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Superior Court of California.

Santa Clara County

MAIL ABUSE PREVENTION SYSTEM LLC,

Plaintiff,

v.

BLACK ICE SOFTWARE, INC., et al., Defendants.

Case No.: CV 788630

October 13, 2000.

MOTION BY DEFENDANT AND CROSS-COMPLAINANT BLACK ICE SOFTWARE FOR SUMMARY ADJUDICATION OF ISSUES; MOTIONS BY PLAINTIFF AND CROSS-DEFENDANT FOR: 1) MOTION TO STRIKE CROSS-COMPLAINT UNDER CODE OF CIVIL PROCEDURE, §425.16; 2) DEMURRER TO CROSS-COMPLAINT; 3) MOTION TO STRIKE PUNITIVE DAMAGES.

Orders on:

Jack Russo, Esq. State Bar No. 96C68, Michael Risch, Esq. State Bar No. 197600, Russo & Hale LLP, Palo Alto, CA, Attorneys for Plaintiff, **Mail Abuse Prevention System LLC**

Reginald D. Steer (SBN 56324), Skjerven Morrill MacPherson LLP, San Francisco, CA, Steven M. Levitan (SBN 148716), Clark S. Stone (SBN 202123), Skjerven Morrill MacPherson LLP, San Jose, CA, George W. Lindh, Lindh & Walker, Manchester, NH, Attorneys for Defendant and Cross-Complainant, Black Ice Software, Inc.

Hon. Socrates Peter Manoukian Judge of the Superior Court County of Santa Clara.

I. FACTS

*1 Defendant and Cross-Complainant Black Ice Software, a New Hampshire corporation, provided computer programs to be used in conjunction with fax, voice, and imaging programs. It conducted a large portion of its advertising and business on the Internet.

Plaintiff and Cross-Defendant **Mail Abuse Prevention System**, a California limited liability company, was also

involved in the Internet industry. One of Mail Abuse's main products was a computer program called "Realtime Blackhole List," a product that blocks "spam." [FN1]

[FN1] "Spam," generally known as a trademark of the Geo. A. Hormel Company, has also been defined by one dictionary as "unsolicited, usually commercial e-mail sent to a large number of addressees." (*Merriam-Webster's Collegiate Dictionary* (10th ed. 1999) 1126.) Spam is often also used as a verb, i.e., to spam someone, or can be modified to be used as a descriptor, i.e., one who sends spam is a spammer.

Realtime Blackhole List maintained a database of computers suspected of sending spam. The program stored Internet Protocol addresses (the unique number assigned to each computer physically attached to the Internet) and prevented all e-mail sent from those computers suspected of sending spam from reaching their final destination. Many Internet service providers, which route much of the e-mail sent over the Internet, relied on Mail Abuse's list to block spammers.

Mail Abuse suspected Black Ice of sending spam, so Black Ice's computers were blocked from sending e-mail to many of its intended, prospective customers. Black Ice argued that their e-mail was solicited, not spam, and therefore should not have been blocked by Mail Abuse.

On March 21, 2000, Mail Abuse sued, alleging: (1) declaratory relief; and (2) violation of Business & Professions Code, §17538.45, subd(b) and (c). [FN2] On July 31, 2000, Black Ice filed its Cross-Complaint, alleging: (1) defamation; (2) intentional interference with contractual relationship; (3) intentional interference with prospective economic advantage; (4) unfair competition; and (5) restraint of trade.

[FN2] "(b) No registered user of an electronic mail service provider shall use or cause to be used that electronic mail service provider's equipment located in this state in violation of that electronic mail service provider's policy prohibiting or restricting the use of its service or equipment for the initiation of unsolicited elec-

tronic mail advertisements. (c) No individual, corporation, or other entity shall use or cause to be used, by initiating an unsolicited electronic mail advertisement, an electronic mail service provider's equipment located in this state in violation of that electronic mail service provider's policy prohibiting or restricting the use of its equipment to deliver unsolicited electronic mail advertisements to its registered users."

II. DISCUSSION

*2 Black Ice moves for summary adjudication of issues with respect to Mail Abuse's second cause of action (violation of § 17538.45.) Mail Abuse moves, pursuant to Code of Civil Procedure, §425.16, to strike Black Ice's Cross-Complaint for being a S.L.A.P.P. suit. Mail Abuse also demurs to the Cross-Complaint, and moves to strike the punitive damages allegations.

A. BLACK ICE'S MOTION FOR SUMMARY ADJUDICATION OF ISSUES

This appears to be a question of first impression. There are no published cases on the application of §17538.45.

Mail Abuse alleges violations of subdivisions does not allege that Black Ice is one of its registered users. Therefore, §17538.45(b) is inapplicable. Mail Abuse does allege Black Ice has violated §17538.45(c). Standing to allege a §17538.45 violation is conferred pursuant to §17538.45(f)(1) [FN3] only to "electronic mail service providers." Black Ice argues Mail Abuse is not an e-mail service provider, and thus lacks standing to allege a violation of §17538.45. Mail Abuse counters that it is an e-mail service provider; in the alternative, if it is not, it may act as the real party in interest for the ones who are.

[FN3]. "In addition to any other action available under law, any electronic mail service provider whose policy on unsolicited electronic mail advertisements is violated as provided in this section may bring a civil action to recover the actual monetary loss suffered by that provider by reason of that violation, or liquidated damages of fifty dollars (\$50) for each electronic mail message initiated or delivered in violation of this section, up to a maximum of twenty-five thousand dollars (\$25,000) per day, whichever

amount is greater."

1. What Is an Electronic Mail Service Provider?

The first step in statutory interpretation is to look at the actual language of the statute. (E.g., Halbert's Lumber v. Lucky Stores (1992) 6 Cal.App.4th 1233, 1238.) [FN4] The courts should give the words their ordinary, everyday meaning, unless the statute itself specifically defines those words. (*id.*) But if the meaning is not clear, the courts then should look to the legislative history. (*id.* at 1239.) If that is not determinative, the final step is to apply reason, practicality, and common sense. (*id.*)

[FN4]. See People v. Knowles (1950) 35 Cal.2d 175, 182-183: "An insistence upon judicial regard for the words of a statute does not imply that they are like words in a dictionary, to be read with no ranging of the mind. They are no longer at rest in their alphabetical bins. Released, combined in phrases that imperfectly communicate the thoughts of one man to another, they challenge men to give them more than passive reading, to consider well their context, to ponder what may be their consequences. Speculation cuts brush with the pertinent question: what purpose did the Legislature seek to express as it strung those words into a statute? The court turns first to the words themselves for the answer. It may also properly rely on extrinsic aids, the history of the statute, the legislative debates, committee reports, statements to the voters on initiative and referendum measures. Primarily, however, the words, in arrangement that superimposes the purpose of the Legislature upon their dictionary meaning, stand in immobilized sentry, reminders that whether their arrangement was wisdom or folly, it was wittingly undertaken and not to be disregarded. [¶] 'While courts are no longer confined to the language [of the statute], they are still confined by it. Violence must not be done to the words chosen by the legislature.' (Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *Columb.L.Rev.* 527, 543.) A standard of conduct prescribed by a statute would hardly command acceptance if the statute were given an interpretation contrary to the interpretation ordinary men subject to the

statute would give it. 'After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.' [citation omitted.] If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. [citations omitted.]"

*3 The Legislature has provided a specific definition of e-mail service provider. [FN5] Thus, to have standing, Mail Abuse must: (1) Be a business or organization qualified to do business in California; (2) Have registered users; (3) Provide these users with the ability to send or receive e-mail; (4) Have the equipment for sending or receiving e-mail located in California; and (5) Be an intermediary in sending or receiving e-mail.

FN5. Section 17538.45(a)(3) states: "Electronic mail service provider" means any business or organization qualified to do business in California that provides registered users the ability to send or receive electronic mail through equipment located in this state and that is an intermediary in sending or receiving electronic mail."

The material facts are not seriously in dispute. Mail Abuse was a California limited liability company. (Declar. of Popovich ¶ 12; *see* Complaint ¶ 3.) This satisfies the first prong. Users subscribed to its services on a for-pay basis. (Declar. of Falk ¶ 2; *see* Complaint ¶ 12.) This satisfies the second prong. Its equipment was located in California. (Declar. of Falk ¶ 5; *see* Complaint ¶ 3.) This satisfies the fourth prong. A user of Mail Abuse's services had an e-mail account, hosted by Mail Abuse's computers, that received e-mail on behalf of that user; Mail Abuse then forwarded all non-spam e-mail to another e-mail account the user had elsewhere. (Declar. of Falk ¶ 4; *see* Complaint ¶ 12.) Thus, the fifth prong is satisfied, as Mail Abuse was acting as an intermediary.

The remaining question is whether Mail Abuse provided its users with the ability to send or receive mail. Mail Abuse did not provide its users with the ability to send mail, as its service only sent mail to its users. It was a one-way function. Its users cannot have used Mail Abuse to send e-

mail to other people. (*See id.*)

Similarly, Mail Abuse did not provide its users with the *ability* to receive mail. It was, by its own admission, "just a forwarding service." (Declar. of Falk, Ex. A.) It did not provide its users with the ability to retrieve or access mail that was sent to them; the users must have had another service provider for that function. (*See* Declar. of Falk ¶ 4; Ex. A.) Thus, without another e-mail account, Mail Abuse's services were useless. While Mail Abuse did "provide" a "service" related to "electronic mail," it did not "provide" "electronic mail service."

An analogy may be useful. Suppose Bob Dobbs has leased a post office box from the United States Postal Service. Rather than walk to the post office every day, Bob hired the neighbor's kid to go to the post office to retrieve the mail. Bob has also instructed the child to throw away all junk mail, and deliver to Bob only the mail sent personally to him. It is the Postal Service that is providing Bob with mail service, not the neighbor's child. The child is just performing a service on behalf of Bob that Bob could do for himself.

*4 However, a slightly more expansive reading of the section is also possible. Rather than focusing only whether Mail Abuse provides the ability to send and receive e-mail, the definition could also be read to include "the ability to send and receive electronic mail through equipment located in this state." That is, an e-mail service provider would be (for the purposes of this section) any organization with the ability to direct mail to pass through its equipment located in California. Thus, any intermediary that provides its users with the ability to transfer mail through computers located in California, regardless of the origin and destination of the e-mail, would be an e-mail service provider under §17538.45.

The analogy associated with this reading would be the Pony Express. This is perhaps the more apt analogy, because the Internet does not provide point-to-point e-mail service, but rather the e-mail is transferred along a series of computers. Like the Pony Express, the mail is delivered via routes to hand-off points, where it is then delivered to the next hand-off point. Each hand-off point, thus, is providing the ability to send and receive mail. Accordingly, Mail Abuse, by inserting itself as a hand-off point between spammers and its users, is providing the

ability to send and receive e-mail.

As such, there are two possible readings of the statute; the statutory language is ambiguous. The next step, then, is to examine the legislative history. The hearings on AB 1629 demonstrate the Legislature intended for §17538.45 to confer standing only those companies that provide users with access to e-mail, not all companies that provide an e-mail-related service. [FN6] Thus, the Legislature used "electronic mail service provider" and "Internet service provider" rather interchangeably. In sum: Mail Abuse has never claimed to be an Internet service provider. (See Complaint ¶ 12.) Nor does it have the ability to provide e-mail service to its users. Therefore, it lacks standing under § 17538.45.

FN6. (Sen. Floor, 3d reading analysis of Assem. Bill No. 1629 (1997- 1998 Reg. Session) as amended Aug. 20, 1998 ("allowing electronic mail service providers (also known as Internet Service Providers or ISP's)"); *id.* ("this bill recognizes the existing rights of ISP's"); Assem. Com. on Appropriations, Analysis of Assem. Bill No. 1629 (1997-1998 Reg. Session) as amended Apr. 21, 1998 ("this bill is intended to help internet service providers"); Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1629 (1997-1998 Reg. Session) as amended Apr. 14, 1998 ("This measure is intended to help internet service providers (ISPs)"); *see also* Sen. Floor, Analysis of Assem. Bill No. 2704 (1999-2000 Reg. Sess.); Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2704 (1999-2000 Reg. Sess.).)

2. Whether Mail Abuse Is a Real Party in Interest.

*5 Mail Abuse also argues it has standing as a real party in interest. A real party in interest may be a party to a lawsuit if they, or someone they represent, have either suffered or been threatened with injury, or the is party who will benefit or suffer from the judgment. (See, e.g., City of Irvine v. Irvine Citizens Against Overdevelopment (1994) 25 Cal.App.4th 868, 874.)

Mail Abuse's users would not have standing to bring this action, as its users also are not e-mail service providers. Therefore, Mail Abuse cannot use them to bootstrap themselves into having standing to litigate this cause of

action. In its opposition papers, Mail Abuse argues it was acting as the agent for Internet service providers. However, the Complaint contains no such allegations, as paragraph 12 states Mail Abuse is in the business of enforcing Internet service providers' anti-spam policies, but fails to state who these providers were, or the nature of their relationships. It is unclear whether Mail Abuse is acting as agent or independent contractor, or for whom it is so acting. Further, there is no *competent* evidence before the court at this time to support such contentions. [FN7]

FN7. (*But of.* Declar. of Risch filed in support of Plaintiff's Mot. to Strike Cross-Complaint, Exs. A-B.)

The agency argument is potentially meritorious. However, neither party seriously addressed it in either of the memoranda or evidence presented to the court, nor does the Complaint contain sufficient allegations to support Mail Abuse's contention that is a real party in interest. Given the lack of evidence before the Court, and the inadequacies of the pleadings, the Court will treat the motion as a motion for judgment on the pleadings [FN8], and GRANT that motion, with 20 days leave within which to amend.

FN8. See Code of Civil Procedure, §438(c)(B)(ii): "If the court on its own motion grants the motion for judgment on the pleadings, it shall be on one of the following bases: ... If the motion is granted in favor of the defendant, that either of the following conditions exist: ... (ii) The complaint does not state facts sufficient to constitute a cause of action against that defendant."

B. MAIL ABUSE PREVENTION SYSTEM'S MOTION TO STRIKE CROSS-COMPLAINT.

A motion to strike, pursuant to Code of Civil Procedure, §425.16, alleges the operative complaint is a S.L.A.P.P. suit designed to chill free-speech rights. Under §425.16, the defendant must first demonstrate that First Amendment interests are threatened. Second, the plaintiff must demonstrate a probability of winning on the merits.

*6 To satisfy the first prong, the moving party must first demonstrate the acts underlying the complaint are: state-

ments made in official proceedings; statements made in a public forum in connection with a public issue or interest; or any conduct that furthers free speech in connection with a public issue or interest. (See C.C.P. § 425.16(e).)

Mail Abuse allegedly maintained a list of Internet Protocol addresses that it believed were owned by spammers. (Cross-Complaint ¶ 8.) Mail Abuse contends this list constitutes its opinions on what computers are guilty of sending out spam; how Internet service providers used this data is beyond Mail Abuse's control. (See Declaration of Stone, Ex. 3.) Mail Abuse's users routed their mail through Mail Abuse's computers. Many Internet service providers also copied the list onto their own computers. (Cross-Complaint ¶ 9.) As such, Mail Abuse did not block spam unless the user or Internet service provider specifically opted for such service.

Computer programs may be worthy of First Amendment protection. [FN9] Thus, Mail Abuse's list of alleged spammers, and the source code for its alleged database have First Amendment protection.

FN9. (See, e.g., Junger v. Daley (6th Cir. 2000) 209 F.3d 481, 485 (holding source code to encryption software is protected by First Amendment).)

Mail Abuse's acts were not in connection with a public issue. Neither the Complaint or Cross-Complaint allege any governmental action. This lawsuit appears to be a matter of private interest, between private parties, and not about the operation of the government. (See Ericsson GE Mobile Comms. v. CSI Tels. Eng'rs (1996) 49 Cal.App.4th 1591, 1601-02.) Moreover, there are no allegations regarding the number of persons affected or the seriousness of the harms allegedly caused, as to make this an issue of public interest. (See Du Pont Merck Pharmaceutical Co. v. Superior Ct. (2000) 78 Cal.App.4th 562, 567.) However, given the scope and importance of the Internet in this modern world and the impact of spam on Internet commerce, the efficacy of Mail Abuse's efforts make this an issue of public interest. (Declar. of Risch, Exs. A-B; see Evid. C. §§ 451(f), 452(h).) As such, the Cross-Complaint appears to be a S.L.A.P.P. suit under C.C.P. § 425.16(b)(1).

The burden then shifts to Black Ice to demonstrate a reas-

onable probability of success on the merits. (See, e.g., Wilcox v. Superior Ct. (1994) 27 Cal.App.4th 809, 823-25.) Black Ice sent e-mail only those persons who made such a request, usually by leaving their e-mail address at Black Ice's Web site. (Declar. of Nemeth ¶ 6.) This, however, was apparently unacceptable to Mail Abuse, which considered e-mail sent under such a scenario potentially unwanted, and therefore spam. (See *id.* ¶ 9.) Because of this dispute over whether Black Ice's practices constituted spam, Mail Abuse added Black Ice to its list of spammers. This severely disrupted Black Ice's ability to market its products to its existing and potential customers, as well as Black Ice's contract with its Internet service provider, Sprint. (*Id.* ¶¶ 10, 15.) Such loss of e-mail communications disrupted Black Ice's business, and caused it to suffer loss revenue. (*Id.* ¶ 17.) Moreover, by being placed on Mail Abuse's list, Black Ice was being labeled a spammer, which had negative connotations in the Internet business community. (*Id.* ¶ 19.) This Court believes that Black Ice has met its burden. The motion to strike the cross-complaint as a S.L.A.P.P. suit is DENIED.

C. MAIL ABUSE PREVENTION SYSTEM'S DEMURRER TO THE CROSS-COMPLAINT.

*7 As to each cause of action, Black Ice has adequately alleged that its placement on Mail Abuse's list caused it damage, even though it is not presently on the list.

1. First Cause of Action (Defamation)

Defamation is a false and unprivileged publication. (Civ. C. §§ 44-47.)

A. *Standard Challenges to Defamation Causes of Action:* Mail Abuse first argues its alleged labeling of Black Ice as a "spammer" is an opinion, and not a false statement of fact. An opinion, implicitly containing a false statement of fact, may be defamatory. (Moyer v. Amador Valley J. Union High Sch. Dist. (1990) 225 Cal.App.3d 720, 725; Carr v. Warden (1984) 159 Cal.App.3d 1166, 1169.)

Mail Abuse next contends that truth operates as a complete defense. "Spam" is commonly understood to be unsolicited commercial e-mail sent to a large amount of addresses. Mail Abuse allegedly considered Black Ice's marketing practices spam when it placed Black Ice on its list. (See Cross-Complaint ¶ 11.) Black Ice, however, contends its e-mails were solicited, and therefore not spam. (See *id.*

¶ 14.) As Black Ice's contentions are presumed to be true for demurrer purposes, the Cross-Complaint does not allege facts which would permit the truthfulness of Mail Abuse's publications to be a complete defense.

Mail Abuse then contends Black Ice has failed to plead damages. However, statements that are per se defamatory need not plead special damages; defamatory per se statements includes any statement that tends to damage a business reputation. (See Civ. C. §§ 45, 45a, 46(3).) "Spammer" and "spam" are disparaging labels in the Internet business community. (See Cross-Complaint ¶ 29.)

B. "Good Samaritan" Provision of the Communications Decency Act: This issue also appears to be a question of first impression. Given the relative recent passage of the Communication Decency Act, there is little case law on its application, and several of its key provisions have not been adjudicated at all.

Mail Abuse argues the Communications Decency Act provides a complete defense to this action. Under the Act, "No cause of action may brought and no liability may be imposed under any State or local law that is inconsistent with this section. (47 U.S.C. § 230(e)(3).) Thus, while federal law does preempt state law, this Court still retains jurisdiction to hear this case, despite the existence of this federal question.

The defamation cases interpreting the Act have focused primarily on 47 U.S.C. § 230(c)(1) to determine whether an Internet service provider can be liable for allegedly defamatory statements issued by another but then republished on the Internet. (See, e.g., *Ben Ezra, Weinstein, & Co. v. American Online* (10th Cir 2000) 206 F.3d 980; *Zeran*, 129 F.3d 327.) In general, § 230(c)(1) has immunized the Internet service provider, but not the original publisher of the defamatory statement. (See, e.g., *Blumenthal v. Drudge* (D.D.C. 1998) 992 F.Supp. 44.)

*8 This lawsuit, however, is not the traditional § 230(c)(1) case. Rather, Mail Abuse is asserting § 230(c)(2) as a defense. Under § 230(c):

"(1) No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. (2) No provider or user of an interactive computer service shall be held liable on account of: (A) any

action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

The issue is, comparable to the *Business & Professions Code*, §17538.45 issue, whether Mail Abuse is an "interactive computer service provider." Under 47 U.S.C. § 230(f)(2), an interactive computer service is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services operated by libraries or educational institutions." American Online, for example, has been found to be an interactive computer service provider since it provides "Internet access, [e-mail], online conferencing and information directories, entertainment, software, electronic publications and original programming." (See, e.g., *Howard v. American Online* (9th Cir. 2000) 208 F.3d 741, 746.) Therefore, Mail Abuse is not a tradition interactive computer service provider, as it does not provide those services.

However, under § 230(f)(4), an "access software provider" is "a provider of software (including client or server software), or enabling tools that do any one or more of the following: (A) filter, screen, or disallow content; (B) pick, choose, analyze, or digest content; or (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, translate content." Under this definition, Mail Abuse is a classic access software provider since it provides, through its Web site and server, software that filters and disallows content (i.e., spam.) As an access software provider, it helps enable other computer users accessing the Internet. Thus it has standing to assert § 230(c)(2) as a defense.

*9 The next inquiry, then, is whether spam is "harassing" or "otherwise objectionable" material under §230(c)(2)(A). This is an undecided question of law. One federal court, in dicta, noted blockage of unsolicited bulk e-mail was "encouraged" by § 230(c)(2). (*America Online*

v. Greatdeals.net (S.D.W.Va 1999) 49 F.Supp.2d 851, 855, 864 (dismissing tortious interference with contractual relations and prospective economic advantage claims) (implying unsolicited bulk e-mail is "harassing" or "otherwise objectionable").)

Congress explained the policy of §230 was "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or state regulation." (47 U.S.C. § 230(b)(2).) Section 230 "was enacted to minimize state regulation of Internet speech by encouraging private content providers to self-regulate against offensive material...." (*Mainstream Loudoun v. Board of Trustees* (E.D.Va 1998) 2 F.Supp.2d 783, 790 (citing *Zeran v. America Online* (4th Cir 1997) 129 F.3d 327, 330.)) Congress, then, has made it clear that it would prefer for interactive computer service providers, rather than the government, regulate speech on the Internet. This supports the argument that § 230(c)(2) encourages the blocking of spam.

Whether spam is "harassing" or "otherwise objectionable" is likely an issue that will be resolved in the federal courts. But given the state of law before the court, the *Greatdeals.net* court's conclusion that §230 encourages the blocking of unsolicited bulk e-mail seems correct.

Black Ice contends its e-mails were solicited, and therefore not spam. It argues this factual dispute (i.e., whether its e-mails were solicited or unsolicited) cannot be resolved at the demurrer stage. Black Ice fails to read the entire section. Section 230(c)(2)(A) provides immunity for any good faith effort to block content. Any good faith but unintentional blockage of non-spam is therefore also afforded immunity. To rule otherwise would require litigation over whether the mail was spam, which would defeat the purpose in granting immunity.

Black Ice, however, has alleged that Mail Abuse blocked its mail in response to Black Ice's e-mail replying to a solicited inquiry. Black Ice also alleges Mail Abuse blocked Black Ice's other servers, in addition to its mail server. (Cross-Complaint ¶¶ 18-22.) This allegations, which are presumed true for demurrer purposes, do not plead a good-faith effort to block unsolicited bulk e-mail, but rather a bad-faith attempt to block solicited, individual e-mails. In other words, Black Ice is alleging Mail Abuse

knew Black Ice was not sending unsolicited bulk e-mail when Black Ice was placed on the list the second time around. While Mail Abuse contends such e-mail is nonetheless spam, it is not the unsolicited bulk e-mail described by *Greatdeals.net*. Moreover, Mail Abuse's alleged preemptive blocking of all of Black Ice's other servers cannot be said to be done in good faith, as Black Ice had not attempted to send commercial e-mail through those Internet Protocol addresses. As such, Black Ice has successfully pleaded around §230(c)(2)(A).

*10 Mail Abuse also contends §230(c)(2)(B) operates as a complete defense. Under that section, there is no liability for providing technical assistance to help restrict access to information provided by information content providers. Mail Abuse's Realtime Blackhole List provides the technical means for Internet service providers and its registered users to filter out spam. Regardless of whether it itself is an interactive computer service provider, its assistance preventing spam is absolutely protected. Thus, while Internet service providers may be liable for a bad-faith blockage of e-mail, Mail Abuse's supplying of the software tools to do so is immunized. This is consistent with the policy stated in §230(b), in which Congress seeks to encourage private self-regulation of the Internet over governmental intrusion.

Such immunity, however, would not cover the publication of an Internet Protocol address to Mail Abuse's list. While Mail Abuse's software may provides the means for Internet service providers and others to block spam, the decision and "announcement" of adding a computer to list is a separate act, one not necessarily covered by §230(c)(2)(B).

Moreover, Black Ice also has specifically alleged Mail Abuse, on its Web site, accused Black Ice of sending spam. (Cross-Complaint ¶ 24.) This is not an act covered by § 230(c), and thus actionable, as Black Ice is alleging Mail Abuse was the original publisher the defamatory statement. As such, Black Ice has adequately pleaded this cause of action.

The demurrer is OVERRULED with respect to this cause of action. Moving party has 20 days within which to answer.

2. Second Cause of Action (Intentional Interference

with Contractual Relations)

The elements of this cause are: (1) contractual relationship between plaintiff and a third party; (2) defendant's knowledge of that contract; (3) intentional acts designed to induce a breach of that contract; (4) actual breach; and (5) damages. (*PG&E Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.)

Mail Abuse first contends it had no knowledge of Black Ice's contractual relationship with Sprint. Paragraph 35 of the Cross-Complaint adequately alleges Mail Abuse knew of Black Ice's contract with Sprint because Mail Abuse had traced Black Ice's Internet Protocol address back to Sprint, Black Ice's Internet service provider. Mail Abuse next argues it did not intend to interfere with the contract. Intent to interfere may be inferred from intentional acts that will likely result in interference. (See, e.g., *Savage v. P.G.&E.* (1993) 21 Cal.App.4th 434, 449-50.)

Mail Abuse then contends its acts were not the proximate cause of Black Ice's damages. Mail Abuse argues Black Ice has not pleaded that Sprint breached its contract with it. While paragraph 37 alleges Mail Abuse's acts disrupted the Internet services that Black Ice had contracted with Sprint for, this is a conclusion. There are no factual allegations of what services were contracted for, or how Mail Abuse's alleged acts disrupted that contract.

*11 Mail Abuse finally argues false statements cannot give rise to interference with contractual relations claims, unless the statements are defamatory. (See, e.g., *Morningstar, Inc. v. Superior Ct.* (1994) 23 Cal.App.4th 676.) However, given the analysis for the first cause of action, above, Black Ice has adequately alleged the existence of defamatory statements.

The demurrer to this cause is SUSTAINED, with 20 days leave to amend.

3. Third Cause of Action (Intentional Interference with Prospective Economic Advantage).

The elements to this cause are: (1) an economic relationship between the plaintiff and a third party, with the probability of future economic benefit to the plaintiff; (2) defendant's knowledge of the relationship; (3) intentional acts designed to disrupt that relationship; (4) actual disruption; and (5) damages. (*Youst v. Longo* (1987) 43

Cal.3d 64, 71.)

Mail Abuse first contends Black Ice's has failed to adequately allege the probability of future economic benefit. Paragraphs 3 and 23 of the Cross-Complaint allege Black Ice receives orders and requests for information from repeat and prospective customers over the Internet. As such, Black Ice has adequately alleged the existing non-contractual relations that have the possibility of economic benefit. (See, e.g., *Westside Center Assocs. v. Safeway Store 23* (1996) 42 Cal.App.4th 507.)

Mail Abuse next argues it did not intend to interfere with these prospective economic relations. As the second cause of action, above, intent to interfere may be inferred from intentional acts that will likely result in interference. (See, e.g., *Savage v. PG&E* (1993) 21 Cal.App.4th 434, 449-50.)

Mail Abuse finally contends Black Ice has failed to adequately plead actual disruption and damages. Paragraphs 17-26, 38, 42, and 43 of the Cross-Complaint do adequately allege a disruption of such relations and the resulting damages.

The demurrer to this cause is OVERRULED with 20 days leave to answer.

4. Fourth Cause of Action (Unfair Competition)

Unfair competition is any unlawful, unfair, or fraudulent business act. (Bus. & Prof. C. § 17200.)

Mail Abuse first argues that its acts were lawful, as they are protected by the First Amendment. As discussed in the first cause of action, above, Black Ice has adequately alleged defamatory statements by Mail Abuse, which are not granted First Amendment protection.

Mail Abuse next contends Black Ice must state with reasonably particularity the facts giving rise to an alleged violation of Business & Professions Code, §17200. Yet the Cross-Complaint is replete with specific factual allegations. (See, e.g., Cross-Complaint ¶¶ 16-55.)

*12 The demurrer is OVERRULED with 20 days leave to answer.

5. Fifth Cause of Action (Restraint of Trade)

A contract which restrains anyone from engaging in lawful business practices is void. (Business & Professions Code §16600.)

Mail Abuse first argues there is no contract between it and Black Ice. Paragraph 52 implicitly alleges a contract between Mail Abuse and its unnamed co-conspirators, i.e., the Internet service providers who subscribe to Mail Abuse's list.

Mail Abuse then contends Black Ice has failed to plead with the requisite particularity, as it has failed to allege any significant facts about the alleged conspiracy. To adequately plead a restraint of trade cause of action, a pleading should state its purpose or effect, and that the defendant was a member of the conspiracy, without further details of how, when, or where the alleged agreement to restrain trade was entered into. (*See Bus. & Prof. C. § 16756; Cellular Plus v. Superior Ct.* (1993) 14 Cal.App.4th 1224.) Paragraphs 8-20 and 52-55 adequately allege agreements between Mail Abuse and various, albeit unnamed, Internet service providers to prevent Black Ice (and others) from conducting their business through e-mail.

The demurrer to this cause of action is OVERRULED with 20 days leave to answer.

D. MOTION TO STRIKE PUNITIVE DAMAGES ALLEGATIONS

Mail Abuse argues Black Ice has failed to allege any malicious, oppressive activity or willful and deliberate intention to injure Black Ice. Given the analysis for the demurrer, above, Black Ice has adequately alleged malicious conduct. Paragraphs 16-26, for example, allege Mail Abuse threatened to add Black Ice to its list of spammers if Black Ice did not comply with its demands. When Black Ice did not, it was so added, which significantly disrupted Black Ice's business. Mail Abuse then allegedly sent e-mail to Black Ice to test Black Ice's confirmation procedures; when Black Ice's procedures were not up to Mail Abuse's standards, Black Ice was again added to Mail Abuse's list. Moreover, Black Ice has adequately alleged it was defamed by being labeled a spammer by Mail Abuse. All this is sufficient to allege oppressive conduct designed at injuring Black Ice. The motion to strike is DENIED.

DATED: 10/12/2000

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

JACK RUSSO, ESQ. State Bar No. 96C68

*13 MICHAEL RISCH, ESQ. State Bar No. 197600

RUSSO & HALE LLP

401 Florence Street

Palo Alto, CA, 94301

Tel.: (650) 327-9800

Attorneys for Plaintiff

MAIL ABUSE PREVENTION SYSTEM LLC

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE COUNTY OF
SANTA
CLARA

-----) No. CV788630
Mail Abuse Prevention System)
LLC, a California Limited)
Liability Company)
)
Plaintiff,)
)
v.) COMPLAINT FOR
) DECLARATORY AND OTHER RELIEF
)
Black Ice Software, Inc.,) JURY TRIAL DEMANDED
a Corporation, and)
DOES I through XX,)
)
Defendants.)
)
)

Plaintiff Mail Abuse Prevention System LLC, a California Limited Liability Company, ("MAPS") complains and alleges as follows:

INTRODUCTION

1. Defendant Black Ice Software, Inc. ("Black Ice") is attempting to "hold up" Plaintiff MAPS by alleging that MAPS has defamed it and that MAPS has intentionally interfered with its business relations. MAPS files this action to obtain declaratory relief that it has committed no wrongdoing.

JURISDICTION AND VENUE

2. This Court has jurisdiction of this matter under C.C.P. §410.10 and other applicable statutes. Venue is proper in this County because Defendant has violated a California statute in this County, Defendant claims that wrongdoing occurred in this County, and Defendant has made a demand on Plaintiff in this County.

PARTIES

*14 3. Plaintiff MAPS is and at all times mentioned herein was a Limited Liability Company duly organized and properly existing under the laws of the State of California, with its principal place of business at 950 Charter Street, Redwood City, California, MAPS develops and sells software products and maintains a subscription list of unsolicited electronic mail ("SPAM") senders.

4. Defendant Black Ice is a corporation located at 292 Route 101, Amherst, New Hampshire. Black Ice does business nationwide, including but not limited to in California.

5. Plaintiff is ignorant of the true names and capacities of the Defendants sued herein as DOES I through XX, inclusive, and therefore sues these Defendants by such fictitious names. Plaintiff will seek leave to amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes, and on that basis alleges, that each of these fictitiously named Defendants is responsible in some manner for the acts or omissions herein alleged, and that declaratory and other equitable relief is necessary with respect to such parties.

FIRST CAUSE OF ACTION (Declaratory Relief - C.C.P. §1060)

6. Plaintiff hereby incorporates by reference the allegations in Paragraphs 1- 5 as if fully set forth herein.

7. Plaintiff is informed and believes, and on that basis alleges, that Plaintiff did not publish any defamatory statements, nor did Plaintiff intentionally or otherwise interfere with the business relations of Defendant.

8. On or about March 10, 2000, counsel for Plaintiff received in California a demand letter entitled "Black Ice Software, Inc. v. Mail Abuse Prevention Systems LLC". This letter makes monetary compensation demands for alleged wrongdoing by Plaintiff, and threatens that a lawsuit will be filed if such payment is not made. A true and correct copy of said demand letter is attached hereto as Exhibit A.

9. Plaintiff is informed and believes and on that basis alleges that the amount in controversy, if any, is substantially less than \$75,000 and in fact, the claims made by Defendant are frivolous and simply designed to attempt to extort monies from Plaintiff through false threats.

10. Pursuant to Section 1060 of the Code of Civil Procedure, a dispute has arisen as to whether Plaintiff in any way injured Defendant. Plaintiff is entitled to declaratory and other relief from the Court to resolve this dispute.

SECOND CAUSE OF ACTION (Violation of California Business and Professions Code)

11. Plaintiff hereby incorporates by reference the allegations in Paragraphs 1-5 as if fully set forth herein.

12. Plaintiff is in the business of enforcing policies against SPAM which are implemented by internet service providers. Plaintiff is informed and believes, and on that basis alleges, ?? implementations of policies fall with California Business & Professions Code § 17538.45 whi?? states in relevant part:

*15 (b) No registered user of an electronic mail service provider shall use or cause to be used that electronic mail service provider's equipment located in this state in violation of that electronic mail service provider's policy prohibiting or restricting the use of its service or equipment for the initiation of unsolicited electronic mail advertisements.

(c) No individual, corporation, or other entity shall use or cause to be used, by initiating an unsolicited electronic mail advertisement, an electronic mail service provider's equipment located in this state in violation of that electronic mail service provider's policy prohibiting or restricting the use of its equipment to deliver unsolicited electronic mail advertisements to its registered users.

(Emphasis added.)

13. Plaintiff is informed and believes, and on that basis alleges, that Defendant has violated and continues to violate each of the above sections as well as § 17200 et seq. of the Business and Professions Code, and is therefore subject to the policies of the internet service providers who look to MAPS to implement their policies.

14. Pursuant to Section 1060 of the Code of Civil Procedure, a dispute has arisen as to whether Plaintiff in any way injured Defendant. Plaintiff is entitled to declaratory and other relief from the Court to resolve this dispute.

15. Under Section 1062.3 of the California Code of Civil Procedure, Plaintiff is entitled to have this Action set for trial "at the earliest possible date" in accordance with applicable law and Plaintiff requests that such trial date be set by the Court at the earliest possible time.

16. Plaintiff is entitled to a declaratory judgment, without prejudice to any other remedy, provisional or otherwise, provided by law for the benefit of Plaintiff (in accordance with Section 1062 of the California Code of Civil Procedure).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief:

A. That the Court declare that Plaintiff committed no wrongdoing that injured Defendant, including but not limited to defamation and intentional or other interference with business relations;

B. That Defendant has violated Cal. Bus. & Prof. Code § 17538.45 and Plaintiff was justified in enforcing the policies of its client internet service providers;

C. That Defendant be enjoined from pursuing any action designed to obtain damages from Plaintiff;

D. For costs of this suit, including attorneys fees, to be proven at trial; and

E. For other such relief as the Court deems just and equitable.

Dated: March 21, 2000 Respectfully submitted,
 RUSSO & HALE LLP
 By: _____
 Jack Russo
 Attorneys for Plaintiff
 MAIL ABUSE PREVENTION
 SYSTEM LLC

DEMAND FOR JURY TRIAL

***16** Plaintiff hereby demands a trial by jury on all issues triable by jury to the fullest extent available under constitutional and all other applicable law.

Dated: March 21, 2000 Respectfully submitted,
 RUSSO & HALE LLP
 By: _____
 Jack Russo
 Attorneys for Plaintiff
 MAIL ABUSE PREVENTION
 SYSTEM LLC

Reginald D. Steer (SBN 56324)

SKJERVEN MORRILL MacPHERSON LLP

3 Embarcadero Center, 28th Floor

San Francisco, CA, 94111

(415) 217-6000

Steven M. Levitan (SBN 148716)

Clark S. Stone (SBN 202123)

SKJERVEN MORRILL MacPHERSON LLP

25 Metro Drive, Suite 700

San Jose, CA, 95110

(408) 453-9200

George W. Lindh

LINDH & WALKER

50 Bridge Street, Suite 205

Manchester, NH, 03101

(603) 634-5090

Attorneys for Defendant and Cross-Complainant

BLACK ICE SOFTWARE, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

MAIL ABUSE PREVENTION SYSTEM)	
LLC, a California Limited Liability)	
Company,)	Case No. CV 788630
)	
Plaintiff,)	CROSS-COMPLAINT FOR DEFAMATION,
)	INTENTIONAL INTERFERENCE WITH
v.)	CONTRACTUAL RELATIONSHIP,
)	INTENTIONAL INTERFERENCE WITH
BLACK ICE SOFTWARE, INC.,)	PROSPECTIVE ECONOMIC
a Corporation, and DOES I through XX,)	RELATIONSHIP, UNFAIR COMPETITION,
)	AND RESTRAINT OF TRADE
Defendants.)	
)	
-----)	
BLACK ICE SOFTWARE, INC.,)	
a Corporation,)	
)	
Cross-Complainant and Defendant,)	
)	
v.)	
)	
MAIL ABUSE PREVENTION SYSTEM)	
LLC, a California Limited Liability)	
Company, and DOES 1- XX,)	
)	
Cross-Defendants.)	
)	
-----)	

*17 Cross-complainant Black Ice Software, Inc. ("Black Ice"), a New Hampshire corporation, alleges:

NATURE OF THE ACTION

1. This case involves the unwarranted disruption and defamation of a legitimate high technology business by a group of self-appointed Internet anti-"spam" enforcers, who seek to impose their practices and beliefs on the Internet business community as a whole.

2. The actions of **Mail Abuse Prevention System LLC** ("MAPS"), alone and in combination with unnamed co-conspirators, are unfair, oppressive, and illegal and demonstrate a total disregard for the rights, business interests and reputation of Black Ice Software, Inc. If allowed to continue its unfair and disruptive actions, MAPS threatens future harm to Black Ice and countless other legitimate businesses in California and the rest of the world who rely upon the Internet to conduct their business.

THE PARTIES

3. Cross-complainant Black Ice Software, Inc. is a New Hampshire corporation with its principal place of business at 292 Route 101, Amherst, New Hampshire 03031. Black Ice was formed in 1989 and provides software toolkits and applications for fax, voice and imaging applications. Black Ice switched from print marketing and advertising to Internet-based marketing in March, 1999 and now conducts its business on and through the Internet, including taking orders and requests for information via email and the World Wide Web.

4. Upon information and belief, cross-defendant **Mail Abuse Prevention System LLC** ("MAPS") is a California limited liability company with its principal place of business at 950 Charter Street, Redwood City, California 94063. Also upon information and belief, MAPS engages in a variety of Internet electronic mail-related activities.

5. Black Ice is ignorant of the true names and capacities of the persons sued as DOES I through XX and therefore sues these persons by such fictitious names. Upon information and belief, Black Ice believes, and on this basis alleges, that each of these fictitiously named persons is responsible in some manner for the acts and omissions herein alleged. Black Ice will seek leave to amend this

cross-complaint to allege their true names and capacities when ascertained.

STATEMENT OF FACTS

6. The Internet is a worldwide computer network. To enable communications between these interconnected computers, each computer is assigned a unique Internet Protocol ("IP") address. This IP address is analogous to a personal or business street address, in that it identifies the physical computer connected to the Internet for the purposes of sending and receiving emails, web browsing, and other functions.

MAPS

7. MAPS maintains an Internet web page at www.mailabuse.org. This web site states that MAPS' mission is "to defend the Internet's e-mail system from abuse by spammers." "Spam" is defined by Webster's dictionary as "unsolicited, usually commercial, E-mail sent to a large number of addresses." Merriam-Webster's Collegiate Dictionary 1126 (10th ed. 1999).

*18 8. One of the activities engaged in by MAPS is the creation, maintenance and distribution of the MAPS "Real-time Blackhole List," (the "RBL"). In MAPS' own words, "The MAPS RBL is a system for creating intentional network outages ("blackholes") for the purpose of limiting the transport of known-to-be-unwanted mass e-mail."

9. Internet Service Providers ("ISPs") "subscribe" to the MAPS RBL list, and certain email software programs allow the end user to "subscribe" to the MAPS RBL. A "subscription" to the RBL can be achieved either by the ISP or person routing emails sent to them through MAPS' computers (where a copy of the RBL resides) or by the ISP copying the MAPS RBL and placing the list on its own computers.

10. Once an IP address is "blocked," by being placed on the RBL, the computer using that IP address is unable to send emails to many other email addresses, and if the "blocked" IP address is assigned to an Internet web site, that web site is inaccessible to many persons attempting to connect with it. Emails sent from an IP address that is "blocked" by the MAPS RBL are returned to the sender as "undeliverable."

11. MAPS also maintains a web page at www.mail-abuse.org/rbl/reportinc.html which provides instructions to those persons who have received unsolicited emails. This web page instructs persons who have received unsolicited emails to first report the unsolicited email to the email's source site, organization or ISP. The web site further states that if these efforts are unsuccessful, "then and only then" should the person receiving the email then contact MAPS.

12. MAPS' web page at www.mail-abuse.org/rbl/notifvfaq.html#Submitting, titled "Reporting E-Mail Abuse" outlines the procedure for "nominating" an email sender for the MAPS RBL. It states that "Before a nomination can be submitted, the parties that would be impacted by a listing need to be notified that an RBL nomination is being prepared," and further that "Nominators are expected to make every effort to contact the offending domain prior to submitting any RBL Nominations, up to and including making a phone call to the domain when necessary."

13. MAPS' web page at <http://mailabuse.org/rbl/getoff.html#FirstStep> outlines the procedures for "Getting off the MAPS RBL." The procedures require that the "blocked" party meet certain "qualifications" to be removed from the RBL, and that a MAPS "staff member will confirm that the listed site publishes and enforces a strict usage policy with respect to e-mail abuse." The web page further states that "The moment you demonstrate favorable intentions toward stopping spam from using your resources, we will as a good faith gesture take you off of the MAPS RBL."

Black Ice Software

14. Black Ice maintain a web page at <http://www.blackice.com/DOWNIMP.HTM> that allows visitors to leave their contact information, including an email address, for the purposes of receiving information on Black Ice fax server products, and new product releases and information. Other Black Ice web pages for different products also allow visitors to leave their contact information, including an email address in order to receive update information from Black Ice via emails or fax. Black Ice's subsequent emails to these visitors, after they submit a request for information at Black Ice's web pages, can in no way be considered or characterized as "spam."

*19 15. Black Ice has a strict procedure that it follows to prevent sending email to any person who does not want to receive mailings. Black Ice maintains a log of those individuals who request to be removed from its mailing list, and all new requests for information are checked against this log. This procedure serves two purposes: 1) it removes any person who does not want to receive Black Ice emails from the distribution list; and 2) it prevents any new or incorrect information from resulting in emails to those persons whose email addresses are on the log

Actions of MAPS

16. On or about March 2, 2000, Mr. Jozsef Nemeth, President of Black Ice Software, as contacted by phone by an employee of MAPS. This person stated that MAPS had received a "complaint" and that Black Ice "was up for nomination into the RBL." MAPS demanded that Black Ice comply with MAPS' "opt-in" procedure or it would be placed in the "blackhole." Black Ice rejected MAPS' demands as unreasonable and intrusive into its business operations, in that it would force additional marketing costs and overhead on Black Ice.

17. Shortly after this conversation, on or about March 7, 2000, Black Ice suffered a substantial disruption in its ability to send and receive email. This was the result of IP "blocking" due to the listing of Black Ice's IPs on the MAPS RBL. This disruption continued until March 9, 2000, when MAPS placed Black Ice on "probationary" status. This disruption caused substantial damage to Black Ice's existing and potential business and contractual relations, and resulted in a substantial loss of revenue for Black Ice.

18. On May 18, 2000, Kelly Thompson, an employee of MAPS, left her email address, kelly.thompson@mail-abuse.org, on a contact form at Black Ice's web site and downloaded a product demo. In subsequent email communications, Ms. Thompson stated that her purpose in doing this was to "test your [Black Ice's] confirmation procedures."

19. Also on May 18, 2000 an email address of mabuze@mail.com was left on the Black Ice web site, and a product demo was downloaded. Black Ice alleges and believes that this and the previous "test" by Kelly Thompson of MAPS were both done in an effort to elicit

an email response from Black Ice to justify MAPS again placing Black Ice on the RBL. Shortly after this date, on May 23, 2000, Black Ice was served with a copy of the complaint in this action.

20. On or about June 11, 2000 Black Ice suffered another substantial disruption in its ability to send and receive email. Additionally, Black Ice's web site was made inaccessible to those persons attempting to visit it. This disruption was again the result of IP "blocking" by Black Ice's listing on the MAPS RBL. Black Ice was subsequently notified by Mr. Russo, an attorney for MAPS, that its "probationary status" had been "revoked" and that it had been placed back on the RBL. This disruption continued until June 16, 2000, when Black Ice agreed to suspend email marketing pending resolution of this dispute. This disruption caused substantial damage to Black Ice's existing and potential business and contractual relations, and resulted in a substantial loss of revenue for Black Ice.

*20 21. Notwithstanding MAPS' purported rationale in "blocking" Black Ice's IP addresses, at no time did MAPS request any individual's email address be removed from Black Ice's mailing list.

22. The "blocking" of IP addresses by MAPS has included not only those IP addresses used by Black Ice's mail server, but also those IPs used for other purposes, in direct contradiction to the published policies of MAPS.

23. These unwarranted, irresponsible and malicious acts by MAPS and unnamed others in "blocking" Black Ice's IP addresses has caused substantial damage to Black Ice. Black Ice's business operations were significantly disrupted due to the inability to communicate by email with either its current customers or employees in remote offices. Revenue was lost as prospective Black Ice customers were unable to access Black Ice's web site to retrieve information on or to purchase Black Ice products, and Black Ice's emails to prospective customers with pricing and availability information were returned to Black Ice as "host not responding," "unable to relay," or "return address refused by a remote mail server." Black Ice has been reluctant to launch any new business ventures due to the threat of "blocking" by MAPS of its IP addresses. Black Ice is unable to resume email marketing under threats by MAPS to "put it back in the blackhole."

24. MAPS maintains a web page at <http://mailabuse.org/rbl/ev/204.249.218.0-25.txt> that is listed as an "evidence file" for Black Ice. This web page states, in part, "new spam from blackice 5/9/00" and "This evening, 5/23/00 I received the spam appended below, directly from the blackice.com server" and "They are still spamming."

25. The characterization of Black Ice as a "spammer" by its publication on the RBL and the publishing of statements on the MAPS web site has defamed Black Ice and seriously and substantially harmed its business reputation.

26. MAPS continues to make ongoing threats to Black Ice that MAPS "reserves the right" to place Black Ice back on the MAPS RBL. MAPS continues to publish that Black Ice is a "spammer" at the web page listed above. These acts constitute an ongoing harm and threat of future harm to Black Ice's current and prospective business relationships and reputation, and are a continuing defamation.

FIRST CAUSE OF ACTION

Defamation (Cal. Civ. Code § 44, et seq.)

27. Black Ice realleges and incorporates herein by reference each and every allegation set forth in paragraphs 1 - 26 above.

28. The labeling by MAPS of Black Ice as a "spammer" is false at it pertains to Black Ice.

29. The publication of Black Ice on the MAPS RBL and the labeling of Black Ice as a "spammer" are libelous on their face. These statements clearly expose Black Ice to hatred, contempt, ridicule, and obloquy and injure its business reputation by deterring other businesses and persons from dealing with it, in that being labeled a "spammer" has negative and derogatory connotations in the Internet business community.

*21 30. As a proximate result of the above-described publications. Black Ice has suffered general damages to its reputation in an amount to be proven at trial.

31. As a further proximate result of the above-described publications. Black Ice has suffered special damages to its business and professional reputation, in an amount to be proven at trial, in that the publications injure its business reputation by deterring other businesses and persons from dealing with it.

32. The above-described publications were published by MAPS with malice and oppression in that MAPS knew or should have known that Black Ice does not engage in "spam," and thus Black Ice seeks an award of punitive damages.

SECOND CAUSE OF ACTION

Intentional Interference with Contractual Relationship

33. Black Ice realleges and incorporates herein by reference each and every allegation set forth in paragraphs 1 - 32 above.

34. On or about June 16, 1999, Black Ice and Sprint Communications Company, L.P. ("Sprint") entered into a written agreement whereby Sprint would provide Black Ice with Internet IP services for use by Black Ice in its on-line business ventures.

35. MAPS knew of the above described contract existing between Black Ice and Sprint, in that MAPS "traced" the Black Ice IP addresses to the Sprint Internet domain before it first contacted Black Ice in March of this year.

36. MAPS' actions in placing Black Ice on the RBL and "blocking" its IP addresses were intended to disrupt the above-described economic relationship between Black Ice and Sprint, with intent to harm Black Ice financially.

37. MAPS' intentional actions were a proximate cause of actual damages suffered by Black Ice, in that Black Ice was unable to use the Internet services it had contracted for with Sprint. Black Ice has suffered damages in an amount to be proven at trial.

38. In addition to the contract listed above, MAPS' intentional actions also disrupted Black Ice's contracts with existing customers for support and service of Black Ice products. MAPS knew of the contracts between Black Ice and its existing customers, based on MAPS' knowledge of the nature of Black Ice's business. MAPS' actions in placing Black Ice on the RBL were intended to disrupt the economic relations between Black Ice and its existing customers. MAPS' intentional acts were the proximate cause of actual damages suffered by Black Ice in its relations with its existing customers. Black Ice has suffered damages in these contracts in an amount to be proven at trial.

39. MAPS' intentional actions were willful and malicious. Black Ice is therefore entitled to punitive damages.

40. MAPS continues to threaten to and unless restrained will "place Black Ice back on the RBL," resulting in further injury to Black Ice for which damages would not provide adequate relief, in that they could not completely compensate for the injury to Black Ice's business reputation and goodwill.

THIRD CAUSE OF ACTION

Intentional Interference with Prospective Economic Relationship

*22 41. Black Ice realleges and incorporates herein by reference each and every allegation set forth in paragraphs 1 - 40 above.

42. MAPS' intentional actions described above interfered with Black Ice's ability to respond to and communicate with prospective customers requesting product information and product pricing and prevented prospective Black Ice customers from visiting the Black Ice web site.

43. MAPS' intentional actions in interfering with Black Ice's prospective economic relationships were the proximate cause of damages to Black Ice. Black Ice has suffered damages in an amount to be proven at trial.

44. MAPS' intentional actions causing interference with Black Ice's prospective economic relationships were also wrongful in that they constitute defamation, unfair business practices in violation of Cal. Bus. & Prof. Code § 17200 et seq. and restraint of trade in violation of Cal. Bus. & Prof. Code §§ 16600 and 16700, et seq.

45. MAPS' intentional actions were willful and malicious. Black Ice is therefore entitled to punitive damages.

46. MAPS continues to threaten to and unless restrained will "place Black Ice back on the RBL," resulting in further injury to Black Ice for which damages would not provide adequate relief, in that they could not completely compensate for the injury to Black Ice's business reputation and goodwill.

FOURTH CAUSE OF ACTION

Unfair Competition (Cal. Bus. & Prof. Code § 17200, et seq.)

47. Black Ice realleges and incorporates herein by refer-

ence each and every allegation set forth in paragraphs 1 - 46 above.

48. The actions of MAPS described above constitute an unfair or unlawful business practice in violation of Cal. Bus. & Prof. Code § 17200, et seq.

49. Black Ice is informed and believes that, as a direct and proximate result of the unfair and unlawful actions of MAPS, that MAPS has been unjustly enriched, in an amount to be proven at trial. Black Ice is entitled to obtain an accounting and restitution from MAPS in an amount to be proven at trial.

50. MAPS' continuing wrongful conduct as alleged above, unless and until restrained by order of this Court, will cause great and irreparable harm to Black Ice and the Internet business community as a whole and to the public at large.

FIFTH CAUSE OF ACTION

Restraint of Trade (Cal. Bus. & Prof. Code §§ 16600, 16700, et seq.)

51. Black Ice realleges and incorporates herein by reference each and every allegation set forth in paragraphs 1 - 50 above.

*23 52. MAPS' actions described above, in combination with unnamed co-conspirators, are a restraint of trade and an unlawful trust to carry out restrictions in trade or commerce, in violation of Cal. Bus. & Prof. Code §§ 16600 and 16726.

53. Black Ice has been damaged by the acts of MAPS and the unnamed co-conspirators, in an amount to be proven at trial. Black Ice is entitled to recover treble damages, reasonable attorney's fees and costs of this action as provided by Cal. Bus. & Prof. Code § 16750.

54. Additionally, the Internet business community as a whole has been damaged by the acts of MAPS and the unnamed co-conspirators, in that MAPS' actions indiscriminately harm legitimate Internet businesses and their current and prospective customers.

55. MAPS' continuing wrongful conduct as alleged above, unless and until restrained by order of this Court, will cause great and irreparable harm to Black Ice and the Internet business community as a whole and to the public at

large.

PRAYER FOR RELIEF

WHEREFORE, Cross-complainant Black Ice Software prays for the following relief:

A. That MAPS be preliminarily and permanently enjoined from "blocking" Black Ice's IPs by use of the RBL and from defaming Black Ice by labeling it as a "spammer;"

B. That MAPS be preliminarily and permanently enjoined from using, distributing, or otherwise causing to be used and distributed the MAPS RBL for the purposes of "blocking" any IP address, Internet address, or Internet domain;

C. That Black Ice be awarded such compensatory damages that shall be proven at trial, in an amount not less than five hundred thousand (500,000) dollars;

D. That Black Ice be awarded such punitive damages as shall be proven at trial;

E. That Black Ice be awarded treble damages as allowed by statute;

F. That Black Ice be awarded its costs, disbursements and reasonable attorneys' fees in bringing this action;

G. That Black Ice be awarded pre-judgment and post-judgment interest at the maximum legal rate;

H. That MAPS disgorge any monies or payments or other benefits resulting from its acts in an amount proven at trial; and

I. That Black Ice be granted other and further relief as this Court may deem proper.

DATED: 7/31/00 Respectfully submitted,
 SKJERVEN MORRILL MacPHERSON LLP
 By _____
 Attorneys for Defendant and Cross-Complainant
 Black Ice Software, Inc.

Not Reported in Cal.Rptr.2d FOR EDUCATIONAL USE ONLY
Not Reported in Cal.Rptr.2d, 2000 WL 34016435 (Cal.Superior)
(Cite as: 2000 WL 34016435 (Cal.Superior))

Page 26

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(Cal.Superior)

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