is an unenforceable contract of adhesion, and the liquidated damages provision, specifically, is unenforceable because it is disproportionate to anticipated damages.

For the following reasons, the Court denies Defendant's Motion for Partial Summary Judgment, and grants in part, Plaintiff's Motion for Summary Adjudication.

A. Claims Under CAN-SPAM

CAN-SPAM regulates the manner in which unsolicited commercial emails may be transmitted. *See* 15 U.S.C. §§ 7701, et seq. The statute also makes unlawful certain conduct relating to such transmissions, including the transmission of false or misleading information, and obtaining email addresses through dictionary attacks.² 15 U.S.C. §§ 7704(a) - (d). Under CAN-SPAM, an Internet access service provider who is harmed by violations of Section 7704(a), (b) or (d) may seek to enjoin further violation by the defendant, or recover damages equal to the greater of: (1) actual monetary loss incurred by the internet access service provider or (2) statutory damages as provided by Section 7706(g)(3).

Plaintiff alleges that, based on its conduct, Defendant is liable for four separate violations under the statute:

- (1) Section 7704(a)(1): transmission of commercial email that contain false or misleading information, including header information;
- (2) Section 7704(a)(2): pattern or practice of transmitting commercial email with deceptive subject headings;

² Dictionary attacks involve obtaining email addresses using an automated means that generates possible addresses by combining names, letter, or numbers into numerous permutation.

- (3) Section 7704(a)(5): pattern or practice of transmitting commercial email which omits identifier, opt-out and physical address information; and
- (4) Section 7704(b)(1): using automated means, such as scripts, to generate commercial email to random recipients.

As discussed below, the Court finds no triable issue as to Defendant's violation of the following three out of four provisions: Sections 7704(a)(1), 7704(a)(5) and 7704(b)(1)(A)(ii).

1. *Plaintiff Has Standing Under CAN-SPAM*

As an initial matter, CAN-SPAM, which is primarily a criminal statute, authorizes a private right of action only to a "provider of Internet access service." 15 U.S.C. § 7706(g)(1). Defendant contends that Plaintiff is not a provider of Internet access service, and therefore, has no standing to sue Defendant under the statute.

a. *Plaintiff is an Internet Access Provider*

Under Section 7702(11), "Internet access service" has the meaning given that term in 47 U.S.C. § 231(e)(4) ("Section 231"). Section 231 defines "Internet access service" as "a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers."

The Ninth Circuit assumes that the legislative purpose of a statute is expressed by the ordinary meaning of the words used. *Leisnoi, Inc. v. Stratman*, 154 F.3d 1062, 1066 (9th Cir. 1998). The plain meaning of the statutory language is unambiguous; "Internet access provider" includes traditional Internet Service Providers ("ISPs"), any email provider, and even most website owners. *See White Buffalo Ventures, LLC v. University of Texas at Austin*, 420 F.3d 366, 373 (5th Cir. 2005); *see also Hypertouch v. Kennedy Western*, 2006 WL 648688 at *3 (N.D. Cal. Mar. 8, 2006). Under this broad definition, Plaintiff is an "Internet access provider."

b. *MySpace E-Messages Are Electronic Mail*

Notwithstanding the broad definition given to "Internet access provider," CAN-SPAM provides a private right of action to only those Internet access providers who are adversely affected by Section 7704. Since Section 7704 regulates and prohibits conduct involving electronic mail ("electronic mail" or "email"), a private right of action under CAN-SPAM is confined to only those Internet access services that provide access to electronic mail.

CAN-SPAM defines "electronic mail message" as "a message sent to a unique electronic mail address." 15 U.S.C. § 7702 (6). "Electronic mail address" is defined as "a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox (commonly referred to as the 'local part') and a reference to an Internet domain (commonly referred to as the 'domain part'), whether or not displayed, to which an electronic mail message can be sent or delivered." 15 U.S.C. § 7702(5).

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According to Plaintiff's evidence, the mail of each MySpace user resides at a unique URL, consisting of a string of characters that includes a reference to a user name or number, and the Internet destination, www.myspace.com. (Ballon Suppl. Decl., Exh.C.2, Whitcom Depo., 71:17-24; Ballon Decl., Tab 4, Wells Decl., ¶ 7.) This evidence shows that MySpace e-messages fall under CAN-SPAM's definition of electronic mail, and Defendant has failed to present any evidence disputing Plaintiff's evidence.

However, Defendant maintains that MySpace e-messages do not constitute CAN-SPAM protected email because: (1) unlike email, MySpace e-messages have no real "route" because the messages always remain within the "walled garden" of MySpace; (2) MySpace e-messages are not email because they do not use simple mail transfer protocol ("SMTP"); and (3) unlike email addresses, MySpace e-message addresses have no domain part. Defendant's arguments are unavailing.

First, nowhere does the statute specify the requirements set forth by Defendant.³ Moreover, argument as to these requirements are part and parcel of Defendant's position that only traditional ISPs have a right to sue under CAN-SPAM, as these requirements are typically associated with email service provided by traditional ISPs. As discussed above, the Court rejects this position. Furthermore, CAN-SPAM's Congressional findings indicates that exclusion of electronic messages that fall outside the ambit of Defendant's specifications would subvert the legislative intent. Regardless of who has a private right of action under the statute, the overarching intent of this legislation is to safeguard the convenience and efficiency of the electronic messaging system, and to curtail overburdening of the system's infrastructure. *See* 15 U.S.C. § 7701(a). Limiting protection to only electronic mail that falls within the narrow confines set forth by Defendant does little to promote the Congress's overarching intent in enacting CAN-SPAM.

Nonetheless, Plaintiff has introduced evidence showing: (1) its e-message system uses both a routing method and a domain part, and (2) some MySpace e-messages are transmitted using SMTP. First, according to Plaintiff's evidence, every message must contain routing information letting MySpace servers know where to send that message. (Whitcom Decl., ¶ 4.) While the routing employed by MySpace may be less complex and elongated than those employed by ISPs, *any* routing necessarily implicates issues regarding volume of traffic and utilization of infrastructure – issues which CAN-SPAM seeks to address. Similar to an ISP, there is only a finite volume of mail that MySpace can handle without further investment in infrastructure. Second, Plaintiff's evidence shows that each user's mailbox includes a reference to, not only a user name, but also to myspace.com, the Internet domain or domain part. (Ballon Suppl. Decl., Exh.C.2, Whitcom Depo., 71:17-24; Ballon Decl., Tab 4, Wells Decl., ¶ 7.) Finally, Plaintiff's evidence shows that, while most MySpace e-messages are sent using Hypertext Transfer Protocol ("HTTP"), each time an HTTP message is sent by a MySpace user, a companion notification message is sent via SMTP to the recipient's alternative email address. (Whitcomb Decl., ¶ 5.) Additionally, MySpace users may send SMTP messages over the Internet from myspace.com when they invite someone who is not a MySpace member to join MySpace. (Whitcomb Decl. ¶ 6.) Defendant has not presented any evidence to dispute the evidence set forth above. Therefore, Defendant's argument fails, even under its improperly narrow interpretation of the statute.

Based on the foregoing, the Court finds that Plaintiff has standing to sue Defendant under CAN-SPAM because, as defined under CAN-SPAM, Plaintiff is an Internet access provider whose electronic messages qualify as electronic mail.

³ While the statute references the phrase "domain part," it is clearly not a required element, but merely used to illustrate how an electronic mail address is commonly expressed.

2. Violation of Section 7704(a)(1)

Section 7704(a)(1) prohibits the transmission of commercial email that contains false or misleading header information.⁴ Under the statute, even if the header information is technically accurate, it is considered materially misleading if it includes an originating email address that was accessed through false or fraudulent pretenses, for purposes of initiating the commercial email message. 15 U.S.C. § 7704(a)(1)(A).

According to Plaintiff's evidence, Defendant's employees created MySpace accounts using false identifying information, including fictitious email addresses and contact information. (Ballon Decl., Tab 8, Fowler Depo., 185:4-21; Ballon Decl., Tab 11, Nelson Depo. 34:4-35:8, 37:16-19, Exh. 2.) Defendant's employees also set up MySpace accounts with the display names, "MySpace Phone," "Chick," and "Coppermine." (Ballon Decl., Tab 3, Kaleel Decl., ¶¶ 7 and 12, Exh. C; Ballon Decl., Tab 10, Mobley Depo., 37:23-38:10.) As indicated by this evidence, the accounts created by Defendant failed to identify the messages as originating from TheGlobe. Based on the plain language of Section 7704(a)(1), Plaintiff's evidence establishes that Defendant violated this provision.⁵

In opposition, Defendant argues that the accounts did, in fact, identify TheGlobe as the originator of the e-messages. To support its argument, Defendant has introduced evidence that a document was used to assist employees in creating MySpace accounts. According to this evidence, the document instructed the employees to use "tгло" in the first name and "phone" as the last name. (Elliot Decl., Exh. 13, Nelson Depo., 34:4-25.) This evidence is unavailing, as it fails to dispute Plaintiff's evidence or otherwise support its proposition. At most, the evidence indicates that, in addition to the false accounts described by Plaintiff's evidence, some of Defendant's other accounts may have had as their account identifiers the words "tгло" and "phone," the product Defendant sought to market. Even so, this fact is irrelevant because Defendant has not offered any evidence showing that those words are readily associated with TheGlobe or its TGLO Products. As such, the Court finds no triable issue as to Defendant's violation of Section 7704(a)(1).

3. Violation of Section 7704(a)(2)

Section 7704(a)(2) prohibits a person from transmitting commercial email containing a subject heading that he or she knows would likely mislead the recipient about a material fact regarding the content or subject matter of the message. Under Section 7706(g)(1), a private right of action under Section 7704(a)(2) is available only when there is a pattern or practice that violates this provision.

It is undisputed that Defendant sent MySpace e-messages with the subject headings, "the new MySpace phone," "the new phone for MySpace," and "the new tгло phone for MySpace." (Ballon Decl., Tab 8, Exh. 33; Ballon Decl., Tab 3, Kaleel Decl., ¶ 4; Ballon Decl., Tab 4, Wells Decl., ¶ 17.) The last heading does not violate the statute, as it references "tгло" in a way that accurately describes the content

⁴ "Header information" means "the source, destination, and routing information attached to an electronic mail message, including the originating domain name and originating electronic mail message, and any other information that appears in the line identifying . . . a person initiating the message." 15 U.S.C. § 7702(8).

⁵ In its Opposition, Defendant argues that Section 7704(a)(1) only prohibits sending emails containing header information that makes the email appear to come from an address other than the one from which it actually came. Again, the Court finds Defendant's interpretation far too narrow and unsupported by the provision's plain language.

of the message and implies a product that is separate and distinct from MySpace. In contrast, the first two headings do violate the statute because they imply an affiliation with MySpace, likely misleading the recipient into believing that the marketed product is related to MySpace. In fact, it is undisputed that in late January 2006, an influential technology blogger on Zdnet.com inaccurately reported that MySpace had partnered with TheGlobe. (Ballon Decl., Tab 1, Exh. E; Ballon Decl., Tab 15, Cespedes Depo., 52:1-17, 56:2-24.) Although Defendant was aware of this error, it never sought to correct the misinformation. (Ballon Decl., Tab 15, Cespedes Depo., 58:15-24.) Significantly, the undisputed evidence shows that the subject headings described above were attached to e-messages sent *after* Defendant learned of the blogger's inaccurate report. (Ballon Decl., Tab 15, Cespedes Depo., 51:17-52:1-6.) As such, the Court finds that Defendant knew, or should have known, that its subject headings were misleading.

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Defendant argues that Plaintiff fails to show a pattern or practice. As to this provision, the Court agrees. The undisputed evidence shows that Defendant's employees were provided written instructions on how to create MySpace accounts and what content to send through the messaging system. (Ballon Decl., Tab 11, Exh.2.) The instructions directed the employees to use "Call for FREE fast and easy" as the headline. (Ballon Decl., Tab 11, Exh. 2, D-00003909.) This subject heading is consistent with the email content, and does not violate Section 7704(a)(2). As discussed above, notwithstanding the written instructions, as least a portion of the 399,481 e-messages sent by Defendant contained deceptive subject headings that violated the statute. However, without further evidence as to the number of such e-messages sent by Defendant, it is impossible to determine whether Defendant's violation of this provision rose to the level of a pattern or practice. Therefore, a triable issue of fact exists as to whether the number of e-messages containing deceptive subject headings is substantial enough to constitute a pattern or practice.

4. Violation of Section 7704(a)(5)

Section 7704(a)(5) requires that unsolicited commercial emails contain: (1) clear notification that the message is an advertisement, (2) clear notice of the opportunity to decline receipt of further messages from the sender, and (3) a valid physical postal address for the sender. Again, under Section 7706(g)(1), a private right of action under Section 7704(a)(5) is available only when the defendant has a pattern or practice of violating this provision.

It is undisputed that none of Defendant's 399,481 e-messages contained clear notice of the opportunity to decline receipt of further messages from the sender,⁶ or a valid physical postal address for the sender. (Separate Statement of Uncontroverted Material Facts ("UMF"), ¶¶ 14 and 15; Defendant's Statement of Genuine Issues.) Therefore, Defendant clearly violated this statutory provision.

Again, Defendant argues that its activities do not constitute a pattern or practice, as prescribed by Section 7706(g)(1). However, as stated above, the following is undisputed: (1) Defendant's employees were given instructions on how to create a MySpace account, what information should be placed in the profiles, and what content to write in the messages (Ballon Decl., Tab 8, Exh. 33.); and (2) through its employees, Defendant created at least 95 MySpace accounts and sent 399,481 unsolicited commercial emails over a course of five months. (Ballon Decl., Tab 4, Wells Decl. ¶ 8; Ballon Decl., Tab 11, Nelson

⁶ In its Statement of Genuine Issues, Defendant attempts to dispute this fact by stating that MySpace provides a mechanism for users to opt out of receiving further messages from a particular sender. However, this fact is irrelevant, as it fails to dispute Plaintiff's evidence and, in any case, fails to comport with the statutory requirement that clear notice of a recipient's ability to decline further messages be provided in the original email.

Depo., 22:5-9; Ballon Decl., Tab 10, Mobley Depo., 10:12-11:2; Ballon Decl., Tab 8, Fowler Depo., 168:5-169:25.) This evidence shows that, rather than an isolated or accidental event, Defendant sent these e-messages in a regular and repeated fashion, as a part of Defendant's marketing practice. Since each one of the 399,481 messages violated Section 7704(a)(5), Plaintiff has shown that Defendant engaged in a pattern or practice of violating this provision. As such, the Court finds no triable issue of fact as to Defendant's liability for violation of Section 7704(a)(5).

5. Violation of Section 7704(b)(1)

Section 7704(b) makes it an aggravated violation to initiate the transmission of commercial email that is unlawful under Section 7704(a) where "the electronic mail address of the recipient was obtained using an automated means that generates possible electronic mail addresses by combining names, letter or numbers into numerous permutation." 15 U.S.C. § 7704(b)(1)(A)(ii).

Plaintiff's evidence shows that Defendant randomly selected a range of MySpace ID numbers. Defendant then used a script to automatically generate a set of sequential IDs. Once these IDs were generated, the script automatically transmitted Defendant's messages to those IDs. (Ballon Decl., Tab 8, Fowler Depo., 54:14-57:11.) According to the evidence, some of the IDs correlated to MySpace profiles, and some did not. (Ballon Decl., Tab 8, Fowler Depo., 55:1-20.) A total of 399,481 messages were sent using this script. (Ballon Decl., Tab 8, Fowler Depo., 170:3-16.) Based on the evidence presented, Defendant violated Section 7704(1)(A)(ii).

In opposition, Defendant argues that it did not violate the statutory provision because the script sent messages in sequence, rather than at random. Defendant further argues that the script sent the messages to a range of MySpace profiles by using a range of user IDs that had already been assigned by MySpace. Defendant's arguments are unavailing, as it is unclear how these distinctions change the fact that Defendant used "automated means that generates possible electronic mail addresses." As such, the Court finds no triable issue as to Defendant's violation of Section 7704(b)(1)(A)(ii).

B. Section 17529.5 Claim

Section 17529.5 prohibits email transmissions to or from California email addresses containing "falsified, misrepresented or forged header information" or a subject line that would likely "mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message." Section 17529.5(a)(2) and (3). Under the statute, an electronic mail service provider⁷ may bring an action against a person or entity that violates this section.

It is undisputed that MySpace's servers, which house all MySpace.com e-message accounts, are located in California. (Ballon Decl., Tab 2, Boster Decl., ¶ 2.) Furthermore, it is undisputed that every time a user logs on to MySpace.com to send, review or reply to an e-message, he or she is doing so by accessing the California servers. (Kaleel Decl., ¶ 3.) Based on this evidence, as well as the evidence and analysis discussed in Section III.A. above, the Court finds no triable issues as to Defendant's liability for Plaintiff's Section 17529.5 claim.

⁷ An "electronic mail service provider" is defined as "any person, including an Internet service provider, that is an intermediary in sending or receiving electronic mail or that provides to end users of the electronic mail service the ability to send or receive electronic mail." Section 17529.1(h).

C. Breach of Contract Claim

To set up a MySpace account, a person must assent to the TOS Contract by checking a box agreeing to its terms. Plaintiff claims that, by setting up 95 accounts and sending its marketing e-messages through those accounts, Defendant breached the terms of the TOS Contract. Furthermore, due to modified terms of the TOS Contract, Plaintiff contends that Defendant must pay \$50 for each of its e-messages that were sent after March 17, 2006.

1. Breach of the TOS Contract

It is undisputed that Defendant's e-messages were sent between January 2006 and May 2006. (Ballon Decl., Tab 8, Fowler Depo., 168:1-15.) During that time, the TOS Contract was modified three times. (Ballon Decl., Tab 2, Boster Decl., ¶¶ 3-6.) All four versions of the TOS Contract contain the following provision: MySpace is "for the personal use of Members only and may not be used in connection with any commercial endeavors except those that are specifically endorsed or approved by the management of MySpace.com. (Ballon Decl., Tab 2, Exhs. A-D.) Also, each version prohibits: (1) content that involves the transmission of 'junk mail,' 'chain letters,' or unsolicited mass mailing or 'spamming;' and (2) "any automated use of the system, such as using scripts to add friends." *Id.*

Based on the evidence and analysis discussed in Section III.A above, the Court finds that Defendant used a script to transmit an unsolicited mass mailing to MySpace users for purposes of an unapproved commercial endeavor. This activity violates the terms of the TOS Contract.

Defendant argues that the TOS Contract, as a whole, is entirely unenforceable because every relevant version is a contract of adhesion, such that the terms are unconscionable. This argument is not well-taken.

The doctrine of unconscionability provides that a contract is unenforceable if it is both procedurally and substantively unconscionable. *A&M Produce Co. v. FMC Corp.*, 135 Cal App. 3d 473, 485-486 (1982). Procedural unconscionability focuses on oppression and surprise due to unequal bargaining power.⁸ *Trend Homes, Inc. v. Superior Court*. 131 Cal. App. 4th 950, 957-58 (2005). "Oppression" arises from the inequality of the parties' bargaining power and an absence of real negotiation or a meaningful choice on the weaker party's part. *Id.* at 958. "Surprise" is found when "the terms to which the party supposedly agreed [are] hidden in a prolix printed form drafted by the party seeking to enforce them." *Id.* (citations omitted). A contract is substantively unconscionable when its terms are so harsh, oppressive, or one-sided as to shock the conscience. *Id.* at 961.

A review of the TOS Contract shows that it is, in fact, a standardized contract that gives the subscribing party only the opportunity to adhere to the contract or reject it. (See Ballon Decl., Tab 2, Exhs. A-D.) However, the facts indicate that Defendant had a reasonable alternative or meaningful choice in the matter, in that marketing through MySpace using the method employed was not its only choice. See *Freeman v. Wal-Mart Stores, Inc.*, 111 Cal. App. 4th 660, 668-669 (2003). In fact, Plaintiff's evidence shows that Defendant had, in fact, considered purchasing advertising space on the MySpace

⁸ Folded into this analysis is the determination of whether the contract is adhesive. Procedural unconscionability is typically found where there is a contract of adhesion. While an alternative method of analysis calls for an initial determination of whether the contract at issue is adhesive, that determination, by itself, has no legal consequence for purposes of deciding whether a contract is enforceable. The true determining factor is whether the contract is unconscionable. See *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807 (1981).

website. (Ballon Decl., Tab 10, Mobley Depo., 44:19-47:7.) Moreover, the Court finds that the contract is not written prolixly, particularly for an experienced, sophisticated business entity whose area of expertise involves Internet related technology. Even if the TOS contract was procedurally unconscionable, the terms, as a whole, are certainly not so harsh, oppressive, or one-sided as to shock the conscience.

In light of the above, the Court finds that Defendant breached the TOS Contract.

2. Liquidated Damages Provision

On March 17, 2006, Plaintiff modified the TOS Contract and included the following provision: "Prohibited activity includes . . . advertising to, or solicitation of, any Member to buy or sell any products or services through the Services. If you breach this Agreement and send unsolicited bulk email, . . . or other unsolicited communications of any kind . . . As a reasonable estimation of such harm, you agree to pay MySpace.com \$50 for each such unsolicited email . . . you send through the Services; . . ." *Id.*

Plaintiff asserts that, under this provision, Defendant is liable for liquidated damages in the amount of \$50 per message sent after March 17, 2006. Defendant argues that the \$50 liquidated damages clause is unenforceable because it is an impermissible contractual penalty. The Court disagrees.

California law provides that liquidated damages clauses are enforceable where: (1) damages from a breach would be impracticable or extremely difficult to determine with certainty; and (2) the amount represents a reasonable estimation of what such damages might be. *Utility Consumers' Action Network, Inc. v. AT&T Broadband of Southern California*, 135 Cal. App. 4th 1023, 1029 (2006). As stated above, the Court has found that Defendant breached the TOS Agreement by bulk transmission of unapproved, unsolicited commercial e-messages. The costs associated with this activity include not only infrastructure costs, such as additional bandwidth, and monitoring costs, they are also rife with large hidden costs. Such hidden costs include those associated with deterrence (legal fees, software, etc.), depletion of customer goodwill, and liability implications associated with the unlawfully advertised product. Therefore, the damages related to Defendant's breach are, in fact, impracticable or extremely difficult to determine. As to the amount of liquidated damages, CAN-SPAM sets statutory damages for unsolicited commercial emails at \$25-\$300 per message. Moreover, while the costs associated with spamming are difficult to definitively assess, the costs listed above are certainly large, and only the tip the iceberg. Therefore, the Court finds \$50 per message a reasonable estimation of Plaintiff's damages.

Defendant further argues that, even if the Court finds the liquidated provision enforceable, the provision should be applied only to those messages that were sent from accounts created after March 17, 2006. Plaintiff contends that, because the TOS contract specifically provides for modification of the agreement, the provision should apply to all messages sent after March 17, 2006, regardless of when the account was created. The Court agrees with Plaintiff.

All four versions of the TOS Contract specifically provide: "MySpace.com may modify this Agreement from time to time and such modification shall be effective upon posting by MySpace.com on the Website. *You agree to be bound to any changes to this Agreement when you use the Service after any such modification is posted.* (Ballon Decl., Tab 2, Exhs. A-D (emphasis added).) For the same reasons stated above, this contractual term is neither procedurally nor substantively unconscionable. Additionally, the Court notes that Defendant created all 95 MySpace accounts, both before and after

March 17, 2006. Therefore, at the time it created its post-March 17 accounts, it knew, or should have known, that all messages, even those sent from pre-March 17 accounts, were subject to the liquidated damages provision. As such, the Court finds that the liquidated damages provision contained in the March 17, 2006 TOS Contract applies to all messages sent by Defendant after March 17, 2006.

IV. EVIDENTIARY OBJECTIONS

To the extent this Court has relied on evidence to which the parties object, those objections are overruled.

V. CONCLUSION

In light of the foregoing, Defendant's Motion for Partial Summary Judgment is **denied**, and Plaintiff's Motion for Partial Summary Judgment is **granted in part**. Specifically, the Court finds summary judgment in favor of Plaintiff as to the following:

- (1) Count I: Violation of 15 U.S.C. §§ 7704(a)(1), 7704(a)(5) and 7704(b)(1)(A)(ii);
- (2) Count III: Violation of Section 1729.5;
- (3) Count VI: Breach of Contract; and
- (4) Liquidated Damages of \$50 per e-message sent after March 17, 2006.

The Court finds a triable issue of fact as to Plaintiff's claim that Defendant violated 15 U.S.C. § 7704(a)(2).

IT IS SO ORDERED.

Initials of Preparer

slw

DECLINED