

1 Christopher J. Hamner, Esq. (SBN 197117)
Amy T. Wootton, Esq. (SBN 188856)
2 Kimberly A. Westmoreland, Esq. (SBN 237919)
HAMNER LAW OFFICES, LLC
3 15760 Ventura Blvd., Suite 860
Encino, California 91436
4 Telephone: (818) 386-0444
Fax No.: (818) 386-0050
5 chamner@hamnerlaw.com
awootton@hamnerlaw.com
6 kwestmoreland@hamnerlaw.com

2008 OCT 17 PM 1:25
COURT CLERK
FILED

7 Attorneys for Plaintiff Frank Cecchini on behalf of himself and all others similarly
8 situated

9 **UNITED STATES DISTRICT COURT-CENTRAL DISTRICT**

10 **CV 08-06845 CAS PLA_x**

11 FRANK CECCHINI, a California
12 Resident, on behalf of himself and all
13 others similarly situated,

) CASE NO.:

14 Plaintiff,

) **CLASS ACTION COMPLAINT**

15 v.

16 AOL LLC, a Delaware Limited Liability
Company, doing business in California as
17 AOL INTERNET SERVICES LLC; and
DOES 1 through 10, inclusive,

- 1. FRAUD
- 2. UNJUST ENRICHMENT
- 3. BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
- 4. UNLAWFUL BUSINESS PRACTICES [Cal. Bus. Prof. Code Section 17200 et seq.]
- 5. UNLAWFUL BUSINESS PRACTICES [Cal. Bus. Prof. Code Section 17500 et seq.]
- 6. CALIFORNIA CIVIL CODE § 1750

18 Defendants.

) **DEMAND FOR TRIAL BY JURY**

19
20
21
22
23
24
25 Plaintiff Frank Cecchini ("Plaintiff") on behalf of himself and all others
26 similarly situated, hereby alleges the following causes of action against AOL LLC,
27 doing business in California as AOL LLC, a Delaware Limited Liability Company,
28

1/5
20

1 doing business in California as AOL INTERNET SERVICES LLC; and DOES 1
2 through 10, inclusive as follows:

3
4 **I.**

5 **PARTIES**

6
7 **A. Plaintiff**

8 1. Plaintiff Frank Cecchini (“Plaintiff”) is an individual who resides in
9 San Joaquin County, in the State of California. For the last ten years, Plaintiff has
10 paid between \$19.99 and \$25.90 for AOL internet and E-mail service.
11

12
13 **B. Defendant**

14 2. AOL LLC, is a Delaware Limited Liability Company, doing business
15 in California as AOL Internet Services LLC (“Defendants” or “AOL”). AOL
16 provides internet-related services to millions of pay customers, or “subscribers”
17 throughout the U.S. AOL is, and was at all times relevant herein, registered and
18 licensed to do business in California.
19

20
21 3. Plaintiff, and the class he seeks to represent, are unaware of the true
22 names and capacities of Defendants sued herein as DOES 1-10, inclusive (“Doe
23 Defendants”), and therefore sues these Doe Defendants by such fictitious names.
24 Plaintiff will seek leave to amend this Complaint to allege the true names and
25 capacities of said Doe Defendants when ascertained. Plaintiff is informed and
26 believes, and thereon alleges, that at all relevant times mentioned herein, each of
27
28

1 the fictitiously-named Doe Defendants conducted business in Los Angeles
2 County, California, and are culpable or responsible in some manner and/or
3
4 conspired with one or more of the other Defendants for the conduct, acts,
5
6 omissions, occurrences, injuries, and damages herein alleged, and that the injuries
7 and damages sustained by Plaintiff were directly and proximately caused thereby.

8 4. The true names and capacities, whether individual, corporate,
9
10 associate, or otherwise, of Defendants sued herein as DOES 1 through 10,
11 inclusive, are currently unknown to Plaintiff, who therefore sues Defendants by
12 such fictitious names. Plaintiff is informed and believes, and based thereon
13
14 alleges, that each of the Defendants designated herein as a DOE are legally
15 responsible in some manner for the unlawful acts referred to herein. Plaintiff will
16
17 seek leave of court to amend this Complaint to reflect the true names and
18 capacities of the Defendants designated hereinafter as DOES when such identities
19 become known.

20
21 5. Plaintiff is informed and believes, and based thereon alleges, that
22
23 each Defendant acted in all respects pertinent to this action as the agent of the
24 other Defendants, carried out a joint scheme, business plan or policy in all respects
25 pertinent hereto, and the acts of each Defendant are legally attributable to the other
26
27 Defendants.

28 6. This Court has subject matter jurisdiction over this case under 28

1 U.S.C. § 1132(d)(2) because the matter in controversy exceeds the sum or value of
2 \$5 million, exclusive of interest and costs, and is a class action in which members
3 of the Class are citizens of states other than California. This Court may properly
4 exercise personal jurisdiction over the parties because Plaintiff and the members
5 of the Class submit to the jurisdiction of this Court, and AOL systematically and
6 continuously does business in this district.
7

8
9
10 **II.**

11 **FACTUAL ALLEGATIONS**

12
13 7. AOL is an internet services company. AOL provides E-mail related
14 services to approximately 10 million people in the United States. While most of
15 AOL's E-mail customers in the United States do so on free accounts, at least 20%
16 of these people pay approximately \$25.90 for monthly, private AOL E-mail
17 service. These approximately 2 million people in the United States who pay for
18 AOL E-mail service are hereinafter referred to as "pay subscribers," or "pay E-
19 mail subscribers."
20
21

22
23 8. At the time a pay subscriber signs up for pay AOL email services, the
24 subscriber must agree to AOL's Terms of Service ("Terms of Service"). The
25 Terms of Service contains AOL's Member Agreement, Community Guidelines
26 and Privacy Policy.
27

28 9. Nowhere in AOL's Terms of Service does AOL disclose, or even

1 allude to, the fact that AOL pay E-mail subscribers will have an advertisement
2 inserted into the end of those subscribers' sent E-mails. AOL does not, and at all
3 times referred to herein, did not inform its pay subscribers or its potential pay
4 subscribers that advertisements would ever appear in their sent AOL E-mails.
5

6
7 10. As such, AOL pay E-mail subscribers expect the ability to send out E-
8 mails without advertisements inserted into their sent E-mails. This is different
9 from the E-mail services provided by so called free E-mail accounts (such as
10 Hotmail.com and Yahoo.com), which do insert various advertisements into sent
11 E-mails.
12

13
14 11. A specific type of E-mail advertisement known as "footers" or "ad
15 tags" involves the insertion of an additional line of text to the senders message.
16 Unlike internet "banner" advertisements, and other overt internet advertisements,
17 these footers, or ad tags, essentially add to and/or change the actual message
18 contained in the E-mail. These advertisements are annoying, confusing, intrusive
19 and misleading. For this reason, internet users who do not wish to have these ad
20 tags inserted into their E-mails often choose so called premium, or pay E-mail
21 services, such as the pay E-mail services for AOL users.
22

23
24
25 12. In about March of 2006, AOL unilaterally, and without seeking or
26 obtaining any permission from its pay subscribers, began inserting ad tags directly
27 after the senders E-mail. These ad tags are for AOL services and/or products, or
28 for services and products of AOL business partners, such as Mapquest.com.

1 These ad tags are inserted in text, directly after the end of the pay subscribers'
2 typed E-mail. AOL pay E-mail subscribers are not immediately made aware of the
3 insertion of these advertisements at the end of their E-mails, as AOL inserts these
4 ad tags into E-mails after the subscriber "sends" the E-mail. For example, many of
5 the advertisements inserted into or at the end of the text of AOL subscribers' E-
6 mails say:
7

8 "Find phone numbers fast with the New AOL Yellow Pages."
9

10 or,
11

12 "New MapQuest Local shows what's happening at your destination.
13

14 Dining, Movies, Events, News & More. Try it out!"
15

16 13. The vast majority, if not all, of the E-mails sent by AOL pay E-mail
17 subscribers since about June of 2006 include an ad tag inserted at the end of the
18 sender's message.

19 14. This action is wholly inconsistent with AOL's Terms of Service with
20 its subscribers, and is in direct conflict with the reasonable expectations of AOL's
21 pay E-mail subscribers.
22

23 15. Once an AOL pay subscriber discovers or is informed of the ad tags,
24 and seeks to prevent further advertisements by AOL, AOL does not provide an
25 adequate, fair or reasonable means for the pay subscriber to prevent AOL from
26 inserting ad tags into their E-mails.
27
28

16. On information and belief, since about May of 2006, AOL has

1 unfairly, wrongfully and unlawfully inserted these advertisements as text at the
2 end of over 100 million emails. Plaintiff alleges AOL has profited substantially
3 from inserting the aforementioned advertisements into its pay subscribers' E-
4 mails.
5

6
7 **III.**

8 **CLASS ACTION ALLEGATIONS**
9

10 17. Plaintiff brings this action on behalf of himself and all others
11 similarly situated as a Class Action pursuant to F.R.C.P., Rule 23. Plaintiff alleges
12 on information and belief that the class size is in excess of 2 million members.
13

14 18. Plaintiff seeks to represent a Class composed of and defined as
15 follows:
16

17 **All persons in the United States who paid for E-mail services**
18 **from AOL LLC since March 1, 2006.**
19

20 19. Plaintiff reserves the right to amend or modify the class description
21 with greater specificity or further division into subclasses or limitation to
22 particular issues.
23

24 20. This action has been brought and may properly be maintained as a
25 class action under F.R.C.P., Rule 23 because there is a well-defined community of
26 interest in the litigation and the proposed Class is easily ascertainable.
27
28

1 **A. Numerosity**

2
3 21. The potential members of the Class as defined are so numerous that
4 joinder of all the members of the Class is impracticable. While the precise number
5 of Class Members has not been determined at this time, Plaintiff is informed and
6 believes that Defendants currently have contracts with, and during the relevant
7 time periods contracted with, at least 2 million customers in the United States who
8 are or have been affected by Defendants' unlawful practices as alleged herein.
9
10

11 22. Accounting for pay subscribers whose E-mail accounts are no longer
12 active necessarily increases this number substantially. Upon information and
13 belief, Plaintiff alleges Defendants' business records would provide information as
14 to the number and location of all Class Members. Joinder of all members of the
15 proposed Class is not practicable.
16
17

18
19 **B. Commonality**

20 23. There are questions of law and fact common to the Class
21 predominating over any questions affecting only individual Class Members. These
22 common questions of law and fact include, without limitation:
23

- 24
25 i. Class definition;
26
27 ii. Class size;
28
29 iii. Damages to be awarded to the Class; and

1 iv. Punitive Damages considerations.

2
3 **C. Typicality**

4 24. The claims of the named Plaintiff are typical of the claims of the
5 Class. Plaintiff and all members of the Class sustained injuries and damages
6 arising out of and caused by Defendants' common course of conduct in violation
7 of United States laws, California laws, regulations, and statutes as alleged herein.
8
9

10 **D. Adequacy of Representation**

11
12 25. Plaintiff will fairly and adequately represent and protect the interests
13 of the members of the Class. The attorneys representing Plaintiff are competent
14 and experienced in litigating large class actions.
15

16 **E. Superiority of Class Action**

17 26. A Class Action is superior to other available means for the fair and
18 efficient adjudication of this controversy. Individual joinder of all Class Members
19 is not practicable, and questions of law and fact common to the Class predominate
20 over any questions affecting only individual members of the Class. Each member
21 of the Class has been damaged and is entitled to recovery by reason of Defendants'
22 unlawful policies and practices alleged in the Complaint.
23
24
25

26 27. Class Action treatment will allow those similarly situated persons to
27 litigate their claims in the manner that is most efficient and economical for the
28 parties and the judicial system. Plaintiff is unaware of any difficulties that are

1 likely to be encountered in the management of this action that would preclude its
2 maintenance as a class action.

3
4 **IV.**

5 **CAUSES OF ACTION**

6
7 **FIRST CAUSE OF ACTION**

8 **(FRAUD)**

9
10 28. Plaintiff incorporates paragraphs 1 through 27 as though fully set
11 forth herein.

12
13 29. Defendants by and through their agents/employees willfully deceived
14 Plaintiff and other AOL pay E-mail subscribers into conducting business with
15 AOL. Beginning in about mid 2006, AOL failed to inform and/or intentionally
16 deceived its potential pay subscribers and its current pay subscribers of the fact
17 that AOL would begin to unilaterally insert advertisements as text at the end of
18 their AOL E-mails. AOL made material omissions and/or misrepresentations of
19 fact in this regard. Plaintiff alleges on behalf of himself and the class that if AOL
20 had disclosed to its subscribers that AOL would begin inserting these ad tags into
21 its pay subscribers' E-mails, many of these pay subscribers would have chosen to
22 no longer use AOL E-mail, and would have purchased pay E-mail services from
23 other service E-mail providers.

24
25
26
27
28 30. At the time the aforementioned omissions and / or misrepresentations

1 were made, AOL knew that it would insert / was inserting these advertisements at
2 the end of the E-mails sent by its pay subscribers. AOL intentionally misled
3 Plaintiff and Class Members in this regard.
4

5 31. The aforementioned omissions and/or misrepresentations of material
6 fact induced Plaintiff and Class Members into conducting business with AOL.
7 Plaintiff and the Class Members would not have otherwise conducted business
8 with AOL absent these material omissions and/or misrepresentations.
9
10

11 32. Instead, Plaintiff and Class Members relied on the AOL Terms of
12 Service, which did not disclose to AOL subscribers the insertion of ad tags into E-
13 mails. Plaintiff and the Class relied on the aforementioned omissions, false
14 promises, false representations of fact and statements of AOL to their detriment.
15 Said reliance was reasonable.
16
17

18 33. Defendants' omissions and/or misrepresentations as alleged above
19 directly and proximately caused injuries to Plaintiff and Class Members.
20

21 34. The above actions by Defendants were intentional and done with
22 fraud, oppression, were malicious and performed with conscious disregard for the
23 safety and rights of others and merely for monetary gain with no socially
24 redeeming value whatsoever. As a result, Plaintiff and Class Members are entitled
25 to an award of punitive damages against all Defendants.
26

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SECOND CAUSE OF ACTION

(UNJUST ENRICHMENT)

35. Plaintiff incorporates paragraphs 1 through 34 as though fully set forth herein.

36. AOL received a benefit from inserting ad tags into Plaintiff's and the Class Members' E-mails.

37. AOL wrongfully and without permission used Plaintiff's and the Class Members' private E-mails to AOL's benefit.

38. It is unjust for AOL to keep the monies earned from AOL's wrongfully and unjust conduct as alleged herein.

39. AOL has been unjustly enriched and Plaintiff and the Class are entitled to restitution of these fees, declaratory relief and incidental damages.

THIRD CAUSE OF ACTION

(BREACH OF IMPLIED COVENANT OF GOOD FAITH

AND FAIR DEALING)

40. Plaintiff incorporates paragraphs 1 through 39 as though fully set forth herein.

41. AOL's Terms of Service contains an implied covenant of good faith and fair dealing which obligates AOL to perform the terms and conditions of the Terms of Service fairly and in good faith, and to refrain from doing any act that would prevent or impede Plaintiff from performing any or all of the conditions of

1 the Terms of Service that Plaintiff agreed to perform, or any act that would deprive
2 Plaintiff of the benefit of the Terms of Service.

3
4 42. AOL breached the implied covenant of good faith and fair dealing
5 under the Terms of Service by, among other things, engaging in the conduct
6 described herein above.

7
8 43. The aforementioned acts by AOL were willful and malicious in that
9 AOL's conduct was intended to cause injury to Plaintiff and the Class and was
10 carried out with a conscious disregard for Plaintiff's rights, thereby warranting the
11 assessment of exemplary and punitive damages in an amount appropriate to punish
12 AOL, and set an example for others.

13
14
15 44. As a further direct and proximate result of AOL's breaches of the
16 implied duty of good faith and fair dealing, Plaintiff has suffered and continues to
17 suffer additional damages in an amount to be proved at trial.

18
19 **FOURTH CAUSE OF ACTION**

20
21 **(VIOLATION OF UNFAIR COMPETITION LAW [BUS. & PROF. CODE**
22 **SECTION 17200, et seq.] AGAINST ALL DEFENDANTS)**

23
24 45. Plaintiff incorporates by reference paragraphs 1 through 44 above as
25 though set forth in full herein.

26
27 46. The actions of Defendants as alleged within this Complaint constitute
28 false, fraudulent, unlawful, unfair and deceptive business practices within the
meaning of Business and Professions Code sections 17200, et.seq.

1 47. Plaintiff and the class he seeks to represent are entitled to an
2 injunction and other equitable relief against such unlawful practices in order to
3 prevent future damage, for which there is no adequate remedy at law, and to avoid
4 a multiplicity of lawsuits.
5

6 48. As a result of their unlawful acts, Defendants have reaped and
7 continue to reap unfair benefits and unlawful profits at the expense of Plaintiff.
8 Defendants should be enjoined from this activity and made to disgorge these ill-
9 gotten gains and restore to Plaintiff the wrongfully withheld wages pursuant to
10 Business and Professions Code section 17203. Plaintiff is informed and believes,
11 and based thereon allege, that Defendants are unjustly enriched through their
12 unlawful and unfair conduct as alleged above. Plaintiff is informed and believes
13 and thereon alleges that Plaintiff and the class he seek to represent are prejudiced
14 by Defendants' unfair business practices.
15

16 49. As a direct and proximate result of the unfair business practices of
17 Defendants, and each of them, Plaintiff and the class she seek to represent are
18 entitled to equitable and injunctive relief, including full restitution and/or
19 disgorgement of all wages which have been unlawfully withheld from Plaintiff and
20 the class he seek to represent as a result of the business acts and practices
21 described herein and enjoining Defendants to cease and desist from engaging in
22 the practices described herein.
23

24 50. The unlawful conduct alleged herein is continuing and there is no
25

1 indication that Defendants will not continue such activity into the future.

2
3 51. Plaintiff further requests that the court issue a preliminary and
4 permanent injunction prohibiting Defendants from engaging in the unlawful and
5 unfair conduct alleged herein

6
7 **FIFTH CAUSE OF ACTION**

8 **(FOR VIOLATION OF CAL. BUS. & PROF. CODE §§ 17500 ET SEQ.)**

9
10 52. Plaintiff incorporates paragraphs 1 through 51 as though fully set
11 forth herein.

12 53. During the Class Period, Defendants have advertised, marketed and
13 sold to the public email services. Defendants engaged in this conduct on a
14 nationwide basis, including in California.

15
16 54. Defendants have engaged in the advertising and marketing alleged
17 herein with the intent to directly or indirectly induce the purchase of AOL pay E-
18 mail services and/or keep the pay E-mail subscribers AOL already had.

19
20 55. Defendants' advertisements and marketing representations regarding
21 E-mail free from advertising such as the ad tags or footers described herein above,
22 were/are false, misleading and deceptive as set forth more fully above.
23
24

25 56. At the time they made and disseminated the statements alleged herein,
26 Defendants knew or should have known that the statements were untrue, deceptive
27 or misleading, and acted in violation of Cal. Bus. & Prof. Code §17500 et seq.
28

57. Defendants actively concealed their knowledge that contrary / in

1 addition to the Terms of Service agreement, AOL would insert intrusive and
2 misleading text advertisements at the end of its subscribers' E-mails.

3
4 58. Defendants' acts of untrue and misleading advertising present a
5 continuing threat to consumers because such advertisements induced consumers to
6 purchase AOL E-mail services in order to obtain E-mail free from advertising such
7 as the ad tags or footers described herein above, but no such service is ultimately
8 provided.
9

10
11 59. As a result of the violations of California law described above,
12 Defendants have been and will be unjustly enriched at the expense of Plaintiff and
13 the members of the Class. Specifically, Defendants have been unjustly enriched
14 by receipt of millions of dollars in monies received from customers who purchased
15 AOL email services which were marketed, advertised and sold in the State of
16 California and the United States through material omissions and/or
17 misrepresentations regarding the service that AOL would provide its subscribers.
18
19

20
21 60. As a result of the violations of California law described above,
22 Defendants have also been and continue to be unjustly enriched at the expense of
23 members of the Class, because Class members have paid and continue to pay
24 Defendants for providing premium email services free from ad tags or footers,
25 which AOL does not provide.
26

27
28 61. As a result of the violations of California law described above,
Plaintiff and the members of the Class have suffered injury in fact and have lost

1 money.

2 62. Plaintiff seeks restitution, injunctive relief, and all other relief
3
4 allowable under Bus. & Prof. Code §17353.

5 **SIXTH CAUSE OF ACTION**

6
7 **(FOR VIOLATIONS OF CALIFORNIA CIVIL CODE § 1750 ET SEQ.)**

8 63. Plaintiff incorporates paragraphs 1 through 62 as though fully set
9
10 forth herein.

11 64. At all times relevant hereto, Plaintiff and each Class member were
12
13 “consumers,” as that term is defined in Civ. Code §1761 (d).

14 65. At all times relevant hereto, Defendants’ pay E-mail services,
15
16 constituted “services,” as that term is defined in Civ. Code §1761(b).

17 66. At all times relevant hereto, Plaintiff and each Class Member’s
18
19 purchase of Defendants’ product, the email services, constituted a “transaction,” as
20
21 that term is defined in Civ. Code §1761(e).

22 67. Cal. Civil Code §1770 provides in relevant part that “[t]he following
23
24 unfair methods of competition and unfair or deceptive acts or practices undertaken
25
26 by any person in a transaction intended to result or which results in the sale or
27
28 lease of goods or services to any consumer are unlawful:... (9) Advertising goods
or services with the intent not to sell them as advertised.” Civil Code §1770(a)(9).

68. Defendant has made and continues to make the omission that it will
provide purchasers of AOL email services free from advertising such as the ad

1 tags or footers described herein to consumers who pay a monthly fee of
2 approximately \$25.90. These omissions and/or misrepresentations, as set forth
3 above, were and are false and/or misleading and violate Cal. Civ. Code §1750 et
4 seq.
5

6
7 69. As a direct and proximate result of Defendants' violations of law,
8 Plaintiff and the Class are entitled to the following relief: (a) injunctive relief,
9 requiring Defendants to provide email free from advertising and ad tags; (b)
10 restitution of all moneys paid to Defendants and all profits derived from
11 Defendants' unilateral insertion of advertisements such as the ad tags and footers
12 described herein; and (c) the recovery of all attorneys' fees, costs, and expenses of
13 conducting this action.
14
15

16
17 70. Pursuant to the provisions of Civil Code §1782, Plaintiff has given
18 notice to AOL of his intention to file an action under Civil Code §1750, et seq., by
19 way of a letter sent by certified mail on October 14, 2008.
20

21
22 WHEREFORE, Plaintiff requests relief as described herein and below and
23 as deemed just:

- 24
25 1. For compensatory damages in an amount according to proof with
26 interest thereon;
27
28 2. For economic and/or special damages in an amount according to
proof with interest thereon;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 3. That Defendants be found to have engaged in unfair competition in violation of section 17200 of the California Business and Professions Code;
- 4. That Defendants be found to have engaged in unfair competition in violation of section 17500 of the California Business and Professions Code;
- 5. For punitive damages;
- 6. For attorney fees, interest and costs of suit;
- 7. For an enhancement of attorneys fees pursuant to California Civil Code Section 1021.5; and
- 8. For such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff demands trial by jury on all issues so triable.

DATED: October 17, 2008

HAMNER LAW OFFICES, LLC

By 

CHRISTOPHER J. HAMNER
 Attorneys for Plaintiff FRANK
 CECCHINI on behalf of himself and
 the class he seeks to represent