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**UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

ZOOBUH, INC., a Utah Corporation

Plaintiff,

vs.

ALCUDA, LTD; DOES 1-40,

Defendants.

COMPLAINT

(JURY DEMAND)

Case No.: 2:14cv00228 DBP

Magistrate Judge Dustin B. Pead

COMES NOW Plaintiff ZooBuh, Inc. (“ZooBuh”), and complains and alleges the following:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff ZooBuh (“**ZooBuh**”) is a Utah Corporation with its principal place of business in Cedar Hills, Utah, and at all relevant times hereto was duly registered and licensed to do business in the State of Utah.

2. Defendant Alcuda, Ltd. (“**Alcuda**”) is a foreign business entity with its principal place of business at 23 Manor Place, Edinburgh, EH37DX, Lothian, United Kingdom.

3. On information and belief DOES 1-40 are individuals and companies doing business in association with the above named-defendant, either as shareholders, officers, members, affiliates and/or publishers, some or all or all of whom are alter egos of the Defendant.

4. ZooBuh presently does not have sufficient information regarding the names and identities of the Doe Defendants. On information and belief, each of the Doe Defendants participated in, ratified, endorsed, facilitated, or was otherwise involved in the acts complained of, and that each has liability for such acts. ZooBuh will amend this Complaint if and when the identities of such persons or entities and the scope of their actions become known.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), for violations of the 15 U.S.C. §7701 *et seq.* (CAN-SPAM Act of 2003), and pursuant to 15 U.S.C. § 7706(g)(1) (original jurisdiction) for cases involving a civil action by an internet access service adversely affected by a violation of 15 U.S.C. §7704(a)(1), 15 U.S.C. §7704(b), or 15 U.S.C. § 7704(d), or a pattern and practice that violates subparagraphs (2), (3), (4), and/or (5) of 15 U.S.C. § 7704(a)

6. This Court has personal jurisdiction over the Defendants because the Defendants, and each of them, are residents of the state of Utah, are businesses organized and existing under the laws of the state of Utah, and/or because Defendants have purposefully availed themselves of the privileges of conducting commercial activity in the forum state, and the exercise of jurisdiction is reasonable since Defendants should have known that they would be subject to the jurisdiction and laws of the forum state when they sent, or had commercial emails sent to customers of an email service provider located in Utah.

7. Venue is proper pursuant to 18 U.S.C. §1391, as a substantial part of the unlawful actions by the Defendants, and each of them, occurred in this judicial district.

GENERAL ALLEGATIONS

8. During all times relevant hereto, and through the date of the filing of this Complaint, ZooBuh was a corporation duly existing under the laws of the State of Utah which provided access to, and enabled and hosted email, chat, and blog services for private parties.

9. ZooBuh was first formed in 2002, prior to the existence of the CAN-SPAM Act.

10. ZooBuh is a widely and well recognized service provider of email, blog, and chat services.

11. ZooBuh has been featured in articles published in *PC Advisor*, *PC Magazine*, *Tech World*, *The Guardian*, *Find it Quick Internet Guide*, *Yahoo's Associated Content* and has been mentioned in the following books: How to Protect Your Children on the Internet, by Gregory S. Smith and CyberSafety, by Ken Knapton. ZooBuh has also been mentioned and/or featured on KSL News' Nanny Radio Show and WBTV.

12. ZooBuh is a bona fide Internet Access Service ("IAS") as defined under 15 U.S.C. §7702(11) and 47 U.S.C. §231(e)(4), and as previously decided by this Court in the matter of *ZooBuh v. Better Broadcasting, et al.*, Case No. 2:11CV00516-DN ("**Better Broadcasting**") wherein the Court stated "ZooBuh is a bona fide Internet access service and satisfies the first part of the standing test under the CAN-SPAM Act." *Better Broadcasting*, 2013 WL 2407669, *2.

13. ZooBuh has customers in all 50 states and in 27 different countries.

14. ZooBuh services approximately 44,000 customer accounts.

15. ZooBuh owns all the servers, routers, and switches on its network through which it hosts and provides its internet access services for its customers.

16. ZooBuh currently runs its services on a network of 18 servers, many of which would be completely unnecessary but for the continuous onslaught of unlawful commercial emails (more commonly known as SPAM) sent to ZooBuh's servers.

17. ZooBuh has an expansive network and infrastructure, which it has had to consistently update, upgrade and augment in order to combat ongoing SPAM problems.

18. Every ZooBuh email account is registered, hosted and serviced through ZooBuh's own hardware.

19. ZooBuh also provides each of its customers with their own web-based portal through which they access their selected web based services (e.g., email, blogs, chat, etc.).

20. ZooBuh designed, created, and controls the web-based portal.

21. ZooBuh stores the routers, switches, and servers in a leased office space which offers server rack space, redundant Internet connections, physical security, and climate controls.

22. ZooBuh has sole ownership of all the hardware, complete and uninhibited access to the hardware, and sole physical control over the hardware.

23. The accounts hosted and served by ZooBuh include email accounts owned by third-party customers of ZooBuh, and also include email accounts owned by ZooBuh.

24. On information and belief, none of the owners of the email addresses in question opted-in or subscribed to receive commercial emails from the Defendants and/or about the Defendants' products, services, or websites.

25. Beginning in or around October 2012 and to the date of this Complaint, ZooBuh has received a total of approximately 20,000 electronic-mail messages (“email”) sent and/or initiated by the Defendants collectively, which independently and collectively caused significant adverse effect to ZooBuh and which independently and collectively, contributed to an overall SPAM problem which the Court recognized in *Better Broadcasting* satisfied the second part of the standing test under CAN-SPAM for ZooBuh.

26. The emails from Defendants appear to be continuing on a daily basis.

27. In *Better Broadcasting*, the Court stated “the harm ZooBuh . . . continues to suffer, as the result of its collective SPAM problem is much more significant than the mere annoyance of having to deal with SPAM or the process of dealing with SPAM in the ordinary course of business (i.e., installing a spam filter to flag and discard spam) ZooBuh is adversely affected by a collective spam problem, which includes the emails in question, and . . . the second part of the standing test is satisfied.” *Better Broadcasting* at *4.

28. Defendant Alcuda is responsible for at least 17,000 unsolicited commercial email messages and, on information and belief, is the “Sender” the email messages as its product, service, and/or website is advertised in the email messages, and as it either transmitted or procured the transmission of the emails in question.

29. Specifically, the emails advertise and provide links to the following websites owned by Alcuda: bediscreet.com; freesexmatch.com; getanaffair.com; hornyasia.com; hornyplumps.com; iwantu.com; iwantubbw.com; iwantumilf.com; maritalhookup.com; maturexmatch.com; meetdivorced.com; milfberry.com; mybbwmatch.com; passionmature.com;

saucysingles.com; saucysingleslink.com; shagaholic.com; sinfulmates.com; sugarbbw.com; upforit.com (collectively “**Websites**”).

30. Each of the emails was sent to minors under the age of 18 and contained advertisements for adult themed dating websites and in some cases, sexually oriented material.

31. Additionally, many of the subject headings used explicit and profane language inappropriate for the targeted recipients.

32. On information and belief, various of the DOES 1-100, are “Initiators” and/or “Senders” of the emails collectively, as each of them, in some way, benefitted from the advertising in the messages and/or initiated or procured the emails in question.

33. Each of the emails is a commercial message and contains commercial content.

34. The emails, and each of them, were received by ZooBuh on its mail servers located in Utah.

35. In *Better Broadcasting*, the Court determined that ZooBuh has standing to pursue CAN-SPAM claims. Specifically, the Court stated, “the harm ZooBuh suffered, and continues to suffer, as the result of its collective SPAM problem is much more significant than the mere annoyance of having to deal with SPAM or the process of dealing with SPAM in the ordinary course of business (i.e., installing a spam filter to flag and discard spam). The harm ZooBuh suffered, and continues to suffer, is manifested in financial expense and burden; lost time; lost profitability; decreases in the life span of ZooBuh’s hardware; server and bandwidth spikes; server crashes; and pre-mature hardware replacements. ZooBuh is adversely affected by a collective spam problem, which includes the emails in question Therefore, ZooBuh has

standing as defined by the CAN-SPAM Act to assert claims as a private party plaintiff.” *Better Broadcasting* at *4.

36. As the result of the receipt of the emails message that violate CAN-SPAM, including the receipt of the emails at issue herein, which, in significant part, also violate CAN-SPAM, ZooBuh has suffered harm in the form of the following: financial expense and burden; lost time; lost profitability; decreases in the life span of ZooBuh’s hardware; server and bandwidth spikes; server crashes; and pre-mature hardware replacements.

37. In order to service ZooBuh’s customers, ZooBuh has had to consistently increase the size and servicing capacity of its system, despite no significant growth to its customer base.

38. With each added server, ZooBuh also has had to increase its bandwidth in order to service the new space adequately.

39. Even with the additional servers and constant upgrades to the servers, ZooBuh consistently deals with server spikes and crashes, and the servers are pushed to capacity constantly, which significantly decreases the life span of the servers and is costly in power consumption.

40. During the time frame of the emails in question, ZooBuh has experienced significant harm in the form of server spikes, server crashes, bandwidth spikes, memory exhaustion, and unrecoverable hardware failure, all of which are attributable to its receipt of SPAM email, including the emails in question.

41. None of these spikes or crashes would have occurred but for the SPAM emails and the spikes and crashes occurred despite ZooBuh’s taking significant precautionary measures, such as implementing and constantly updating SPAM filters.

42. For each individual email, ZooBuh had to expend man hours and work to identify the source of the email, to determine how and why the specific emails were able to circumvent and/or bypass preliminary filtering techniques, and ultimately to make the emails stop. ZooBuh has hired an additional employee on a contract basis to assist with these efforts.

43. ZooBuh's business has been further hindered by SPAM as it has impeded ZooBuh's growth and profitability.

44. Additionally, ZooBuh, on a fairly regular basis, receives customer complaints attributable to SPAM. In essence, the customers complain that their email is not being delivered and/or received promptly, and that the system runs slowly overall. ZooBuh can state with certainty that the slowdown issues complained of are directly attributable to ZooBuh's receipt of the unlawful email.

45. The harm suffered by ZooBuh on a regular basis is much more significant than the mere annoyance of having to deal with SPAM or the process of dealing with SPAM in the ordinary course of business (i.e. installing a spam filter to flag and discard spam).

46. The harm ZooBuh suffers is manifested in significant financial expense and burden, significant loss of employee time, significant loss in profitability and ability to grow the company, significant decreases in the life span of ZooBuh's hardware, which ultimately will mean more spikes, more crashes, and pre-mature hardware replacements and more money.

47. Each of the emails in question violates multiple CAN-SPAM provisions.

48. The majority of emails received by ZooBuh, including the emails in question, violate the CAN-SPAM Act in one or more ways, and contributed to a larger SPAM problem.

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FIRST CAUSE OF ACTION
CAN-SPAM ACT, 15 U.S.C. § 7704(a)(1)
(Against all Defendants)

49. Each of the previous paragraphs is re-alleged herein.

50. The CAN-SPAM Act makes it unlawful to send email messages that contain, or are accompanied by, materially false or materially misleading Header Information. 15 U.S.C. §7704(a)(1).

51. All of Defendant's spam messages falsely purport to be from legitimate users of the Defendant's Websites. The spam messages invite the targeted ZooBuh customer (a child under the age of 18) to follow hyperlinks that claim to lead to photographs or live or recorded video of other purported users.

52. ZooBuh customers who click on the hyperlinks in the spam messages are ultimately directed to various pornographic and/or adult dating websites identified above as Websites.

53. The operator of these fraudulently marketed websites (i.e. Alcuda) does not to disclose that the messages are not from actual users. Rather, Alcuda hides the truth by creating fictional user profiles and sending automated messages to potential users to deceive them into paying subscription fees to join the websites and/or to upgrade their free user accounts.

54. The fraudulent emails targeted at ZooBuh's customers are all part of this sophisticated and fraudulent marketing scheme.

55. Each of the emails contain materially false and materially misleading header information in that they all purport to be from legitimate users of the Defendant's Websites when

in fact they are automated messages tailored to induce unsuspecting and impressionable children into viewing the emails and clicking the hyperlinks provided therein.

56. Approximately 20,000 emails associated with Defendant Alcuda violate §7704(a)(1) as set forth herein.

57. Accordingly, ZooBuh prays for relief in the amount of \$100 per violation of 15 U.S.C § 7704(a)(1) pursuant to 15 U.S.C. § 7706(g)(3) for a total damage award of not less than \$2,000,000.

SECOND CAUSE OF ACTION
CAN-SPAM ACT, 15 U.S.C. § 7704(a)(1)(A)
(Against all Defendants)

58. Each of the previous paragraphs is re-alleged herein.

59. The CAN-SPAM Act makes it unlawful to send email messages that contain, or are accompanied by, materially false or materially misleading Header Information. 15 U.S.C. §7704(a)(1).

60. “Header information that is technically accurate but includes an originating electronic mail address, domain name, or Internet Protocol address the access to which for purposes of initiating the message was obtained by means of false or fraudulent pretenses or representations shall be considered materially misleading.” 15 U.S.C. § 7704(a)(1)(A).

61. In *Better Broadcasting*, the Court determined that an email that originated from a sender domain registered with an ICANN compliant domain registrar who maintains an anti-spam policy, violates the law regardless of whether the email contains a header that is technically accurate. See *Better Broadcasting* at *6-7.

62. The Court specifically stated “in order to obtain the domain names used to send the emails in question, the Defendants represented to the domain registrars that the domain names would not be used for SPAM purposes. However, the domain names were intended to be used, and were used, for SPAM purposes. Consequently, the Defendants obtained the sender domains . . . under false and fraudulent pretenses in violation of §7704(a)(1)(A).” *Id.* at *7.

63. Here, each of the emails in question originated from sender domains registered with ICANN compliant domain registrars. Specifically, GoDaddy, eNOM, or Key-Systems GmbH.

64. Each of these registrars maintains anti-spam policies.

65. Each of the domains from which the emails were sent were registered for a purpose that violates that registrars’ policy(ies) (i.e., for sending SPAM).

66. Approximately 20,000 of the emails associated with Alcuda contained sender domain names registered with an ICANN compliant domain registrars, each of which maintained an anti-spam policy; and that the domain names were registered for a purpose that violates that registrars’ policies (i.e., for sending SPAM), all in violation of 15 U.S.C. §7704(a)(1)(A).

67. Accordingly, ZooBuh prays for relief in the amount of \$100 per violation of 15 U.S.C § 7704(a)(1) pursuant to 15 U.S.C. § 7706(g)(3) for a total damage award of not less than \$2,000,000.

THIRD CAUSE OF ACTION
CAN-SPAM ACT, 15 U.S.C. § 7704(a)(2)
(Against all Defendants)

68. Each of the previous paragraphs is re-alleged herein.

69. The CAN-SPAM Act makes it unlawful for any person to “initiate the transmission to a protected computer of a commercial electronic mail message if such person has actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that a subject heading of the message would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.” 15 U.S.C. § 7704(a)(2).

70. Many of the emails in question contain subject headings designed to perpetuate the Defendant’s fraudulent marketing scheme identified above. Specifically, the subject headings are misleading in violation of 15 U.S.C. § 7704(a)(2) by: 1) creating the impression that a relationship exists between the sender and the recipient; 2) creating the impression that the recipient must respond to an urgent message; 3) calling the recipient by first name in order to create the impression that a previous relationship exists; 4) failing to provide any indication of what the email is about.

71. Approximately 12,300 emails associated with Alcuda violate §7704(a)(2) in that the Subject Heading was misleading or likely to mislead a recipient about a material fact regarding the contents or subject matter of the email message.

72. The percentage of the total number of emails from Alcuda that contain violations of 15 U.S.C. § 7704(a)(2) demonstrates that the Defendant engaged in a pattern or practice of violating this provision.

73. Accordingly, ZooBuh prays for relief in the amount of \$25 per violation of 15 U.S.C § 7704(a)(2) pursuant to 15 U.S.C. § 7706(g)(3) for a total damage award of not less than \$307,500.00.

FOURTH CAUSE OF ACTION
CAN-SPAM Act 15 U.S.C. §7704(d)(1)(A)
(Against all Defendants)

74. Each of the previous paragraphs is re-alleged herein.

75. The CAN-SPAM Act states that “No person may initiate in or affecting interstate commerce the transmission, to a protected computer, of any commercial electronic mail message that includes sexually oriented material and . . . fail to include in subject heading for the electronic mail message the marks or notices prescribed by the Commission under this subsection” 15 U.S.C. §7704(d)(1)(A).

76. In 16 CFR 316.4 the Commission prescribed that any commercial electronic mail message that includes sexually oriented material must “include in the subject heading the phrase “SEXUALLY-EXPLICIT: ” in capital letters as the first nineteen (19) characters at the beginning of the subject line.”

77. Approximately 5,000 of the emails in question include sexually oriented material as defined by 15 U.S.C. §7704(d)(4) specifically, exposed breasts, genitals and/or pubic area of persons, and/or actual or simulated sexual acts.

78. None of the aforementioned emails contains in the subject heading the phrase “SEXUALLY-EXPLICIT: ” in capital letters as the first nineteen (19) characters at the beginning of the subject line.

79. Accordingly, ZooBuh prays for relief in the amount of \$25 per violation of 15 U.S.C § 7704(d)(1)(A) pursuant to 15 U.S.C. § 7706(g)(3) for a total damage award of not less than \$125,000.00.

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FIFTH CAUSE OF ACTION
CAN-SPAM Act 15 U.S.C. §7704(d)(1)(B)
(Against all Defendants)

80. Each of the previous paragraphs is re-alleged herein.

81. The CAN-SPAM Act states that “No person may initiate in or affecting interstate commerce the transmission, to a protected computer, of any commercial electronic mail message that includes sexually oriented material and . . . fail to provide that the matter in the message that is initially viewable to the recipient, when the message is opened by any recipient and absent any further actions by the recipient, includes only (i) to the extent required or authorized pursuant to paragraph (2), any such marks or notices; (ii) the information required to be included in the message pursuant to subsection (a)(5); and (iii) instructions on how to access, or a mechanism to access, the sexually oriented material.” 15 U.S.C. § 7704(d)(1)(B).

82. Approximately 5,000 of the emails in question include sexually oriented material as defined by 15 U.S.C. §7704(d)(4) specifically, exposed breasts, genitals and/or pubic area of persons, and/or actual or simulated sexual acts.

83. Each of the email immediately displays the sexual oriented material to the recipient upon opening the message instead of concealing the content and providing instruction on how to access, or a mechanism to access, the sexually oriented material.

84. Accordingly, ZooBuh prays for relief in the amount of \$25 per violation of 15 U.S.C § 7704(d)(1)(B) pursuant to 15 U.S.C. § 7706(g)(3) for a total damage award of not less than \$125,000.00.

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SIXTH CAUSE OF ACTION

Aggravated Damages – CAN-SPAM Act 15 U.S.C §7706(g)(3)(C)
(Against all Defendants)

85. Each of the previous paragraphs is re-alleged herein.

86. On information and belief, each of the Defendants committed the violations set forth above willfully and knowingly; or, in the alternative, each of the Defendant's unlawful activity included one or more of the aggravated violations set forth in 15 U.S.C. § 7704(b).

87. Specifically, on information and belief, each of the Defendants engaged in dictionary attacks, used scripts or other automated means to created sender and recipient email addresses, and engaged in relaying and retransmitting in violation of 15 U.S.C. §7704(b)(1), (2), and/or (3).

88. Accordingly, ZooBuh prays for treble damages of the total damage amount determined by this Court.

REQUEST FOR RELIEF

Plaintiff respectfully requests the following relief:

- A. Entry of judgment in the amount of \$100 per violation of 15 U.S.C. § 7704(a)(1) for a total damage award of not less than \$2,000,000.00.
- B. Entry of judgment in the amount of \$100 per violation of 15 U.S.C. § 7704(a)(1)(A) for a total damage award of not less than \$2,000,000.00.
- C. Entry of judgment in the amount of \$25 per violation of 15 U.S.C. § 7704(a)(2) for a total damage award of not less than \$307,500.00.
- D. Entry of judgment in the amount of \$25 per violation of 15 U.S.C. § 7704(d)(1)(A) for a total damage award of not less than \$125,000.00.

- E. Entry of judgment in the amount of \$25 per violation of 15 U.S.C. § 7704(d)(1)(B) for a total damage award of not less than \$125,000.00.
- F. A total aggregate based damage amount in not less than \$4,557,500.
- G. Treble damages pursuant to 15 U.S.C. § 7706(g)(3).
- H. Attorneys' fees and costs pursuant to 15 U.S.C. § 7706(g)(4).
- I. Pre and post-judgment interest at the highest rate permitted by law.
- J. Entry of permanent injunction against each Defendant prohibiting each Defendant from sending or causing to be sent email message to ZooBuh and its customers.
- K. All other relief deemed just in law or equity by this Court.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues triable of right in this action, pursuant to Rule 38(b), Federal Rules of Civil Procedure.

DATED this 27th day of March, 2014.

DURHAM, JONES & PINEGAR, P.C.

/s/ Jordan K. Cameron _____

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