— INTERIM ORDER —

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOTTIE E. WILKINS JUSTICE *Justice* PART 18

THE PEOPLE OF THE STATE OF NEW YORK BY ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner(s),

- v -

MONSTERHUT, INC., d/b/a MONSTERHUT.COM, TODD PELOW and GARRY HARTL, INDIVIDUALLY

Respondent(s).

INDEX NO. 402140/02

MOTION DATE 8/23/02

MOTION SEQ. NO. 001

MOTION CAL. NO. 103

The following papers, numbered 1 to 3 were read on this motion to/for Injunction

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits Memo of Law	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

Motion decided pursuant to Decision attached.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

JAN 06 2003

Dated: January 6, 2002

Lottie E. Wilkins J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Hon. Lottie E. Wilkins
J.S.C.

DECISION

Petitioner, the People of the State of New York by the Attorney General of New York, bring this special proceeding alleging persistent and repeated fraudulent and illegal conduct on the part of the Respondent pursuant to General Business Law § 349 and § 350 and Executive Law §63(12) in that the Respondent, MonsterHut, a marketing company which advertises via the Internet, and the individual Respondents, Todd Pelow and Garry Hartl, have engaged in deceptive business practices and false advertising. Respondents MonsterHut and Pelow have appeared and Respondent Pelow has filed an affidavit on behalf of the corporation and himself. Respondent Hartl although properly served, he has not responded to the verified petition.

It is alleged that the Respondents have sent more than one half-billion commercial e-mails since March 2001 while falsely representing to consumers that all e-mail addresses were obtained by Respondents based on permission based protocols and that consumers had received such e-mails because they "opted-in" to receive such. More than 750,000 consumers asked to be removed from the Respondents e-mail list and forty thousand consumers complained. Petitioners contend that MonsterHut's e-mail list actually contained e-mail addresses that were obtained using both "opt-in" and "opt-out" protocols, and as such Respondents have falsely represented to consumers that they had received e-

ails from MonsterHut because they "opted-in," constituting fraud, false advertising, and deceptive practices. Petitioners seek the following relief: to enjoin Respondents from falsely representing that all of the e-mail lists are entirely permission based or based on "opt-in" protocols; to require Respondents to post a bond to protect future consumers; that Respondents submit an accounting of their e-mail list and finances; a civil penalty in the amount of five hundred ($500.00) dollars for each violation of the General Business Law §350 and §349 and a civil penalty in the amount of two thousand ($2,000.00) dollars against the corporate Respondent and each individual Respondent pursuant to General Business Law §350-d CPLR § 8303(a)(6) ; and to provide restitution and damages to eligible consumers.

The Respondents argue that they never represented that the e-mail addresses they acquired were "confirmed opt-in" addresses. Respondents believed that all the e-mail addresses they received from third parties were obtained in compliance with permission based protocols. Respondents state that they merely attempted to develop a more effective approach to permission based e-mail marketing and tried to develop a new approach to e-mail data base acquisition other than the confirmed "opt-in" method by developing partnerships with web based organizations that get users permission to send them advertisements.

The issues before this Court center around whether MonsterHut conveyed to its consumers that it received e-mail address on an "opt-in" basis only, and what is the definition of an "opt-in" or permission based protocol. Petitioners argue that in accordance with generally accepted industry wide standards, in an "opt-in" protocol consumer e-mail addresses are collected and used only if the consumer affirmatively approves such collection. For example, a consumer must mark a box indicating the desire to allow the use

his or her e-mail address. Adversely, under the "opt-out" protocol, consumer e-mail addresses are collected so long as the consumer has not specifically declined such collection by an affirmative act, for example by the consumers failure to remove a check mark from a box which contained such marking as a default. See Kline Affidavit, 10-12, 14-17. The distinction between the two protocols is the resulting default, based on the inaction of the consumer with the opt-out protocol. Respondent MonsterHut asserts its definition of "opt-in" varies from Petitioner's, and that the Petitioner's definition does not constitute the standard in the industry. Respondent differentiates between "permission based," "confirmed opt-in," and "opt-in" protocols, whereas Petitioner indicates that these terms are synonymous.

Respondents contend that they used an alternative form of permission based protocols to acquire e-mail addresses. Respondents states that they used the "third-party acquisition method" to obtain e-mail addresses in that they developed relationships with web-based organizations who got permission from their users to send them advertisements. According to the Respondents, these web-based organizations told Respondent that they used "opt-in" protocols in obtaining consent from their users. Respondent contends that they relied on the representations of the sources from whom they acquired data that the information was gathered in compliance with "opt-in" protocols.

Respondent's arguments and papers in support thereof are devoid of any purported legal basis for the distinction between "opt-in", "confirmed opt-in", and "permission based" protocols. Respondents make repeated conclusory assertions that are baseless. No legal or factual support has been provided to this Court for Respondents' reliance on these protocols.

Petitioner directs this Court to MonsterHut, Inc v. PaeTec Comm., Inc., 107189 cv

, (Sup. Ct. Niagara Co. 2001), aff'd 294 A.D.2d 945, 741 N.Y.S.2d 820 (4th Dept.2002). This is a prior case involving MonsterHut where Respondents' definition of "permission based" and "opt- in" was consistent with the definition asserted by the Petitioner. In the PaeTec litigation, MonsterHut violated its agreement with an Internet service provider (ISP) by sending its own "unsolicited, mass, commercial e-mail in breach of the agreement". In that case MonsterHut represented that its e-mails are "100% permission based, and it is a "permission based" or "opt-in" e-mail marketer. Respondents have provided no evidence to indicate from whom Respondents received consumer e-mail address, and how the alleged ISPs practice within the confines of "opt-in" protocols.

Lastly, Respondents argue that General Business Law § § 349 and 350 cannot be used against a New York business without regard to where the particular transaction originated and where the customers defrauded are situated. Respondents cite a consolidated matter, Goshen v. Mutual Life Ins. Co. and Scott v. Bell Atlantic Corp., 98 N.Y.2d 314 (2002). Plaintiffs in each of the cases sought redress for violations of General Business Law § § 349 and 350 that involved deceptive schemes that were originated in New York. Goshen involved the marketing of an insurance product with a deceptive scheme of vanishing premiums which allegedly injured a Florida resident. Scott involved New York and out-of-state consumers who subscribed to defendants' digital subscriber line (DSL) Internet service. Defendants are Delaware corporations with principal places of business in New York and Virginia. Plaintiffs were injured because service was poor and did not meet or approximate the quality of what was advertised and offered to them.

In Goshen The Court of Appeals' holding that the transactions formulated in New York in which consumers' were allegedly deceived must occur in New York is distinguishable from the instant case. Goshen involves private rights of action to redress deceptive practices.

instant case deals with the Attorney General's authority to protect consumers. General Business Law § 349(b) expressly states that the Attorney General can bring an action whenever any person "has engaged or is about to engage in" deceptive practices "in the state." Additionally, the instant case involves three causes of action under Executive Law § 63(12) and General Business Laws § § 349 and 350. Goshen does not affect the violation of Executive Law § 63(12) for persistent and repeated fraud that is not limited by injuries which purportedly must occur in this state. Morever, this case has overwhelming nexus to New York state which is lacking in Scott.

The Appellate Division Fourth Department held as a matter of law that MonsterHut engaged in "spamming", in sending its own unsolicited, mass, commercial e-mail in breach of its agreement with PaeTec. See MonsterHut, Inc. v. PaeTec Comm., Inc., 741 N.Y.S.2d 820 (4th Dep't. 2002). In that case as in the instant case Respondents have not offered any proof or legal basis to demonstrate that their practice conforms with industry-wide accepted "opt-in" protocols.

No legal support has been presented indicating that scienter is an element in any of the statues that Respondent is accused of violating. In contrast, Petitioner cites a number of cases in support of its position that proof of scienter is not necessary and is, in fact, irrelevant to the question of illegality. See Lefkowitz v. Bull Investment Group, 46 A.D.2d at 28 (3d Dep't. 1974), appeal denied, 35 N.Y. 2d 647 (1975); Lefkowit v. E.F.G. Baby Products, Inc., 40 A.D.2d 364 3d Dep't.1973); Geismer v.; Abraham & Strauss, 109 Misc. 2d at 496-497 (Sup. Ct. Suffolk Co. 1981).

Accordingly, petitioner's request for relief is granted to the following extent:

1. Respondent is permanently enjoined from further engaging in any of the fraudulent, deceptive and illegal acts and practices pertaining to

representations of "opt-in", "opt-out," or the "permission based" nature of their protocols or the collection and use of their e-mail data.

2. This matter will be set down for a conference on February 11, 2003 at 9:30 A.M. on the remaining issues that will include, be not be limited to, whether respondent will be required to: 1) post a surety bond; 2) pay a money judgment for restitution and damages to aggrieved consumers; 3) pay money damages in civil penalties pursuant to G.B.L. § 350-d and CPLR § 8303(a)(6); 4) damages; and, 5) restitution.

Settle Order.

Dated: January 6, 2002

Lottie E. Wilkins, J. S. C.

Lottie E. Wilkins