CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I (a) PLAINTIFFS

AMAZON.COM, INC.

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Seattle, Washington
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

EDWARD DAVIDSON

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT Pinellas
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Kenny Nachwalter Seymour Arnold Critchlow & Spector, P.A. PH: (305) 373-1000
201 S. Biscayne Blvd., Suite 1100, Miami, FL 33131

ATTORNEYS (IF KNOWN)

(d) CIRCLE COUNTY WHERE ACTION AROSE: (Pinellas)
DADE, MONROE, BROWARD, PALM BEACH, MARTIN, ST. LUCIE, INDIAN RIVER, OKEECHOBEE, HIGHLANDS

II. BASIS OF JURISDICTION
(PLACE AN X ONE BOX ONLY)

- ☐ 1. U.S. Government Plaintiff
- ☒ 3. Federal Question (U.S. Government Not a Party)
- ☐ 2. U.S. Government Defendant
- ☐ 4. Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES
(For Diversity Case Only) (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated of Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.
DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)

Trademark claims under 15 U.S.C. Sections 1114 and 1125, as well as related common law unfair competition claim.

IVa. 5 **days estimated (for both sides) to try entire case**

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

A CONTACT	A TORTS	B FORFEITURE PENALTY	A BANKRUPTCY	A OTHER STATUS
☐ 110 Insurance	PERSONAL INJURY	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 States Reapportionment
☐ 120 Marine	☐ 310 Airplane	☐ 620 Other Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust
☐ 130 Miller Act	☐ 315 Airplane Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881	A PROPERTY RIGHTS	☐ 430 Banks and Banking
☐ 140 Negotiable Instrument	☐ 320 Assault, Libel & Slander	☐ 630 Liquor Laws	☐ 820 Copyrights	☐ 450 Commerce/ICC Rates/etc. B
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 330 Federal Employers' Liability	☐ 640 R.R. & Truck	☐ 830 Patent	☐ 460 Deportation
☐ 151 Medicare Act	☐ 340 Marine	☐ 650 Airline Regs	☒ 840 Trademark	☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 152 Recovery of Defaulted Student Loans (Excl Veterans) B	☐ 345 Marine Product Liability	☐ 660 Occupational Safety/Health	B SOCIAL SECURITY	☐ 810 Selective Service
☐ 153 Recovery of Overpayment of Veteran's Benefits B	☐ 350 Motor Vehicle	☐ 690 Other	☐ 861 HIA (1395ff)	☐ 850 Securities/Commodities/Exchange
☐ 160 Stockholder's Suits	☐ 355 Motor Vehicle Product Liability	A LABOR	☐ 862 Black Lung (923)	☐ 875 Customer Challenge 12USC3410
☐ 190 Other Contract	☐ 360 Other Personal Injury	☐ 710 Fair Labor Standards Act	☐ 863 DIWC/DIWW (405(g))	☐ 891 Agricultural Acts
☐ 195 Contract Product Liability	☐ 362 Personal Injury-Med Malpractice	☐ 720 Labor Management Relations B	☐ 864 SSID Title XVI	☐ 892 Economic Stabilization Act
A REAL PROPERTY	☐ 365 Personal Injury-Product Liability	☐ 730 Labor Management Reporting & Disclosure Act	☐ 865 RSI (405(g))	☐ 893 Environmental Matters
☐ 210 Land Condemnation	☐ 368 Asbestos Personnel Injury Product Liability	☐ 740 Railway Labor Act	A FEDERAL TAX SUITS	☐ 894 Energy Allocation Act
☐ 220 Foreclosure B	PERSONAL PROPERTY	☐ 790 Other Labor Litigation	☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 895 Freedom of Information Act
☐ 230 Rent Lease & Ejectment	☐ 370 Other Fraud	☐ 791 Employee Ret. Inc. Security Act B	☐ 871 IRS-Third Party 26 USC 7609	☐ 900 Appeal of Fee Determination Under Equal Access to Justice
☐ 240 Torts to Land	☐ 371 Truth in Lending B			☐ 950 Constitutionality of State Statutes
☐ 245 Tort Product Liability	☐ 380 Other Personnel Property Damage			☐ 890 Other Statutory Actions *
☐ 290 All Other Real Property	☐ 385 Property Damage Product Liability			* A or B

A CIVIL RIGHTS	B PRISONER PETITIONS
☐ 441 Voting	☐ 510 Motions to Vacate Sentence Habeas Corpus
☐ 442 Employment	☐ 530 General *
☐ 443 Housing/Accommodations	☐ 535 Death Penalty
☐ 444 Welfare	☐ 540 Mandamus & Other *
☐ 440 Other Civil Rights	☐ 550 Civil Rights * A or B

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

- ☒ 1. Original Proceeding
- ☐ 2. Removed From State Court
- ☐ 3. Remanded from Appellate Court
- ☐ 4. Reflled
- ☐ 5. Transferred from another district (Specify)
- ☐ 6. Multidistrict Litigation
- ☐ 7. Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT
CHECK IF THIS IS A ☐ UNDER F.R.C.P. 23
CLASS ACTION **DEMAND $**
☐ Check YES only if demanded in complaint:
JURY DEMAND: ☒ YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See Instructions):
JUDGE _____ DOCKET NUMBER _____

DATE 8/25/3

SIGNATURE OF ATTORNEY OF RECORD

UNITED STATES DISTRICT COURT
S/F I-2
REV. 9/94

FOR OFFICE USE ONLY. Receipt No. _____
Date Paid: _____
Amount: _____
M/fp: _____

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

AMAZON.COM, INC., a Washington corporation,

Plaintiff,

v.

EDWARD DAVIDSON, an individual, and JOHN DOES 1-20,

Defendants.

SUMMONS IN A CIVIL CASE

CASE NUMBER:

TO: EDWARD DAVIDSON
205 Katherine Blvd.
Apt. 1102
Palm Harbor, FL 34684-3679

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFFS' ATTORNEY (name and address):

Harry R. Schafer, Esq.
KENNY NACHWALTER SEYMOUR ARNOLD
CRITCHLOW & SPECTOR, P.A.
1100 Miami Center, 201 South Biscayne Boulevard
Miami, FL 33131-4327, Telephone: (305)373-1000

an answer to the complaint which is herewith served upon you, within **twenty (20)** days after service of this summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

CLERK _____ DATE _____

BY DEPUTY CLERK _____

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO.:

AMAZON.COM, INC., a Delaware corporation,

Plaintiff,

v.

EDWARD DAVIDSON, an individual, and JOHN DOES 1-20,

Defendants.

_____/

COMPLAINT
(Injunctive relief requested)

Plaintiff Amazon.com, Inc. ("Amazon.com"), through its attorneys, alleges as follows:

I. INTRODUCTION

1. Defendant Edward Davidson and other unknown defendants are engaged in a marketing campaign in interstate commerce in which they have been sending e-mails to consumers with spoofed "from" lines and other e-mail routing information, creating the impression that the e-mails are from Amazon.com. Defendants have intentionally used the AMAZON.COM® mark in the e-mail to cause the recipient to believe that the e-mail is from Amazon.com and/or to get past e-mail filters. Defendants do not have permission to use the AMAZON.COM® mark and are not affiliated in any way with Amazon.com.

2. By this Complaint, Amazon.com seeks to prevent consumer confusion and protect AMAZON.COM®, one of the world's best-known brands, from intentional infringement and cyberpiracy. Defendants have recently conducted an e-mail marketing

campaign advertising a penis enlargement and sexual enhancement product known as "VP-RX," using e-mails that falsely claim that they are from "Amazon.com."

3. Defendants are using the AMAZON.COM® trademark in their e-mail marketing campaign to immediately convey to consumers an association with Amazon.com, to circumvent e-mail filters, and to unfairly trade off the reputation and goodwill of the AMAZON.COM® mark. Since commencing operations on the World Wide Web in 1995, Amazon.com's annual sales have grown to over $3.9 billion, and Amazon.com has become a Fortune 500 company. With tens of millions of customers worldwide, Amazon.com is among the best-known and most popular Internet retailers.

4. Amazon.com has extensively promoted its business using the AMAZON.COM® mark, and Internet shoppers and consumers almost universally recognize AMAZON.COM® as a brand identifier for Amazon.com's websites and products. Consumers have a strong association between the AMAZON.COM® mark and Amazon.com's websites and the strength of the AMAZON.COM® trademark—one of Amazon.com's most valuable corporate assets.

5. Defendants' use of AMAZON.COM® in connection with their marketing of goods or services is likely to confuse consumers. Defendants' use of AMAZON.COM® will lead some consumers to conclude that Amazon.com is a partner, has a business relationship, or is somehow associated with defendants or their products.

6. Preventing this confusion will help protect consumers from deceptive and fraudulent e-mail practices, allowing consumers to make fully informed choices about where they are shopping on the Internet, thereby promoting the consumer protection goals of the trademark and unfair competition laws. In this action, Amazon.com seeks to enjoin defendants from using the trade name and trademark AMAZON.COM® for the marketing and sale of their products. The unfair competition laws do not allow a latecomer to copy a mark and "free ride" on the goodwill associated with it. A myriad of other names are

available. A marketer should not be allowed to benefit from Amazon.com's long term and extensive investment in AMAZON.COM® at the expense of Amazon.com and to the detriment of consumers.

II. JURISDICTION AND VENUE

7. This is a Complaint for violations of §§ 32 and 43 of the Lanham Act , 15 U.S.C. § 1114(1)(Trademark Infringement), 15 U.S.C. § 1125(a) (False Designation of Origin, Unfair Competition), 15 U.S.C. § 1125(d) (Cyberpiracy Prevention), common law unfair competition and trespass to chattels.

8. The Court has original subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1338(a). The Court has jurisdiction over the state law claims pursuant to 28 U.S.C. §§ 1338(b) and 1367.

9. The Court has personal jurisdiction over the defendants because the defendants are located in and/or conduct business in this District. Also, the defendants have purposefully availed themselves of the opportunity to conduct commercial activities in this forum, and this Complaint arises out of those activities. E-mails sent from the defendants actively display, disseminate, and promote the infringing AMAZON.COM® mark. The publication and dissemination of the infringing trademark in Florida is causing ongoing injury to Amazon.com.

10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(c), because a substantial part of the events giving rise to the claim occurred, and continue to occur, in the Southern District of Florida. The damage to Amazon.com described herein takes place in this District and elsewhere.

III. THE PARTIES

11. Amazon.com is a Delaware corporation with its principal place of business in Seattle, Washington. On or about July 15, 1997, Amazon.com registered the trademark AMAZON.COM® with the United States Patent and Trademark Office.

12. On information and belief, defendant Edward Davidson is a Florida resident. Davidson owns and operates a variety of internet websites and domains, including the domains <www.planetdealz.com> and <www.sellthrunet.com>, and advertises for sale under the name "VP-RX" a penile enlargement and sexual enhancement pill. Davidson markets his products by, among other things, the sending of bulk, unsolicited e-mail, or "spam." Moreover, Davidson has been the subject of at least one other federal court lawsuit involving deceptive and misleading spam, including the forging of a domain name in his junk e-mail advertisements. A copy of the Court's "Report and Recommendation" in *America Online, Inc. v. Web Communications, et. al.,* United States District Court for the Eastern District of Virginia, Civil Action No. 98-289A, in which Davidson was a defendant, is attached hereto as Exhibit A.

13. Amazon.com is unaware of the true names and capacities of defendants sued herein as DOES 1-20, and therefore sues these defendants by such fictitious names. Amazon.com will amend this complaint to allege their true names and capacities when ascertained. Amazon.com is informed and believes and therefore alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that Amazon.com's injuries as herein alleged were proximately caused by such defendants. These fictitiously named defendants, along with defendant RTH, are herein referred to as "defendants." .

14. The actions alleged herein to have been undertaken by the defendants were undertaken by each defendant individually, were actions that each defendant caused to occur, were actions that each defendant authorized, controlled, directed, or had the ability to authorize, control or direct, and/or were actions in which each defendant assisted, participated or otherwise encouraged, and are actions for which each defendant is liable. Each defendant aided and abetted the actions of the defendants set forth below, in that each defendant had knowledge of those actions, provided assistance and benefitted from those

actions, in whole or in part. Each of the defendants was the agent of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of such agency and with the permission and consent of other defendants.

IV. THE AMAZON.COM® TRADEMARK.

15. The term "Amazon.com" is not only the name of plaintiff's company, but the most important and easily recognized identifier of the goods and services it offers. There is a particularly close association among consumers between Amazon.com the business, the AMAZON.COM® mark, and the products and services offered under the Amazon.com designation. For millions of consumers, the name "Amazon.com" has come to represent wide selection, fast delivery, fair pricing, and excellent security for Internet transactions. Courts in the United States and Greece have entered judgments for Amazon.com that attest to the fame and/or the strong association between the AMAZON.COM® mark and the services offered by Amazon.com.

16. AMAZON.COM® mark is one of the best known trademarks on the Internet. For instance:

- Tens of millions of customers from over 220 countries have made purchases through the Amazon.com Site. Every one of these purchasers has, at a minimum, seen the AMAZON.COM® mark on the Web site, on the packaging in which his or her order was shipped, and in e-mail communications that confirm each order.

- Many millions more have come to know the AMAZON.COM® mark through Amazon.com's extensive advertising in a variety of media. Since 1996, Amazon.com has spent hundreds of millions on advertising—all of which makes prominent use of the AMAZON.COM® mark—on television and radio, and in newspapers and magazines.

- According to the MMXI Europe May 2000 European Audience Ratings Report, the Amazon.com, Amazon.co.uk, and Amazon.de sites reach more consumers in Europe than any other site on the Internet.

- A recent survey by Media Metrix, a company that monitors traffic to popular e-commerce Web sites, identified the Amazon.com Site as one of the most frequently visited shopping sites on the Internet, and the largest seller of books (ahead of sites operated by Barnes & Noble and Borders), music (ahead of sites operated by Columbia House and BMG Music), toys, software (ahead of sites operated by <Bestbuy.com> and <CompUSA.com>) and video (ahead of the <BlockBuster.com> site).

- Amazon.com's achievements have generated tremendous attention in the media—thousands of articles have been written about the company over the last few years. Feature stores in *Fortune*, *Business Week*, *The New York Times*, *USA Today*, *Advertising Age* and *Wired* have touted the company's success and have identified it as a leading force in the "New Economy."

- The Amazon.com name is found on literally thousands of Internet Web sites. Not only do important Internet retailers (e.g., AOL.com) carry Amazon.com "banner" ads on their homepages, but more than 800,000 other Web site operators around the world have become Amazon.com "Associates," and are thus permitted to link to the Amazon.com Site and to display the AMAZON.COM® mark on their Web sites.

- A recent study by Interbrand Group, a leading international brand consultancy company, ranked the 100 most valuable brands in the world, all of which Interbrand identified as having a value in excess of $1 billion. Interbrand's study included the AMAZON.COM® mark, ranking its value above such well-known trade names as "Hilton®" and "Guinness®." Another Interbrand study recognized the AMAZON.COM® mark's value in the year 2001, ranking its value above 24 other trade names such as "Burger King®" and "Wall Street Journal®."

17. The AMAZON.COM® mark is famous by virtue of its inherent distinctiveness and substantial secondary meaning as a designation of the source of the products Amazon.com sells and by its continuous and broad use for virtually the entire life

of the Internet as a commercial medium. The AMAZON.COM® mark is registered in the European Union and in 72 individual countries, and has over 400 additional registration applications pending all over the world. AMAZON.COM® is a registered trademark with the United States Patent and Trademark Office for a computerized on-line search and ordering service featuring the wholesale and retail distribution of books, music, motion pictures, multimedia products and computer software in the form of printed books, audiocassettes, videocassettes, compact disks, floppy disks, CD ROMs, and direct digital transmission.

18. The AMAZON.COM® mark is particularly well known among Internet users, the trading areas and channel of trade used by both Amazon.com and defendants. There are no similar marks in common commercial use. A recent review of the database maintained by the United States Patent and Trademark Office reveals not a single registration for any mark that included both "amazon" and "com."

19. Amazon.com is one of the best-known Internet retailers in the world today. Jeff Bezos ("Bezos"), the company's founder, was a pioneer in the use of the Internet as a medium of commerce. In 1995, Bezos created an Internet Web site ("Amazon.com Site") that permitted consumers around the world to purchase books on-line. Amazon.com was one of the first corporations to make the name of its business identical to the domain name from which its business operates—such that anyone using the Internet to find its Web site need only remember the name of the company.

20. Since its inception, the Amazon.com Site has continuously operated from the Internet address <www.amazon.com>. When Amazon.com opened its cyber-doors, its site primarily featured books, which is still an integral part of Amazon.com's business. Since then, Amazon.com has expanded its operations to include an even broader selection of products, offering full line of goods ranging from computer products and electronics to toys to compact discs and movies on videotape and DVD.

21. Since at least as early as 1995, Amazon.com has used the trademark AMAZON.COM® to promote its business and its websites.

V. DEFENDANTS' ILLEGAL ACTS

22. On information and belief, sometime on or before May 19, 2003, defendants began an extensive e-mail campaign. As part of that campaign, defendants, acting together and in concert, created and sent large volumes of e-mail messages advertising their penis enlargement and sexual enhancement product. Some of the e-mails were designed so that they appeared to be sent from Amazon.com, and used the AMAZON.COM® mark in the e-mail header as the "from" address. *See* Exhibit B.

23. Amazon.com did not provide permission to defendants to use its AMAZON.COM® trademark for any reason, including their e-mail marketing campaign.

24. On information and belief, defendants intentionally adopted the AMAZON.COM® mark to trade on the fame and goodwill associated with the AMAZON.COM® mark, and to evade customers' anti-spam filters specifically designed to permit the receipt of e-mail from Amazon.com.

25. Defendants' use of the AMAZON.COM® mark is likely to cause consumer confusion, mistake, and deception. This likelihood of confusion, mistake, and deception is even greater because both Amazon.com and defendants operate their businesses over the Internet.

26. Defendants' use of the AMAZON.COM® mark is likely to lead consumers to mistakenly conclude that the e-mail from defendants was exclusively or jointly sent by, licensed or certified by, or otherwise sponsored or approved by Amazon.com, or that "VP-RX" or defendants' websites are somehow otherwise affiliated, connected, or associated with Amazon.com. Consumers are likely to be misled as to the true source, sponsorship, or affiliation of the e-mail.

27. On information and belief, through their use of the AMAZON.COM® mark, defendants have intentionally and with knowledge sought to cause consumer confusion, mistake, and deception. Alternatively, defendants have acted with reckless disregard for plaintiff's rights and/or were willfully blind in connection with their unlawful actions.

28. Defendants have disparaged plaintiff and its AMAZON.COM® mark by creating a false association with defendants and their goods.

29. Defendants have misappropriated plaintiff's advertising ideas and style of doing business with regard to the advertisement, promotion, marketing and sale of plaintiff's products.

30. Defendants have been unjustly enriched by illegally using and misappropriating plaintiff's intellectual property for their own financial gain.

31. Defendant's infringement of the AMAZON.COM® mark has caused, is causing and will continue to cause, a likelihood of confusion, deception and mistake on the part of consumers. This confusion has caused, is causing and will continue to cause, irreparable harm to plaintiff. Accordingly, defendants must be restrained and enjoined from any further infringement and misappropriation of the AMAZON.COM® mark.

32. Defendants are directly, contributorily and/or vicariously liable for the foregoing actions.

33. Plaintiff has no adequate remedy at law.

34. Plaintiff has suffered harm and damages as a result of the acts of defendants in an amount thus far not determined. The injuries and damages sustained by plaintiff have been directly and proximately caused by defendants' wrongful advertisement, promotion, marketing, display, distribution, sale and offers of sale of their goods using infringements of the AMAZON.COM® mark, as well as by defendants' misappropriation of plaintiff's advertising ideas and style of doing business.

COUNT I

TRADEMARK INFRINGEMENT UNDER LANHAM ACT 15 U.S.C. § 1114

35. Amazon.com realleges paragraphs 1-34 of this Complaint as if fully set forth herein.

36. Defendants' use of the AMAZON.COM® to advertise, promote, market, offer for sale, or sell products and services constitutes trademark infringement pursuant to 15 U.S.C. § 1114.

COUNT II

FALSE DESIGNATION OF ORIGIN UNDER LANHAM ACT 15 U.S.C. § 1125(a)

37. Amazon.com realleges paragraphs 1-34 of this Complaint as if fully set forth herein.

38. Defendants have used and continue to use AMAZON.COM® in connection with goods or services, in commerce, in a manner that is likely to cause confusion, mistake, or deception as to the origin, sponsorship, or approval of their goods or services.

39. Defendants have affixed, applied, or used in connection with their sale, offers of sale, distribution, display, advertisement, marketing and promotion of goods, false designations or origin and false descriptions and representations, including words or other symbols which tend falsely to describe or represent such goods and have caused such goods to enter into commerce with actual and/or constructive knowledge of the falsity of such designations of origin and such descriptions and representations, all of the detriment of plaintiff.

40. Defendants' wrongful and illegal acts set forth above constitute false designation of origin in violation of 15 U.S.C. § 1125.

COUNT III

CYBERPIRACY PREVENTION UNDER LANHAM ACT 15 U.S.C. § 1125(d)

41. Amazon.com realleges paragraphs 1-34 of this Complaint as if fully set forth herein.

42. Defendants' bad faith intent to profit from use of AMAZON.COM®, by sending e-mail messages that state they are from AMAZON.COM® that are confusingly similar to Amazon.com's distinctive marks, constitutes cyberpiracy under 15 U.S.C. § 1125(d).

COUNT IV

UNFAIR COMPETITION UNDER LANHAM ACT 15 U.S.C. § 1125(a)

43. Amazon.com realleges paragraphs 1-34 of this Complaint as if fully set forth herein.

44. Defendants' use of the AMAZON.COM® mark to advertise, promote, market, offer for sale, or sell their products or services, including on their website, constitutes unfair competition pursuant to 15 U.S.C. § 1125(a). Defendants' use of the AMAZON.COM® mark is likely to cause confusion, mistake, and deception among consumers.

COUNT V

UNFAIR COMPETITION

45. Amazon.com realleges paragraphs 1-34 of this Complaint as if fully set forth herein.

46. Defendants' use of the AMAZON.COM® mark to advertise, promote, market, offer for sale, or sell their products constitutes unfair competition under the common law of Florida. Defendants' use of the AMAZON.COM® mark is likely to cause confusion, mistake, and deception among consumers.

47. Defendants have acted recklessly, with willful blindness and/or wantonly or maliciously with the intent to infringe upon and misappropriate the AMAZON.COM® mark.

COUNT VI

TRESPASS TO CHATTELS

48. Amazon.com realleges paragraphs 1-34 of this Complaint as if fully set forth herein.

49. The computers, computer networks and computer services used to operate Amazon.com's business are the personal property of Amazon.com.

50. The Defendants knew that their bulk-emailing practices inevitably lead to a significant portion of their e-mail being undeliverable. When an e-mail is undeliverable, "bounce" messages are generated to advise the sender of this fact. By spoofing Amazon.com's domain name in the e-mail header, defendants insured that Amazon.com's computer equipment – rather than defendants' own equipment – was burdened by the innumerable bounce messages resulting from the e-mail campaign.

51. Defendants have knowingly, intentionally and without authorization used and intentionally trespassed upon Amazon.com's property. Alternatively, defendants have acted with reckless disregard for plaintiff's rights and/or were willfully blind in connection with their unlawful actions.

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

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays that this Court:

1. Issue a permanent injunction, enjoining and prohibiting defendants, or their agents, servants, employees, officers, attorneys, successors and assigns from:

(A) Using AMAZON.COM® trademark, or any version thereof, in connection with the description, marketing, promotion, advertising, sale, or offering for sale of any products or services, including defendants' e-mails or websites; and

(B) Infringing Amazon.com's AMAZON.COM® trademark.

2. Order an award of damages and/or defendants' profits and trebling such award in accordance with 15 U.S.C. § 1117.

3. Order an award of attorneys' fees, costs, investigative fees and pre-judgment interest as provided by 15 U.S.C. § 1117.

4. Order an award of punitive damages in an amount sufficient to punish defendants.

5. Order such other and further relief as the Court may deem appropriate, including, but not limited to, an award under 15 U.S.C. § 1117 of such sum as the Court deems just under the facts and circumstances of this case.

JURY DEMAND

Plaintiff hereby demands a trial by jury of all issues so triable.

Dated: August 25, 2003
Miami, FL

Respectfully submitted,

Harry R. Schafer (FLA. BAR NO. 508667)
KENNY NACHWALTER
201 South Biscayne Boulevard
Suite 1100 - Miami Center
Miami, FL 33131
Telephone: (305) 373-1000
Facsimile: (305) 372-1861
Attorneys for Plaintiff Amazon.com, Inc.

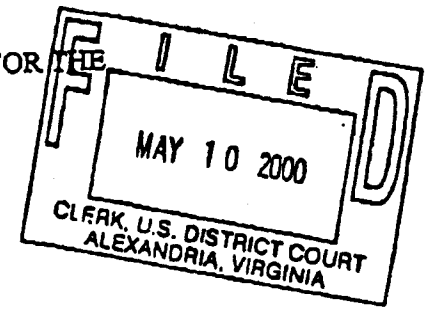
OF COUNSEL:

David A. Zapolsky, Associate General Counsel
Kathryn M. Sheehan, Corporate Counsel
Amazon.com, Inc.

160959.1

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division



AMERICA ONLINE, INC.

Plaintiff

v.

WEB COMMUNICATIONS et al

Defendants.

Civil Action No. 98-289A

REPORT AND RECOMMENDATION

I Procedural History

This matter came before the Court on April 14, 2000 on Plaintiff's Motion for Default Judgment. Plaintiff filed its complaint on March 2, 1998. On March 3, 1998, the defendants Sex Web, Inc., Web Communications, and Eddie Davidson were served in person at 205 Katherine Blvd., #1102, Palm Harbor, Florida. Proof of service for all defendants was filed with the Court on March 16, 1998. The defendants did not file a timely answer and on June 4, 1998, the Clerk entered default as to the three defendants. Subsequently, after the defendants filed a suggestion of bankruptcy, they filed an untimely answer to the complaint on June 22, 1998. By order of this Court, the action was stayed as to all defendants pending the resolution of the bankruptcy proceeding. On October 15, 1999, this Court vacated the stay entered in this action on July 1, 1998 and December 2, 1998. As a result, this Court issued a Scheduling Order on December 2, 1999. The defendants did not move to set aside the Clerk's Entry of Default or file any responsive pleadings other than the untimely answer. Therefore, Plaintiff filed a Motion for Default Judgment. On April 14, 2000, the Court held the hearing on Plaintiff's Motion for Default Judgment and Plaintiff's counsel appeared in court.

II Findings

Upon a full review of the submitted pleadings and proofs, the Magistrate Judge finds that Plaintiff has established the following facts by a preponderance of the evidence. Plaintiff AOL is a Delaware corporation with its principal place of business in Dulles, Virginia. AOL owns and operates a proprietary, content-based online service which affords its Members access to the Internet and the capability to send and receive e-mail with other AOL Members and with non-AOL Members over the Internet. Complaint, ¶ 4. In connection with its products and online services, AOL has used the initials "AOL" as a trademark and as a service mark since October 1989. Complaint, ¶ 5. AOL has registered this mark with the United States Patent and Trademark Office and has invested substantial resources to promote and protect its products and services using this mark. Complaint, ¶¶ 5-6. In addition, AOL has also registered its mark with the InterNIC as part of its registration of the "aol.com" Internet domain name. Complaint, ¶ 7. AOL uses the domain name "aol.com" as a source identifier of its online services. Complaint, ¶ 7.

AOL's e-mail system was created solely for the benefit of AOL Members who pay prescribed fees and who agree to adhere to AOL's Terms of Service. Complaint, ¶ 31. The e-mail system is operated through dedicated servers that store and route e-mail messages between AOL's Members. Complaint, ¶ 31. AOL permits its Members to use the "aol.com" domain name, which when combined with a unique user name, gives each Member a distinctive e-mail address from which to exchange e-mail with Internet users (e.g., "member96@aol.com"). Complaint, ¶ 31. All e-mail that is received by AOL from the Internet must be sorted, delivered and stored by AOL's Internet mail servers. Complaint, ¶ 32. These mail servers have a finite capacity designed to accommodate the demands imposed by AOL's Members. Complaint, ¶ 32. AOL's mail system is disrupted by indiscriminate mass mailings of unsolicited bulk e-mail ("UBE"). Complaint, ¶ 32.

The transmission of UBE is widely condemned in the Internet community; AOL's Internet e-mail delivery system has, at times, been disrupted by the transmission of UBE through AOL's e-mail servers to its Members. Complaint, ¶ 32. UBE diverts computer processing resources away from the handling of authorized e-mail for AOL Members and depletes the finite processing and storage capacity of AOL's mail servers. Complaint, ¶ 32. Furthermore, UBE

has caused measurable delays in the delivery of Internet e-mail to AOL's Members. Because of the effect of UBE on AOL's e-mail system, AOL has been forced to invest resources in new hardware, software, and personnel in an effort to maintain the performance capacity of AOL's e-mail system. Complaint, ¶ 32.

UBE often contains false information with respect to the point of origin, the transmission path, the subject of the e-mail, and other information regarding the source of (and the person responsible for) the e-mail message. Complaint, ¶¶ 28. UBE is transmitted in large quantities to lists of e-mail addressees that contain a significant number of invalid and undeliverable addresses. When AOL receives an e-mail message that containing false source and transmission path information, and an invalid AOL addressee, AOL's mail servers unsuccessfully try to deliver the e-mail message to the non-existent AOL addressee. Complaint, ¶ 34. When delivery fails, AOL's mail servers unsuccessfully try to return the e-mail message to its point of origin so that the sender will know that the message was not successfully delivered. Complaint, ¶ 34. The receipt of UBE is the number one complaint cited by AOL Members concerning AOL's e-mail system. Complaint, ¶ 38. AOL regularly receives hundreds of thousands such complaints. Complaint, ¶ 38. The receipt of UBE angers AOL Members and damages AOL's business, its business reputation, and goodwill. Complaint, ¶ 37.

AOL has undertaken various technical efforts to permit its Members to opt out of receiving e-mail messages from domains and IP Addresses that are or have been the subject of Member complaints regarding UBE. Complaint, ¶ 35. These methods, however, rely on truthful e-mailing practices to be successful. Complaint, ¶ 35. When senders, such as Defendants, mail from multiple and varying domains and falsify the headers of their e-mails, AOL's computers and computer system cannot detect and filter the e-mail. Complaint, ¶ 35. AOL's Terms of Service specifically prohibit AOL Members from using their AOL accounts to send UBE, and expressly reserves AOL's right to block UBE sent to its Members. Complaint, ¶ 29. In addition, AOL's Terms of Service prohibit Members from "harvesting" or collecting the e-mail addresses of other AOL Members. Complaint, ¶ 29.

AOL maintains an electronic mailbox (TOSSpam@aol.com) that was established in August 1996 to receive complaints from AOL Members regarding UBE. Exhibit 3 to Pl.'s Mem. of P. & A. in Supp. of Request for Monetary and Injunctive Relief (Declaration of Histand, ¶ 3)

[hereinafter, "Declaration of Histand"]. AOL Members have forwarded over 100,000 complaints per day regarding UBE which has been sent to them. Id., ¶ 3. The contents of the TOSSpam mailbox are periodically downloaded into a series of databases maintained by AOL in order to permit the mailbox to receive new complaints without filling up. Declaration of Histand, ¶ 5. The TOSSpam database presently contains millions of Member complaints concerning UBE sent over the Internet. Id., ¶ 3. If an AOL Member wishes to complain about a particular piece of UBE, the Member must affirmatively forward the e-mail to TOSSpam. Declaration of Histand, ¶ 5. In order for this to happen, the AOL Member must: (1) technically know how to forward the message; (2) know the e-mail address to which to forward the complaint (TOSSpam); and (3) take the time necessary to forward the message. Id., ¶ 5.

The TOSSpam database does not contain every UBE message received by AOL Members, and it does not contain any UBE messages that could not be delivered to an AOL Member because of invalid addresses. Declaration of Histand, ¶ 5. The database contains only those e-mails actually received by AOL Members and actually forwarded to TOSSpam. Id., ¶ 5. Thus, the number of complaints in the TOSSpam database is a fraction of the total number of UBE actually transmitted to AOL Members. Declaration of Histand, ¶ 5. A reasonable calculation of the ratio between the number of complaints received by TOSSpam and the total number of unsolicited e-mail messages transmitted to an AOL Member is 1:500. Id., ¶ 7. This ratio is derived from the actual TOSSpam complaint to total UBE ratios that have been established in three prior anti-spam lawsuits filed by AOL in this Court. Declaration of Histand, ¶ 7.

AOL does not permit the transmission of UBE advertisements to its Members. Complaint, ¶ 29. However, AOL does make space available on its proprietary network, including on its E-Mail Inbox Screen (one of hundreds of different areas on the AOL Service) for use by advertisers on a paying basis. Exhibit 8 to Pl.'s Mem. of P. & A. in Supp. of Request for Monetary and Injunctive Relief (Declaration of Discenza, ¶¶ 3-4) [hereinafter, "Declaration of Discenza"]. Id., ¶ 4. AOL's E-mail Inbox Screen contains an advertisement area consisting of a rectangular banner which appears (in AOL's Version 4.0) in the upper right hand corner of the screen (the "Banner Advertisement"). Declaration of Discenza, ¶ 4; Exhibit A to Declaration of Discenza (Banner Advertisement on AOL E-Mail Inbox Screen). In addition to this

advertisement area, the E-Mail Inbox Screen lists all e-mail messages that an AOL Member has in his or her Inbox at that moment.

The Banner Advertisement that appears on the E-Mail Inbox Screen is typically used by an advertiser to present a short phrase or descriptive text to an AOL Member that encourages the Member to click on the advertisement for more details. Declaration of Discenza, ¶ 5. The text in the Banner Advertisement is comparable to the subject line of an e-mail message. Id., ¶ 5; Exhibit A to Declaration of Discenza (Banner Advertisement on AOL E-Mail Inbox Screen). The amount of information that can be presented in the Banner Advertisement is comparable to the amount of information that is presented in the subject line of the e-mail messages that also appear on the E-Mail Inbox Screen. Declaration of Discenza, ¶ 5. An AOL Member who wants to learn more about the item being advertised can click on the Banner Advertisement. Id., ¶ 6. By doing so, the Member would be taken (via his/her web browser) to an Internet site or a dedicated area on AOL's service. Id., ¶ 6. When the Member has finished looking through that web site, he/she can return to his/her E-Mail Inbox Screen by closing their web browser or the form on the AOL service that has appeared. Id., ¶ 6.

AOL charges advertisers for the right to advertise on its service, including placing Banner Advertisements on its E-Mail Inbox Screen. Declaration of Discenza, ¶ 7. All prices charged are quoted in terms of cost per thousand impressions (abbreviated "CPM"). Id., ¶ 7. An "impression" counts the number of times the Banner Advertisement has been presented on the screen to a consumer. Declaration of Discenza, ¶ 7. An impression is counted each time a Member's E-Mail Inbox is opened. Id., ¶ 7. From the middle of 1997 to the present, AOL has charged advertisers wishing to purchase Banner Advertisements on AOL's E-Mail Inbox Screen a rate varying from between $4 CPM to $7 CPM ($0.004 to $0.007 per impression). Declaration of Discenza, ¶ 8. Over this time period, the average CPM charged for such advertisements is approximately $5 ($0.005 per impression). Id., ¶ 8. The defendants have paid no amount to AOL in exchange for marketing their products to AOL Members on AOL's proprietary network through the transmission of UBE. Declaration of Discenza, ¶ 7.

When AOL's Complaint was filed, Defendant Eddie Davidson was a resident of Florida residing at 205 Katherine Boulevard, No. 1102, Palm Harbor, FL 34684. Defendant Eddie Davidson conducted business under the names Web Communications and Sex Web, Inc.

Complaint, ¶¶ 8-10. Davidson owned and operated several adult Internet Web sites, including www.aolsex.com, www.malibuheat.com, and www.websex.net. Complaint, ¶¶ 7-11. The domain names of Davidson's adult Internet Web sites exploited the "AOL" trademark and service mark. Complaint, ¶¶ 7-11. For example, Davidson, owned, used, and advertised the adult Internet Web sites: www.aolplaymates.com, www.aolsexlinks.com, www.aolsexshows.com, and www.aoluncut.com. Complaint, ¶¶ 7-11. These adult Internet Web sites contained graphic pictures and text. Complaint, ¶¶ 41-42; Exhibit 4 to Pl.'s Mem. of P. & A. in Supp. of Request for Monetary and Injunctive Relief (print-out of www.malibuheat.com Internet Web site). Davidson – acting in concert with third party contractors and/or agents unknown to AOL – sent UBE to AOL and its Members. Complaint, ¶ 13. Davidson's UBE, sent indiscriminately to AOL Members of all ages, contained hypertext links to his adult Internet Web sites. Complaint, ¶¶ 40-41; Exhibit 5 to Pl.'s Mem. of P. & A. in Supp. of Request for Monetary and Injunctive Relief (samples of Davidson's UBE that generated complaints from AOL Members).

In transmitting his UBE advertisements to AOL Members, Davidson employed a variety of deceptive techniques, including forgery of the "aol.com" domain name. Complaint, ¶¶ 45-46. Davidson repeatedly and knowingly transmitted UBE containing false source and transmission path information in order to evade AOL's bulk e-mail filtering system. Complaint, ¶¶ 45-46. Davidson used "aol.com" in the "to," "from" and "reply to" lines and placed invalid user names in the "from" and "reply to" lines of his UBE advertisements to AOL Members. Complaint, ¶¶ 45-46. Davidson's use of the "aol.com" domain name in his UBE caused AOL Members to believe mistakenly that AOL was connected to, affiliated with, approved of, or condoned Defendant's unsolicited advertisements. Complaint, ¶¶ 43, 48-52; Exhibit 5 to Pl.'s Mem. of P. & A. in Supp. of Request for Monetary and Injunctive Relief (samples of Davidson's UBE that generated complaints from AOL Members). Furthermore, Davidson's exploitation of the registered "AOL" trademark and service mark in his adult Internet Web sites improperly suggested that AOL was affiliated with or condoned his pornographic products and services. Complaint, ¶ 49

In a August 1, 1997 letter, AOL warned that Davidson that his adult Internet Web

sites, such as www.aolsex.com, were improperly using the "AOL" trademark and service mark. Complaint, ¶ 50; Exhibit 6 to Pl.'s Mem. of P. & A. in Sup. of Request for Monetary and Injunctive Relief (AOL's Cease & Desist Letters). Again, in a written cease and desist letter dated October 24, 1997, AOL demanded that Davidson refrain from sending UBE advertising his adult Internet Web sites to AOL and its Members. Complaint, ¶ 44; Exhibit 6 to Pl.'s Mem. of P. & A. in Supp. of Request for Monetary and Injunctive Relief (AOL's Cease & Desist Letters). On December 30, 1997, AOL again demanded that Davidson cease his UBE transmissions to AOL Members. Complaint, ¶ 44; Exhibit 6 to Pl.'s Mem. of P. & A. in Supp. of Request for Monetary and Injunctive Relief (AOL's Cease & Desist Letters). When Davidson persisted in transmitting UBE, AOL filed suit against him and his alter ego companies.

Based upon a review of the TOSSpam data between November 1997 through March 1998, a total of 147,353 TOSSpam complaints are attributable to Davidson. Declaration of Histand, ¶ 9. Applying the 1:500 ratio between the number of complaints forwarded to TOSSpam and the total number of UBE messages transmitted to AOL, Davidson transmitted **73,676,500** UBE messages to AOL and its Members. Declaration of Histand, ¶ 9; Judicial Notice (147,353 TOSSpam Complaints x 500).

III Conclusions

This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1332 and 1338. This Court has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367. This Court has personal jurisdiction over Defendants Web Communications, Sex Web, Inc., and Eddie Davidson (collectively, "Davidson") who have engaged in business activities in or directed at Virginia, and who have caused tortious injury in Virginia. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because a substantial portion of the events or omissions giving rise to AOL's claims occurred here, and a substantial part of the property that is the subject of AOL's claims is situated in this judicial district. Complaint, ¶¶ 2, 4, 15-16.

Liability against Davidson is established by the entry of default judgment. Town & Country Kids, Inc. v. Protected Venture Investment Trust No. 1, Inc., Civil Action No. 97-849-A, 1998 U.S. Dist. LEXIS 10309, *1 (E.D. Va. Feb. 20, 1998) ("[D]efaulting parties are deemed to have admitted all well-pled allegations of the Complaint.") (Magistrate Judge Poretz); 10

James Wm. Moore, Moore's Federal Practice § 55.12[1], at 55-18 (3d ed. 1998) ("Upon entry of default, the facts alleged by the plaintiff in the complaint are deemed admitted."); Danning v. Lavine, 572 F.2d 1386 (9th Cir. 1956).

Davidson has violated: (i) the Lanham Act, 15 U.S.C. § 1125 (dilution of interest in a famous mark, infringement of a federally registered mark, and false designation of origin and, dilution of interest in a famous mark); (ii) the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (exceeding authorized access and impairing computer facilities); (iii) the Virginia Computer Crimes Act, Va. Code Ann. § 18.2-152.2 (using a computer or computer network without authority and obtaining services under false pretenses); (iv) Virginia common law on trespass to chattels; and (v) Virginia common law on trademark infringement and unfair competition.

Under both the damages provision of the Lanham Act, 15 U.S.C. § 1117(a), and Virginia common law, AOL is entitled to monetary recovery equivalent to the benefits unlawfully appropriated by the defendants. Taco Cabana Intern'l, Inc. v. Two Pesos, Inc., 932 F.2d 1113, 1126 (5th Cir.) (noting that a Lanham Act plaintiff's recovery may include "the economic benefits [it] normally would have received" had defendant acted lawfully), aff'd on other issues, 505 U.S. 763 (1991); Overstreet v. Kentucky Cent. Life Ins., 950 F.2d 931, 944 (4th Cir. 1991) (explaining that under a Virginia common law claim damages theory of restitution, plaintiff is entitled to recover benefits appropriated by defendant). Thus, AOL is entitled to (i) recover the market value of all advertising services stolen by Davidson, as well as (ii) all profits generated through Davidson's unauthorized UBE advertising scheme. AOL is also entitled to (iii) treble the value of advertising services stolen by Davidson; (iv) punitive damages; and (v) attorneys' fees and costs.

The relief provisions of the Lanham Act authorize AOL to recover all damages it incurred as a result of Davidson's dilution, trademark infringement, and false designation of origin. 15 U.S.C. § 1117(a); Ramada Inns, Inc. v. Gadsen Motel Co., 804 F.2d 1562, 1565 (11th Cir. 1986) ("In making a damage assessment [in a Lanham Act action], the district court may allow recovery for 'all elements of injury to the business of the trademark owner proximately resulting from the infringer's wrongful acts.'") (citation omitted).

One method for measuring the damage caused to AOL as a result of Davidson's unlawful use of "aol.com" is the calculation of a "reasonable royalty rate." Hospitality Intern'l, Inc. v. Mahtani, Civil Action No. 2:97CV87, 1998 U.S. Dist. LEXIS 16445, *38 (M.D.N.C. August 3, 1998) ("Many other Circuits agree that the reasonable royalty rate is an appropriate way to measure damages."). See also Sands, Taylor & Wood Co. v.. QuakerOats Co., 34 F.3d 1340, 1343-44 (7th Cir. 1994) [hereinafter Sands II]; Taco Cabana Intern'l, Inc. v. Two Pesos, Inc., 932 F.2d 1113, 1126 (5th Cir.) (noting that a Lanham Act plaintiff's recovery may include "the economic benefits [it] normally would have received by licensing"), aff'd on other issues, 505 U.S. 763 (1991); Howard Johnson Co., Inc. v. Khimani, 892 F.2d 1512, 1519 (11th Cir. 1990) ("The use of lost royalties to determine the actual damages incurred by a victim of trademark misuse is well established in this court."); Ramada Inns, Inc. v. Gadsen Motel Co., 804 F.2d 1562, 1565 (5th Cir. 1986) (noting that loss of royalty payments during the period of infringement is a proper measure of damages for the misuse of a trademark), reh'g denied, 811 F.2d 612 (1987) (en banc); Boston Professional Hockey Ass'n, Inc. v. Dallas Cap & Emblem Mfg., Inc., 597 F.2d 71, 77 (5th Cir. 1979) (holding that an infringing defendant who "misappropriated a valuable right belonging to plaintiffs and did not pay for it" was liable for the royalty rate defendant would have paid had it acted lawfully); Holiday Inns, Inc. v. Airport Holiday Corp., 493 F. Supp. 1025 (N.D. Tex. 1980) (awarding Lanham Act plaintiff actual damages consisting of a royalty fee and an advertising fee normally charged to lawful actors), aff'd 683 F.2d 931 (5th Cir. 1982); cf. 5 J.Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 30:85 (4th ed. 1996) (noting that an award of a reasonable royalty is a workable measure of damages).

A reasonable royalty rate in this case must be set at a rate equal to or higher to the amount paid by those who lawfully advertise on AOL's proprietary network. AOL charges between $0.004 to $0.007 per impression for Banner Advertisements that appear on its E-mail Inbox Screen. Declaration of Discenza, ¶ 8. During the five-month period when AOL's records indicate that Davidson was transmitting his UBE to its Members (November 1997 to March 1998), the average per impression cost for Banner Advertisements that appear on AOL's E-mail Inbox Screen was about half a penny ($0.005). Declaration of Discenza, ¶ 8.

From November 1997 to March 1998, Davidson's UBE generated 147,353 complaints from AOL Members. Declaration of Ivan Histand, ¶ 9. Applying the 1:500 ratio between the number of complaints forwarded to TOSSpam and the total number of UBE messages transmitted to AOL, Davidson transmitted 73,676,500 UBE messages. Declaration of Histand, ¶ 9; Judicial Notice (147,353 TOSSpam Complaints x 500). This methodology used to calculate the total volume of UBE transmitted by Davidson (total number of TOSSpam Complaints x 1:500 TOSSpam Complaints to UBE ratio) is appropriate since he refused to participate in this litigation. Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359, 378 (1927) "[t]he wrongdoer may not complain of inexactness where his actions preclude precise computation of the extent of injury." cf. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931).

Thus AOL's damages caused by Davidson's unlawful use of "aol.com" may reasonably be calculated by multiplying the number of UBE messages he transmitted by a reasonable royalty rate of at least $0.0055. Accordingly, AOL is entitled to $405,220.75 in Lanham Act damages against Davidson (73,676,500 UBE messages x $0.0055). The amount of monetary recovery available to AOL under the Lanham Act is equal to the amount to which AOL is entitled under the Virginia common law theory of restitution. The amount of restitution to which a prevailing plaintiff is entitled is measured by the unauthorized benefits obtained by defendant. Overstreet v. Kentucky Cent. Life Ins., 950 F.2d 931, 944 (4th Cir. 1991) (explaining that restitution is measured by the unauthorized benefits obtained by defendant, not plaintiff's actual damages).

The proper measure of restitutionary recovery for plaintiff is the market value of the benefits appropriated by the defendant since "[d]efendant has no moral or legal right to enrich itself by . . . illegal use of plaintiff's property. To limit plaintiff to the recovery of nominal damages for the repeated trespasses will enable defendant, as a trespasser, to obtain a more favorable position than a party contracting for the same right." Raven Red Ash Coal Co., Inc. v. Ball, 39 S.E.2d 231, 238(Va. 1946); AOL v. TS Publishing, Report & Recommendation, Case No. 98-905, at 8 (E.D. Va. issued Jan. 5, 2000) (explaining that Virginia law clearly implies a promises for the benefits that a defendant obtains from an unauthorized UBE advertising

scheme) (Magistrate Judge Jones).

Davidson's illegal transmission of UBE to AOL allowed him to advertise to AOL Members on AOL's proprietary network without paying for this right. By marketing his adult Internet Web sites to AOL through illegal UBE transmissions rather than through other lawful means, Davidson avoided paying AOL any advertising fee. The market value of the right to advertise to AOL Members on AOL's proprietary network is equal to the $0.004 to $0.007 per "impression" rate AOL charges lawful advertisers who market products and services through Banner Advertisements on the AOL E-Mail Inbox Screen. Declaration of Discenza, ¶¶ 7-8. Thus the market value of the benefits appropriated by Davidson is equivalent to at least $405,220.75 in advertising services stolen (73,676,500 UBE messages x $0.0055).

The Lanham Act permits this Court, within its equitable discretion, to order disgorgement of Davidson's profits. 15 U.S.C. § 1117(a). Disgorgement of profits is appropriate when "a defendant's infringement is deliberate and willful." Black & Decker, Inc. v. Pro-Tech Power Inc., Civ. No. 98-124-A, Civ. No. 97-1123-A, 1998 U.S. Dist. LEXIS 18252, at *49 (E.D. Va. Nov. 16, 1998) (Judge Cacheris) (quoting Roulo v. Russ Berrie & Co., 886 F. 2d 931, 941 (7th Cir. 1989)); see also Matlina Corp. v. Cawy Bottling Co., Inc., 613 F.2d 582, 585 (5th Cir. 1980) (explaining that disgorgement of defendant's profits serves "two purposes: remedying unjust enrichment and deterring future infringement"); Maier Brewing Co. v. Fleischmann Distilling Corp., 390 F.2d 117, 121 (9th Cir.) (stating that an accounting of defendant's profits is appropriate as redress for the defendant's unjust enrichment and as a deterrent to further infringement), cert. denied, 391 U.S. 966 (1968); Otis Clapp & Son, Inc. v. Filmore Vitamin Co., 754 F.2d 738, 744 (7th Cir. 1985) (explaining that an award of only actual damages "would fail to serve as a convincing deterrent to the profit maximizing entrepreneur who engages in trademark piracy"); Panduit Corp. v. Stahlin Bros. Fibre Works, Inc., 575 F.2d 1152, 1158 (6th Cir. 1978) ("The infringer would have nothing to lose and everything to gain if he could count on paying only the normal, routine royalty non-infringers might have paid."); W.E. Bassett Co. v. Revlon, Inc., 435 F.2d 656, 664 (2d Cir. 1970) ("[T]he only way the courts can fashion a strong enough deterrent [to prevent trademark infringement] is to see to it that a company found guilty of willful infringement shall lose all profits from its use of the infringing

mark."); Playboy Enterprises, Inc. v. Baccarat Clothing Co. Inc., 692 F.2d 1272, 1274 (awarding a Lanham Act plaintiff disgorged profits and explaining that a damages award consisting of only a reasonably royalty rate is an ineffective remedy which will not deter future infringing activities).

Disgorgement of profits is also appropriate under the common law theory of restitution. Truck Equip. Serv. Co. v. Fruehauf Corp., 536 F.2d 1210 (1976), cert. denied, 429 U.S. 861 (1976) (explaining that the benefits a plaintiff may recover through restitution include the profits derived by the defendant's unauthorized use of plaintiff's property); Warren v. Century Bankcorporation, Inc., 741 P.2d 846 (Okl. 1987). In this case, Davidson's trademark infringement was deliberate and willful. Davidson knew that AOL prohibited the transmission of UBE to AOL's Members, and knew that the Internet community as a whole condemned the practice. Notwithstanding this knowledge, Davidson intentionally used the "aol.com" name in the headers of his UBE advertisements in order to evade AOL's mail filters and increase the chance that his messages would be received by AOL's Members. Moreover, Davidson exploited AOL's registered trademarks and service mark by operating, using, and advertising adult Internet Web sites such as www.aolsex.com. Although AOL has a legal right to disgorgement, it does not have any evidence of Davidson's profits because he refused to participate in these proceedings and relied on cash payment for services. Accordingly, this Court should affirm AOL's right to disgorgement but set that award at $0 based on AOL's inability to obtain any evidence of profits.

This Court has trebled Lanham Act damages against other defendants who, like Davidson, transmitted UBE to AOL and its Members. AOL v. TS Publishing, Case No. 98-905 (E.D. Va. entered March 27, 2000) (Judge Ellis). AOL v. CN Productions, et al., Civil Action No. 98-552-A, at 3 (E.D. Va. Memorandum Opinion Entered Feb. 10, 1999) ("Because the defendants' acts were knowing and willful, the actual damages will [be] trebled, in accordance with the Lanham Act. The trebling is warranted because the damages are hard to quantify, but obviously real, and there is a definite need for deterrent.") (Senior Judge Bryan). Under the Lanham Act, this Court is vested with the discretion to enhance a damages award according to the circumstances of the case, not to exceed three times the amount of actual damages. 15 U.S.C.

§ 1117(a). Enhancement is appropriate: (i) when the offending conduct is knowing and willful; (ii) when a plaintiff's damages, although real, are hard to quantify; and (iii) to deter the wrongdoer. Gorenstein Enterprises, Inc. v. Quality Care - USA, Inc., 874 F. 2d 431, 435-36 (7th Cir. 1989) (explaining that, in a case where the infringement was deliberate, "it might have been an abuse of discretion for the district judge not to have awarded [plaintiff] treble damages"); Taco Cabana Int'l Inc. v. Two Pesos, Inc., 932 F. 2d 1113, 1127 (5th Cir. 1991) (explaining that enhancement is appropriate to redress an otherwise under compensated plaintiff where damages are imprecise), aff'd on other issues, 505 U.S. 763 (1991); Sands II., 34 F. 3d 1340, 1348 (7th Cir. 1994), modified 44 F. 3d 579 (stating that enhancement can be a tool to achieve a final monetary award that will "provide a sufficient deterrent to ensure that the guilty will not return to its former ways and once again pollute the marketplace").

Davidson intentionally forged "aol.com" in the header of the adult UBE messages he indiscriminately sent to AOL Members of all ages. Complaint, ¶¶ 43, 48-52; Exhibit 5 to Pl.'s Mem. of P. & A. in Supp. of Request for Monetary and Injunctive Relief (samples of Davidson's UBE that generated complaints from AOL Members). Davidson's infringement of AOL's registered trademark was knowingly and willfully calculated to exploit the advantage in using the forged "aol.com" domain name in his junk e-mail advertisements. Complaint, ¶¶ 43, 48-52. This forgery allowed Davidson to evade AOL's e-mail filters and improperly suggest that his adult UBE advertisements were endorsed or condoned by AOL. Complaint, ¶¶ 66-71. Moreover, Davidson exploited AOL's registered trademark and service mark in connection with his ownership, operation, and advertisement of adult Internet Web sites such as www.aolsex.com. Complaint, ¶¶ 7-11, 49. As the hundreds of thousands of AOL Member complaints suggest, AOL has suffered tremendous damage to its reputation and goodwill because of Davidson's illegal advertising scheme. Complaint, ¶¶ 48-52, 54-71; Exhibit 5 to Pl.'s Mem. of P. & A. in Supp. of Request for Monetary and Injunctive Relief (samples of Davidson's UBE that generated complaints from AOL Members). This damage is difficult to quantify and warrants an enhancement of the monetary relief awarded to AOL. Furthermore, trebling of damages will serve as an effective deterrent to further illegal conduct by Davidson. Thus, this Court should treble the Lanham Act damages awarded and authorize AOL to recover

$1,215,662.25 ($405,220.75 x 3) against Davidson.

This Court may award treble damages under the Lanham Act and punitive damages under AOL's state common-law claims. New York Racing Assoc., Inc. v. Stroup News Agency Corp., 920 F. Supp. 295 (N.D.N.Y. 1996) (trebling award of both profits and damages, and awarding punitive damages under a state law cause of action) ("In order to sanction [defendant] for the obstinate and arrogant manner in which it continually violated [plaintiff's] marks, and in order to deter [defendant] and others who may have incentives to infringe trademarks knowingly and deliberately in the future, the Court will double the already trebled profits and damages awards."); Business Yellow Pages, Inc. v. Wells, 1995 U.S. Dist. LEXIS 8942, 93 Civ. 3856 (S.D.N.Y. June 29, 1995) (awarding over $12 million in compensatory damages after trebling under the Lanham Act, and an additional $1 million in punitive damages under a state law cause of action).

Punitive damages are also appropriate under the common law damages theory of restitution. Thomas Auto Co., Inc. v. Craft, 763 S.W.2d 651, 654 (Ark. 1989); Indiana & Michigan Elec. Co. v. Harlan, 504 N.E.2d 301, 307 (Ind. App. 1 Dist. 1987); Brown v. Techdata Corp., Inc., 234 S.E.2d 787, 793 (Ga. 1977); Grandi v. LeSage, 399 P.2d 285 (N.M. 1965); State of Bank of Kingman v. Braly, 33 P.2d 141 (Kan. 1934). The purpose of punitive damages is deterrence and punishment of wrongdoing which evinces a conscious disregard of the rights of others. Grant of Virginia, Inc. v. Pigg, 207 Va. 679, 685 (1967). Punitive damages are designed for the protection of the public, as a punishment to defendants, and as a warning and example to deter them and others from committing like offenses. Baker v. Marcus, 114 S.E.2d 617, 620 (Va. 1960).

AOL is entitled to recover punitive damages on its trespass to chattels and common law infringement claims for several reasons. First, Davidson was a prolific junk e-mailer who repeatedly demonstrated a conscious disregard for AOL's property rights by transmitting more than 73 million prohibited adult e-mail advertisements to AOL Members of all ages. Second, Davidson employed deceptive and fraudulent e-mailing techniques to evade AOL's e-mail filtering systems. Third, Davidson's UBE resulted in hundreds of thousands

Member complaints. Fourth, Davidson exploited AOL's registered trademark and service mark and inflicted further injury upon AOL's reputation by using adult Internet Web sites. These adult Internet Web sites, such as www.aolsex.com, were designed to improperly suggest to AOL Members that his pornographic products and services were affiliated with AOL. Fifth, Davidson continued to transmit UBE to AOL and its Members and continued to use adult Internet Web sites that exploited AOL's trademark and service mark after AOL warned him (on three separate occasions) to cease and desist. Finally, punitive damages are necessary to protect the public from the growing number of junk mailers like Davidson.

The total amount awarded for punitive damages may not exceed $350,000, pursuant to a state law punitive damages cap. Va. Code. § 8.01-38.1. AOL is entitled to recover $350,000 in punitive damages against Davidson. Such an award is necessary to punish him for his egregious behavior, and deter other junk mailers from engaging in further illegal conduct and thereby protect the public interest. Such an award of damages in this case is consistent with punitive damages that have been awarded in other cases involving bulk e-mail. AOL v. TS Publishing, Case No. 98-905 (E.D. Va. entered March 27, 2000) (Judge Ellis); Earthlink Network, Inc. v. Seiver, Case No. BC169072 (Cal. Sup. Ct. Order entered Jan. 20, 1998) (awarding $871,372.65 in damages, including $500,000 in punitive damages based on the transmission of only 175,000 UBE messages).

As a prevailing party on its Lanham Act trademark claim, AOL is also entitled to recover its attorneys fees and costs of suit. 15 U.S.C. § 1117(a). This Court has awarded attorneys' fees to AOL in other bulk e-mail cases involving similar defendants. AOL v. TS Publishing, Case No. 98-905 (E.D. Va. Judgment entered March 27, 2000) (Judge Ellis); AOL v. CN Productions, et al., Civil Action No. 98-552-A, at 4 (E.D. Va. Memorandum Opinion Entered Feb. 10, 1999); AOL v. LCGM, et al., Civil Action No. 98-0102-A (E.D. Va. Nov. 10, 1998) (orally granting attorneys' fees and costs in a ruling from the bench) (Chief Judge Hilton). To recover attorneys' fees under 15 U.S.C. § 1117(a), a prevailing plaintiff must "show that the defendant acted in bad faith." Scotch Whisky Ass'n v. Majestic Distilling Co., 958 F. 2d 594, 599 (4th Cir. 1992). Under facts similar to this case, this Court recently concluded in another trademark case that a defendant's continuing improper conduct following notification of a

trademark infringement constituted bad faith, and merited an award of attorneys fees. Cardservice Int'l, Inc. v. McGee, 950 F. Supp. 737, 742 (E.D. Va. 1997) (awarding nearly $60,000 in attorneys fees and costs to plaintiff based in part on defendant's continued use of plaintiff's trademark in Internet domain name after receiving notice of infringement), aff'd, 1997 U.S. App. LEXIS 32267 (4th Cir. Nov. 18, 1997).

Attorneys' fees and costs are also recoverable under the Lanham Act when a defendant disregards the authority of the court: "[Defendant's] lack of cooperation and disrespect for the judicial process constitute exceptional circumstances warranting an award of attorneys fees to plaintiff in the action." Taylor Made Golf Co., v. Carsten Sports, Ltd., 175 F.R.D. 658, 663 (S.D. Cal. 1997) (awarding attorneys' fees to a Lanham Act plaintiff after entering default judgment against a defendant who refused to participate in the judicial process) (citing Lien v. Compusoft of Kalamazoo, Inc., 1991 U.S. Dist. LEXIS 3218 (W.D. Mich. 1991)). Davidson's trademark violations in this case were in bad faith. He incorporated AOL's trademark symbol "aol" in the headers of his e-mails as part of a knowing and intentional effort to avoid AOL's blocking filters. Moreover, Davidson knowingly exploited AOL's trademark and service mark by operating, using, and advertising adult Internet Web sites, such as www.aolsex.com, which improperly suggested that AOL was affiliated with or condoned his adult products and services. Thus, an award of attorneys' fees and costs is appropriate in this case.

In order to determine an appropriate attorneys' fee award, this Court must first establish "the lodestar," a product calculated by multiplying the hours reasonably expended on the matter by a reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The reasonableness of the hourly rate is based on the market rate for legal services in the community in which the court sits. National Wildlife Fed'n v. Hanson, 859 F.2d 313, 317 (4th Cir. 1988). The hours expended by the professionals working on this case were reasonable in light of the circumstances of this case, and the hourly rates charged by each of the professionals working on this case were reasonable based on the market rate for legal services in the metropolitan Washington, D.C. area. These figures give rise to a lodestar amount of $12,182.50 in attorneys' fees. Exhibit 9 to Pl.'s Mem. of P. & A. in Supp. of Request for Monetary and Injunctive Relief (Declaration of Qureshi, ¶¶ 3-5) [hereinafter, "Declaration of Qureshi"]. In addition to these

reasonable attorneys' fees, AOL is also entitled to the award of costs of suit in the amount of $330.73. Declaration of Qureshi, ¶ 10.

Permanent injunctive relief is appropriate when a defendant inflicts irreparable harm through tortious action. Davidson's infringement of AOL's trade and service marks and trespass upon AOL's proprietary computer systems caused irreparable harm to AOL by injuring AOL's goodwill. Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 552 (4th Cir. 1994); Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc., 43 F.3d 922, 938-39 (4th Cir. 1995). In cases where trademark infringement is shown, irreparable harm is presumed. Hotmail Corporation v. Van Money Pie, Inc., 1998 U.S. Dist. LEXIS 10729 (N.D. Calif. 1998) Apple Computer, Inc. v. Formula Int'l, Inc., 725 F.2d 521, 523 (9th Cir. 1984).

If a party demonstrates it is entitled to injunctive relief, a federal district court has broad discretion in fashioning an injunctive remedy. Richmond Tenants Organization, Inc. v. Kemp, 956 F.2d 1300, 1308 (4th Cir. 1992). Any remedy fashioned, however, must be tailored to eliminate the specific harm alleged. Lamb-Weston, Inc. v. McCain Foods, Ltd., 941 F.2d 970, 973 (9th Cir. 1991). AOL will continue to suffer irreparable harm from Davidson's unlawful use of AOL's trade and service marks and trespass upon AOL's proprietary computer systems, unless he is enjoined from directly or indirectly engaging in the following activities:

(1) using any images, designs, logos or marks which copy, imitate or simulate any AOL trade or service mark for any purpose, and/or using "aol" in any Internet domain name or any Internet Web site for any purpose, including but not limited to any advertisement, promotion, sale or use of any products or services;

(2) performing any action or using any images, designs, logos or marks that are likely to cause confusion, to cause mistake, to deceive, or to otherwise mislead the trade or public into believing that AOL and Defendants, or any of them, are in any way connected, or that AOL sponsors Defendants; or that Defendants, or any of them, are in any manner affiliated or associated

with or under the supervision or control of AOL, or that Defendants and AOL or AOL's services are associated in any way;

(3) using any images, designs, logos or marks or engaging in any other conduct that creates a likelihood of injury to the business reputation of AOL or a likelihood of misappropriation and/or dilution of AOL's distinctive marks and the goodwill associated therewith;

(4) sending or transmitting to any destination, or directing, aiding, or conspiring with others to send or transmit to any destination, electronic mail or electronic communication bearing any false, fraudulent, anonymous, inactive, deceptive, or invalid return information, or containing the domain "aol.com," or otherwise using any other artifice, scheme or method of transmission that would prevent the automatic return of undeliverable electronic mail to its original and true point of origin or that would cause the e-mail return address to be that of anyone other than the actual sender;

(5) using, or directing, aiding, or conspiring with others to use AOL's computers or computer networks in any manner, directly or indirectly, in connection with the transmission or transfer of any form of electronic information across the Internet;

(6) opening, creating, obtaining access to, and/or using in any way, or directing, aiding, or conspiring with others to open, create, obtain access to, and/or use in any way, any AOL membership or account;

(7) acquiring, compiling or transferring AOL member e-mail addresses or e-mail addresses that contain "aol" in the domain;

(8) sending or transmitting, or directing, aiding, facilitating or conspiring with others to send or transmit, any electronic mail message, or any electronic communication of any kind, to or through AOL or its Members; and

(9) The term "AOL" as used in paragraphs (1)-(8) above includes America Online, Inc., and all of its past and future parents, affiliates, and subsidiaries, and includes all services offered by these entities.

This Court has awarded AOL such an injunction in other cases against similar defendants. AOL v. TS Publishing, Case No. 98-905 (E.D. Va. Judgment entered March 27, 2000) (Judge Ellis); AOL v. CN Productions, et al., Civil Action No. 98-552-A, at 4 (E.D. Va. Memorandum Opinion & Order Entered Feb. 10, 1999).

IV Recommendation

The Magistrate Judge recommends entry of default judgment in favor of Plaintiff AOL. Specifically, the Magistrate Judge recommends monetary damages in the amount of $1,578,175.48 which includes the following: $1,215,662.25, the restitution award trebled, $0 in disgorgement of profits, $12,513.23 in attorneys' fees and costs and $350,000. The Magistrate Judge also recommends the injunctive relief listed above.

NOTICE

The parties are advised that exceptions to this Report and Recommendation pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72(b) must be filed 10 days after service. A failure to object waives appellate review of a judgment based on this Report and Recommendation.

Barry R. Poretz
United States Magistrate Judge

May 10, 2000
Alexandria, Virginia

From: "Danielle Mcdonald" <dan ielleмcdonald18@amazon.com>
To: <indy1998@hotmail.com>
Sent: Tuesday, May 20, 2003 10:22 PM
Subject: Re: your order

VP-RX will take your sex life to new levels.. . Guaranteed!

Your penis will gr ow up to 3 inches

Your erections will be rock hard

Your sex drive will be supercharged

Your orgasms will be more intense

Your partner will be astounded

Click here to ge t VP-RX no w!

Discontinue receiving of fers

From: "Kenneth G. Young" <g.young@amazon.com>
To: <bxexn11@hotmail.com>
Sent: Friday, May 16, 2003 5:32 PM
Subject: Your friend said this

Enla rge yo ur pe nis to day!

Discontinue receiving of fers

EXHIBIT B

From: "Danielle Mcdonald" <daniellemcdonald18@amazon.com>
To: <indy1998@hotmail.com>
Sent: Tuesday, May 20, 2003 10:22 PM
Subject: Re: your order

VP-RX will take your sex life to new levels... Guaranteed!

Your penis will grow up to 3 inches

Your erections will be rock hard

Your sex drive will be supercharged

Your orgasms will be more intense

Your partner will be astounded

Click here to get VP-RX now!

Discontinue receiving offers