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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ASIS INTERNET SERVICES,

Plaintiff,

v.

OPTIN GLOBAL, INC., et al.,

Defendants.

No. C 05-5124 CW

ORDER GRANTING
DEFENDANT AEGIS'
MOTION TO DISMISS
AND DENYING
DEFENDANT
QUICKEN'S MOTION
FOR SECURITY

_____ /

Defendant Aegis Lending Corporation (Aegis) moves pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6) to dismiss Plaintiff Asis Internet Services' complaint against it. Defendants Michael Cuervo, John Terrence Dorland, Stateside Mortgage, Inc., Bruce Lerner, Quicken Loans, Inc., Chris Valley, National Fidelity Funding, Michael Garcia and American Home Equity Corporation join

1 in Aegis' motion to dismiss.¹ Quicken separately moves pursuant to
2 the Controlling the Assault of Non-Solicited Pornography and
3 Marketing Act of 2003 (CAN-SPAM Act), 15 U.S.C. § 7706(g)(4), Local
4 Rule 65.1-1 and the Court's inherent power for an order requiring
5 Plaintiff to post security for the costs and attorneys' fees
6 Quicken expects to incur in this action. Plaintiff opposes the
7 motions. The motions were heard on April 21, 2006.

8 Having considered all of the papers filed by the parties and
9 oral argument on the motions, the Court grants Aegis' motion to
10 dismiss, grants Plaintiff leave to file an amended complaint, and
11 denies Quicken's motion for posting of security.

12 BACKGROUND

13 The facts below are taken from Plaintiff's complaint and are
14 assumed to be true for the purposes of this motion only.

15 Plaintiff is a California corporation that provides internet
16 access services. The Spammer Defendants directed, controlled and
17 participated in "spamming," causing more than 10,000 deceptive and
18 unsolicited commercial electronic messages to be sent to
19 Plaintiff's computer server between October 25, 2005 and November
20 14, 2005. The header information for these emails was falsified,
21 misrepresented or forged in a way that would mislead a reasonable
22 recipient as to the contents and subject matter of the message.

23 Defendants Mr. Dorland, Mr. Cuervo, Mr. Valley, National
24 Fidelity Funding, Mr. Lerner, Stateside, Mr. Garcia, American Home

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26 ¹Optin Global, Inc., Vision Media Ltd., Corp., Rick Yang and
27 Peonie Pui Tang Chen (collectively, the Spammer Defendants) do not
28 join in Aegis' motion to dismiss.

1 Equity, Quicken, Emerald Home Loan, Inc., Francis Prasad and Aegis
2 (collectively, the Mortgage Defendants) are mortgage brokers doing
3 business in the United States. The Mortgage Defendants allegedly
4 "conspired with and at all times supported," and benefitted from,
5 the Spammer Defendants' actions. Complaint ¶ 10, 12. Plaintiff
6 alleges that the Mortgage Defendants knew that the Spammer
7 Defendants' actions were injuring Plaintiff.

8 Plaintiff brings claims against all Defendants under the CAN-
9 SPAM Act, 15 U.S.C. § 7701 et seq. and California's Business and
10 Professions Code § 17529 et seq., both of which restrict the use of
11 unsolicited commercial email. Plaintiff also brings a State law
12 claim for civil conspiracy against all Defendants.

13 LEGAL STANDARD

14 I. Rule 12(b)(6)

15 A motion to dismiss for failure to state a claim will be
16 denied unless it is "clear that no relief could be granted under
17 any set of facts that could be proved consistent with the
18 allegations." Falkowski v. Imation Corp., 309 F.3d 1123, 1132 (9th
19 Cir. 2002), citing Swierkiewicz v. Sorema N.A., 534 U.S. 506
20 (2002). All material allegations in the complaint will be taken as
21 true and construed in the light most favorable to the plaintiff.
22 NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

23 Although the court is generally confined to consideration of the
24 allegations in the pleadings, when the complaint is accompanied by
25 attached documents, such documents are deemed part of the complaint
26 and may be considered in evaluating the merits of a Rule 12(b)(6)
27 motion. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th
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1 Cir. 1987).

2 A complaint must contain a "short and plain statement of the
3 claim showing that the pleader is entitled to relief." Fed. R.
4 Civ. P. 8(a). "Each averment of a pleading shall be simple,
5 concise, and direct. No technical forms of pleading or motions are
6 required." Fed. R. Civ. P. 8(e). These rules "do not require a
7 claimant to set out in detail the facts upon which he bases his
8 claim. To the contrary, all the Rules require is 'a short and
9 plain statement of the claim' that will give the defendant fair
10 notice of what the plaintiff's claim is and the grounds on which it
11 rests." Conley v. Gibson, 355 U.S. 41, 47 (1957).

12 When granting a motion to dismiss, a court is generally
13 required to grant a plaintiff leave to amend, even if no request to
14 amend the pleading was made, unless amendment would be futile.
15 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
16 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment
17 would be futile, a court examines whether the complaint could be
18 amended to cure the defect requiring dismissal "without
19 contradicting any of the allegations of [the] original complaint."
20 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).
21 Leave to amend should be liberally granted, but an amended
22 complaint cannot allege facts inconsistent with the challenged
23 pleading. Id. at 296-97.

24 II. Rule 9(b)

25 "In all averments of fraud or mistake, the circumstances
26 constituting fraud or mistake shall be stated with particularity."
27 Fed. R. Civ. P. 9(b). The allegations must be "specific enough to
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1 give defendants notice of the particular misconduct which is
2 alleged to constitute the fraud charged so that they can defend
3 against the charge and not just deny that they have done anything
4 wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985).
5 Statements of the time, place and nature of the alleged fraudulent
6 activities are sufficient, Wool v. Tandem Computers, Inc., 818 F.2d
7 1433, 1439 (9th Cir. 1987), provided the plaintiff sets forth "what
8 is false or misleading about a statement, and why it is false." In
9 re GlenFed, Inc., Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994).
10 Scierter may be averred generally, simply by saying that it
11 existed. See id. at 1547; see Fed. R. Civ. P. 9(b) ("Malice,
12 intent, knowledge, and other condition of mind of a person may be
13 averred generally"). As to matters peculiarly within the opposing
14 party's knowledge, pleadings based on information and belief may
15 satisfy Rule 9(b) if they also state the facts on which the belief
16 is founded. Wool, 818 F.2d at 1439.

17 DISCUSSION

18 I. Extrinsic Evidence

19 Plaintiff states that Aegis has referred to "facts regarding
20 the knowledge of Defendants, based on industry information not
21 contained in the Complaint," Pl.'s Opp. at 1, and thus its motion
22 should be "treated as one for summary judgment and disposed of as
23 provided in Rule 56." Fed. R. Civ. P. 12(b). Plaintiff then
24 offers its own extrinsic evidence to support its allegations.
25 However, Plaintiff fails to identify the facts supposedly
26 introduced by Aegis in its motion to dismiss, and Aegis disclaims
27 any reliance on facts outside the four corners of the Complaint.

1 The Court finds that summary adjudication of issues would be
2 premature. Accordingly, in deciding Aegis' motion to dismiss, the
3 Court does not consider the extrinsic material provided by
4 Plaintiff and disregards the portions of Plaintiff's brief that
5 depend upon this material. See Schneider v. Cal. Dept. of Corr.,
6 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (noting that the district
7 court may not look beyond the complaint to the plaintiff's brief in
8 determining the propriety of a Rule 12(b)(6) motion to dismiss).

9 II. Applicability of Rule 9(b) to Anti-SPAM Claims

10 Aegis argues that Plaintiff's federal and State anti-spam
11 claims sound in fraud, and that Plaintiff has failed to plead these
12 claims with the requisite particularity.

13 Whether Rule 9(b) applies to claims brought under the CAN-SPAM
14 Act or California Business & Professions Code § 17529.5 is a
15 question of first impression. Generally, Rule 9(b)'s particularity
16 requirement applies to both federal and State law causes of action.
17 Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003).
18 Even where fraud is not a necessary element of a claim, Rule 9(b)
19 applies if the plaintiff alleges a "unified course of fraudulent
20 conduct" and relies entirely on that course of conduct as the basis
21 of a claim. Id. at 1103-04. If the plaintiff instead alleges some
22 fraudulent and some non-fraudulent conduct, then the heightened
23 pleading requirements apply "only to 'averments' of fraud
24 supporting a claim rather than to the claim as a whole." Id. at
25 1104. If particular averments of fraud are insufficiently plead
26 under Rule 9(b), then the district court should disregard those
27 averments. Id. at 1105.

1 Although Plaintiff suggests that the Court look to wire fraud
2 cases to determine whether to apply Rule 9(b), a more directly
3 relevant statute was considered in Gordon v. Impulse Marketing
4 Group, Inc., 375 F. Supp. 2d 1040 (E.D. Wash. 2005), where the
5 district court addressed the applicability of Rule 9(b) to claims
6 under Washington State's Commercial Electronic Mail Act. The
7 Washington statute, like the federal CAN-SPAM Act and California's
8 own anti-spam law, prohibits the use of commercial email that
9 misrepresents information in identifying the message's origin or
10 that contains false or misleading information in the subject line.
11 375 F. Supp. at 1047-48. After comparing the elements of the
12 Washington statute to the elements of fraud, the court concluded
13 that the Washington anti-spam law did not sound in fraud:

14 There is no requirement under RCW § 19.190.020 that the sender
15 'know' that the information in the subject line or
16 transmission path of the mail is 'false and misleading.'
17 Also, RCW § 19.190.020 does not require the false or
18 misleading information in the subject line or transmission
19 path to be 'material.' Further, RCW § 19.190.020 does not
20 require the recipient of an email that violates the statute
21 [to] take any action 'in reliance upon the representation' in
the email. Neither intent on the part of the sender, nor
detrimental reliance on the part of the recipient, is required
to prove a violation of RCW § 19.190.020, like it is required
to prove fraud. Therefore, the Court concludes that
Plaintiff's claims under Washington's Commercial Electronic
Mail Act do not trigger the heightened pleading requirements
of Rule 9(b).

22 375 F. Supp. 2d at 1048.

23 Under California law, the "indispensable elements of a fraud
24 claim include a false representation, knowledge of its falsity,
25 intent to defraud, justifiable reliance, and damages." Vess, 317
26 F.3d at 1105 (quoting Moore v. Brewster, 96 F.3d 1240, 1245 (9th
27 Cir. 1996)). As both parties acknowledge, the required elements of
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1 a claim by an internet access provider under the CAN-SPAM Act or
2 California Business & Professions Code § 17529 do not include all
3 of the elements of common law fraud. Therefore, in accordance with
4 Gordon, the Court finds that Rule 9(b) does not necessarily apply
5 to Plaintiff's claims.

6 Instead, the Court looks to whether Plaintiff has alleged
7 either some fraudulent conduct or a unified course of fraudulent
8 conduct. Plaintiff alleges that it was injured by "fraudulent
9 email attacks." Complaint ¶ 11. It alleges that Defendants sent
10 or caused to be sent "deceptive" electronic mail messages
11 containing "falsified, misrepresented, or forged header
12 information" and subject lines "likely to mislead a recipient"
13 about material facts regarding its contents. Id. ¶¶ 17-20, 35-36.
14 It alleges that Defendants used "stolen or hijacked email
15 identities" to send the spam and that the emails contained domain
16 names registered to "unknown and false entities." Id. ¶¶ 25-26,
17 35.

18 These allegations do not describe a unified course of
19 fraudulent conduct. Plaintiff does not allege, for instance, that
20 Defendants use the allegedly fraudulent email to induce readers to
21 enter into fraudulent mortgage deals. Therefore, the Court finds
22 that the circumstances to be plead with particularity do not
23 include the Mortgage Defendants' scienter or their relationship
24 with the Spammer Defendants.

25 Nevertheless, Plaintiff does specifically allege that the
26 contents of the emails themselves, including their headers and
27 subject line information, were fraudulent, and the Court therefore

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1 concludes that Rule 9(b) applies to those averments of fraud.
2 Plaintiff has specifically identified the time period during which
3 the allegedly fraudulent emails were sent. With respect to the
4 content of the electronic messages, however, Plaintiff relies in
5 part on the Declaration of Nella White, who attaches examples of
6 the allegedly fraudulent emails, in order to show that Plaintiff
7 has meet the heightened pleading standard. As noted in Section I
8 above, the Court will not consider Plaintiff's supplemental
9 evidence in evaluating the sufficiency of the complaint. However,
10 even disregarding Ms. White's declaration, the Complaint itself
11 states with particularity how the allegedly fraudulent header
12 information purporting to identify the sender of the email was
13 false, Complaint ¶ 25, explaining that the emails included domain
14 names "such as wwmort.com, b3mort.com, vcmort.com, great-3.com and
15 others" that were registered to unknown and false entities. Id.
16 ¶ 26.

17 However, other aspects of Plaintiff's allegations of fraud are
18 not plead with particularity. Plaintiff alleges that Defendants
19 sent email with subject lines that "were false and misleading and
20 would be likely to mislead a recipient," ¶ 36, but does not provide
21 an example or otherwise specify the manner in which the subject
22 lines were false and misleading. In addition, Plaintiff charges
23 "Defendants," collectively, with responsibility for sending the
24 allegedly fraudulent emails. Ascribing to all Defendants the act
25 of sending the allegedly fraudulent email also runs afoul of Rule
26 9(b).

27 Defendants also claim that Plaintiff has failed to plead with
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1 the requisite particularity the basis for liability for those who
2 did not literally send the alleged spam, i.e. the Mortgage
3 Defendants. However, as explained in Section III below, multiple
4 Defendants may be held liable under the CAN-SPAM Act if they
5 "initiated" illegal emails, including either actually sending the
6 message or paying or inducing another to send the message while
7 consciously avoiding knowledge that the messages violated the law.
8 Plaintiff's averments of fraud do not extend to the initiation of
9 the allegedly fraudulent commercial emails, but only to their
10 content. Therefore, the Court finds that Plaintiff need not plead
11 with particularity the circumstances surrounding the initiation of
12 the alleged email; for instance, Plaintiff need not plead
13 particular facts showing a business relationship between the
14 Mortgage Defendants and the Spammer Defendants.

15 Therefore, the Court grants Defendants' motion to dismiss the
16 Complaint on the grounds that Plaintiff's allegations of fraud,
17 which form the basis of both Plaintiff's federal and State claims,
18 have not been plead with particularity as required by Rule 9(b).
19 Plaintiff is granted leave to file an amended complaint stating
20 with particularity the identity of the sender or senders of the
21 alleged spam. If Plaintiff chooses to base its CAN-SPAM Act claim
22 on the nature of the allegedly fraudulent subject lines, this must
23 also be plead with particularity.

24 III. The CAN-SPAM Act Claim

25 Aegis also moves under Rule 12(b)(6) to dismiss Plaintiff's
26 claim under the CAN-SPAM Act.

27 The CAN-SPAM Act makes it "unlawful for any person to initiate
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1 the transmission, to a protected computer, of a commercial
2 electronic mail message . . . that contains, or is accompanied by,
3 header information that is materially false or materially
4 misleading." 15 U.S.C. § 7704(a)(1). It also prohibits a person
5 from initiating the transmission of commercial email messages

6 if such person has actual knowledge, or knowledge fairly
7 implied on the basis of objective circumstances, that a
8 subject heading of the message would be likely to mislead a
9 recipient, acting reasonably under the circumstances, about a
10 material fact regarding the contents or subject of the
11 message.

12 15 U.S.C. § 7704(a)(2). "[M]ore than one person may be considered
13 to have initiated a message." 15 U.S.C. § 7702(9). The statute
14 defines "initiate" as "to originate or transmit such message or to
15 procure the origination or transmission of such message." Id. In
16 actions brought by internet access service providers, a special
17 definition of "procure" applies. 15 U.S.C. § 7706(g)(2).

18 Combining the basic definition with the special definition,
19 "procure" means,

20 intentionally to pay or provide other consideration to, or
21 induce, another person to initiate such a message on one's
22 behalf with actual knowledge, or by consciously avoiding
23 knowing, whether such person is engaging, or will engage, in a
24 pattern or practice that violates this chapter.

25 15 U.S.C. §§ 7702(12) and 7706(g)(2).

26 In order to hold the Mortgage Defendants liable under the CAN-
27 SPAM Act, Plaintiff must therefore prove that they paid or induced
28 the Spammer Defendants to initiate commercial email messages and
that the Mortgage Defendants acted either with actual knowledge, or
by consciously avoiding knowing, that the Spammer Defendants' acts
were illegal. This set of facts could be proved consistent with

1 the existing allegations in the Complaint. Indeed, the Complaint
2 directly alleges that Aegis and the other Mortgage Defendants
3 "approved or ratified" the conduct of the other Defendants.
4 Complaint ¶ 14. Even if the heightened pleading standards of Rule
5 9(b) did apply to Plaintiff's entire CAN-SPAM Act claim, the
6 allegations regarding the Mortgage Defendants' scienter could be
7 averred generally.

8 Therefore, the Court denies Aegis' motion to dismiss
9 Plaintiff's CAN-SPAM claim on this ground. However, Plaintiff must
10 replead its CAN-SPAM claim in order to comply with Rule 9(b), as
11 described above.

12 III. California Anti-Spam Law

13 Aegis moves to dismiss Plaintiff's claim under California's
14 Business and Professions Code § 17529.5, for failure to state a
15 claim and for failure to state the underlying factual allegations
16 with reasonable particularity.

17 Section 17529.5(a) provides,

18 It is unlawful for any person or entity to advertise in a
19 commercial email advertisement either sent from California or
20 sent to a California electronic mail address under any of the
following circumstances:

21 (2) The e-mail advertisement contains or is accompanied by
falsified, misrepresented, or forged header information.

22 (3) The e-mail advertisement has a subject line that a person
23 knows would be likely to mislead a recipient, acting
reasonably under the circumstances, about a material fact
24 regarding the contents or subject matter of the message.

25 A "commercial email advertisement" is defined as "any electronic
26 mail message initiated for the purpose of advertising or promoting
27 the lease, sale, rental, gift offer, or other disposition of any

1 property, goods, services, or extension of credit." Cal. Bus. &
2 Prof. Code § 17529.1(c). The statute creates a cause of action
3 based on violations of § 17529.5 for "electronic mail service
4 provider[s]," among others. Cal. Bus. & Prof. Code
5 § 17529.5(b)(1)(A)(ii).

6 Aegis argues that Plaintiff's claim must be dismissed because
7 it does not adequately allege or meet the pleading requirements for
8 California claims of unfair business practices. See Khoury v.
9 Maly's of Cal., Inc., 14 Cal. App. 4th 612, 619 (1993) (holding
10 that plaintiffs alleging unfair business practices must state with
11 reasonable particularity facts supporting the statutory elements of
12 the violation)²; Emery v. Visa Int'l Serv. Ass'n, 95 Cal. App. 4th
13 952, 960 (2002) (holding that actions brought under California's
14 unfair business practices act cannot be predicated on vicarious
15 liability). Aegis states that the California statute requires that
16 a defendant "actually send the alleged spam or cause it to be
17 sent." Aegis' Mot. Dismiss at 5. Yet Aegis' argument is

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19 ²Plaintiff argues that this requirement for pleading unfair
20 business practices with "reasonable particularity" should not be
21 applied here because it is not required by the Federal Rules. See
22 Empress LLC v. City and County of San Francisco, 419 F.3d 1052,
23 1056 (9th Cir. 2005) (stating in dicta that the logical conclusion
24 of the holding in Swierkiewicz and similar cases is that "a
25 heightened pleading standard should only be applied when the
26 Federal Rules of Civil Procedure so require"). Aegis notes that
27 other federal courts have applied the heightened pleading standard
28 required by Khoury, but the case it cites, Silicon Knights, Inc.,
v. Crystal Dynamics, Inc., 983 F. Supp. 1303, 1316 (N.D. Cal.
1997), was decided prior to Swierkiewicz and Empress. Although it
is not clear whether the Ninth Circuit intended by the language in
Empress to dispense with the requirement of a heightened pleading
standard with respect to State law claims, the Court need not
decide that question because it finds that Plaintiff has failed
state a claim even under normal notice pleading standards.

1 contradicted by the language of the statute, which appears to
2 extend liability to anyone who "advertises" in a commercial email
3 containing a misleading header or subject line, regardless of
4 whether the advertiser was also the one who actually sent the spam
5 or caused it to be sent. Cf. Cal. Bus. & Profs. Code § 19529.2
6 (prohibiting the initiation or advertisement in unsolicited
7 commercial emails sent from or to California).

8 Nevertheless, the Court concludes that the Complaint does not
9 state a claim under § 17529.5, not for the reasons identified by
10 Aegis, but because Plaintiff nowhere alleges that the Mortgage
11 Defendants "advertised" in the alleged commercial e-mail messages.
12 Therefore, the Court dismisses Plaintiff's California anti-spam
13 claim. Plaintiff may include a § 17529.5 claim in an amended
14 complaint if it can state, truthfully and without contradicting the
15 original complaint, that Defendants advertised their services in
16 the allegedly fraudulent emails.

17 IV. Civil Conspiracy

18 Aegis moves to dismiss Plaintiff's claim for civil conspiracy
19 on the grounds that Plaintiff has failed to allege that the
20 Mortgage Defendants intended to aid in the commission of the
21 conspiracy.

22 The required elements of a claim for civil conspiracy under
23 California law are (1) the formation and operation of the
24 conspiracy, (2) wrongful conduct in furtherance of the conspiracy,
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1 and (3) damages arising from the wrongful conduct.³ Kidron v.
2 Movie Acquisition Corp., 40 Cal. App. 4th 1571, 1581 (1995).
3 "Actual knowledge, without more, is insufficient to serve as a
4 basis for a conspiracy claim; "knowledge of the planned tort must
5 be combined with intent to aid in its commission." Id. at 1582.
6 Under California law, civil conspiracy is not a separate cause of
7 action. Applied Equipment v. Litton Saudi Arabia, 7 Cal. 4th 503,
8 510 (1994). Conspiracy is simply a way to impose liability upon a
9 defendant who did not commit a tort himself or herself but who
10 shared with the immediate tortfeasor a common plan to harm the
11 plaintiff. See id. at 510-11.

12 Aegis asserts that in order sufficiently to allege civil
13 conspiracy, a complaint must state "with sufficient factual
14 particularity" the existence of a mutual understanding or agreement
15 among the alleged tortfeasors. Masco Contractors Serv. W. v. New
16 Hampshire Ins. Co., 2005 WL 405361, *6 (N.D. Cal. Feb. 17, 2005)
17 (quoting Alfus v. Pyramid Tech. Corp., 745 F. Supp. 1511, 1521
18 (N.D. Cal. 1990)). However, the cases in which courts have applied
19 this heightened pleading standard involve claims of civil
20 conspiracy to commit fraud, specifically. See Wasco Prods., Inc.,
21 v. Southwall Tech., Inc., 435 F.3d 989, 990-91 (9th Cir. 2006)

22
23 ³Plaintiff relies on Saunders v. Superior Court, 27 Cal. App.
24 4th 832, 846 (1994), for the proposition that civil conspiracy
25 involves the breach of a duty. Plaintiff confuses the elements of
26 civil conspiracy with the elements of liability for aiding and
27 abetting the commission of an intentional tort. The portion of
Saunders cited by Plaintiff refers only to the latter. If
28 Plaintiff wishes to claim that the Mortgage Defendants aided and
abetted others in the commission of an intentional tort, it must
amend its complaint accordingly.

1 (holding that plaintiffs must plead California civil conspiracy
2 claim with particularity where object of agreement is fraudulent).
3 Here, however, as described in Section II, Plaintiff has alleged
4 some fraudulent conduct, but not a unified course of fraudulent
5 conduct or an overriding fraudulent objective. Therefore, the
6 Court will not apply a heightened pleading standard to Plaintiff's
7 civil conspiracy claim.

8 The Court has granted Plaintiff leave to amend its complaint
9 in order to allege the particularities of fraud related to the CAN-
10 SPAM Act and to allege a violation of California Business &
11 Professions Code § 17529.5. If Plaintiff successfully pleads these
12 claims, it would fulfill the civil conspiracy requirement of
13 pleading an underlying violation. Although Plaintiff does not
14 specifically allege that the Mortgage Defendants intentionally
15 entered into an agreement to violate the law, it does state that
16 the Mortgage Defendants "conspired" with the Spammer Defendants.
17 Complaint ¶ 10. Plaintiff alleges that the Mortgage Defendants
18 "were informed and knew prior to conspiring with SPAMMERS that
19 SPAMMERS had been named in a federal prosecution for violations of
20 the CAN-SPAM Act and California Business and Professions Code
21 § 17529.5." Complaint ¶ 45. However, Plaintiff may prove,
22 consistent with this allegation, that the Mortgage Defendants
23 entered into an agreement with the Spammer Defendants with the
24 intent to commit violations of the anti-spam laws.

25 Therefore, the Court denies Aegis' motion to dismiss
26 Plaintiff's claim for civil conspiracy against the Mortgage
27 Defendants, subject to Plaintiff's successful statement of at least
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1 one underlying claim.

2 V. Quicken's Motion for Security

3 Defendant Quicken moves for an order requiring Plaintiff to
4 post security for the costs and attorneys' fees Quicken expects to
5 incur in this action. Plaintiff opposes the motion.

6 Section 7706(g)(4) of the CAN-SPAM Act allows the district
7 court, in its discretion, to "require an undertaking for the
8 payment of the costs of such an action [brought by an internet
9 access provider], and assess reasonable costs, including reasonable
10 attorneys' fees, against any party." In addition, Civil Local Rule
11 65.1-1 provides, "Upon demand of any party, where authorized by law
12 and for good cause shown, the Court may require any party to
13 furnish security for costs which can be awarded against such party
14 in an amount and on such terms as the Court deems appropriate."
15 Federal courts also have inherent authority to require plaintiffs
16 to post security for costs. In re Merrill Lynch Relocation Mgmt.,
17 Inc., 812 F.2d 1116, 1121 (9th Cir. 1987).

18 Quicken argues that it is entitled to security for its
19 attorneys' fees and costs because (1) it is likely to succeed on
20 the merits; and (2) Plaintiff is violating an agreement to release
21 Quicken from liability in exchange for information.

22 The Court finds that Quicken is not likely to succeed on the
23 merits. Plaintiff has shown at least some evidence in support of
24 its allegations. Moreover, this is a new area of law in which the
25 scope of liability is not clear; requiring Plaintiff to post a
26 security bond at this juncture could chill private enforcement of
27 anti-spam laws.

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1 With respect to the alleged release of liability, the Court is
2 troubled by counsel's contradictory assertions and accusations.
3 The existence of an oral contract releasing Quicken from liability
4 appears to be a disputed issue of fact which the Court cannot
5 resolve based on the evidence before it. Amy Bishop, counsel for
6 Quicken, declares under oath,

7 I told Mr. [Jason] Singleton[, counsel for Plaintiff,] words
8 to the effect that 'it is understood that the release of this
9 information to you is conditioned upon you releasing Quicken
10 Loans.' Mr. Singleton agreed to release Quicken Loans in
11 exchange for the information. Mr. Singleton did not tell me
12 that he had filed a lawsuit against Quicken Loans two days
13 earlier, but instead asked me to cooperate by providing the
14 information I had.

15 Relying on the release, I then explained to Mr. Singleton
16 that Quicken Loans received the lead from its affiliate,
17 Azoogle Mr. Singleton thanked me and promised to send
18 me a written release to memorialize the oral agreement.

19 Bishop Decl. ¶¶ 9-10.

20 Mr. Singleton, however, denies under oath that he agreed to
21 release Quicken from liability, stating generally, "Ms. Bishop's
22 statement that she and I had a telephone conversation, wherein I
23 agreed to release Defendant, is untrue." Singleton Decl. ¶ 3.

24 The Court will not require Plaintiff to post security for
25 Quicken's attorneys' fees and costs. However, the Court will
26 entertain a motion for attorneys' fees from the party who prevails
27 on the issue of the alleged liability release.

28 CONCLUSION

For the foregoing reasons, the Court GRANTS Aegis' motion to
dismiss Plaintiff's complaint (Docket No. 20), with respect to
Plaintiff's averments of fraud and its claim under California
Business and Professions Code § 17529.5. Plaintiff may file an

1 amended complaint within two weeks of the date of this order. The
2 Court DENIES Quicken's motion for an order requiring Plaintiff to
3 post security (Docket No. 54).

4 In its amended complaint, Plaintiff must state with
5 particularity the nature of the allegedly fraudulent subject lines
6 and the identity of the sender or senders of the alleged spam.
7 Plaintiff may include in the amended complaint its civil conspiracy
8 claim, provided it is able successfully to state an underlying
9 claim under either the federal or State anti-spam laws. Plaintiff
10 may only bring a § 17529.5 claim in its amended complaint if it can
11 state, truthfully and without contradicting the original complaint,
12 that Defendants advertised their services in the allegedly
13 fraudulent emails.

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15 IT IS SO ORDERED.

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17 Dated: 6/30/06



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19 CLAUDIA WILKEN
United States District Judge

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