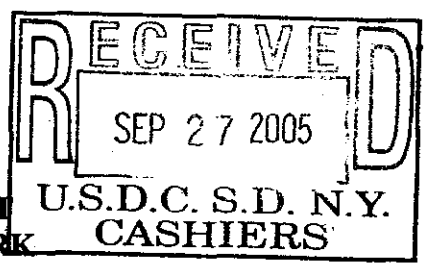


...ONE FIGURE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YEHUDA MICHAELI, on behalf of
himself and all others similarly situated,

Plaintiff,

v.

EXACT ADVERTISING, LLC,

Defendant.

CIV. ACTION NO.:

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiff, Yehuda Michaeli, individually and on behalf of all others similarly situated, for his Complaint against the Defendant, states and alleges as follows:

INTRODUCTION

1. The Defendant, eXact Advertising, LLC ("eXact Advertising") has unlawfully used and damaged Plaintiff's rights to use and enjoy his personal property. Without Plaintiff's authorization, eXact Advertising infected Plaintiff's computer with harmful and offensive spyware programs by deceptively bundling its malicious software with a wide variety of "free" games, cursors, screensavers and other small software programs. These harmful programs would then secretly track Plaintiff's Internet use, thereby invading his privacy and damaging his computer. Utilizing this software, eXact Advertising would monitor the Internet "surfing"

and/or web-browsing activities of the Plaintiff, ultimately bombarding Plaintiff's computer with intrusive advertisements ("adware"). In addition to invading Plaintiff's privacy, eXact Advertising's unwanted spyware and adware programs illicitly caused Plaintiff's computer to slow down, consume excessive bandwidth over Plaintiff's Internet connection, monopolize computer resources, including memory, pixels and monitor screen-space, and disable or destroy user-installed computer software, ultimately causing many computers to crash.

PARTIES

2. Plaintiff Yehuda Michaeli is a resident of the State of New York. As further set forth below, Plaintiff Yehuda Michaeli brings this action in an individual and representative capacity on behalf of a proposed class of all residents of the United States who, during the period from September 30, 2002, to the present, had spyware or adware put onto their computers by eXact Advertising.

3. Defendant eXact Advertising is a private limited liability company with its principal office located in New York, New York. Since at least 2002, eXact Advertising has distributed to millions of consumers throughout the United States a wide variety of "free" games, cursors, screensavers and other software. eXact Advertising would deceptively and surreptitiously bundle this software with undisclosed and invasive spyware and adware programs. eXact Advertising's bundled software is installed onto the computers of unsuspecting users through its own proprietary websites.

4. eXact Advertising describes itself as enabling "marketers to build valuable relationships with consumers and businesses. By providing multiple performance-based products to the same client, eXact [Advertising] can maximize its customers' advertising budget and deliver high returns." (See <http://www.exactadvertising.com/exact.php?screen=about>).

eXact Advertising's clients include over one hundred Fortune 500 companies, including AOL Time Warner, Bank of America, Cingular Wireless, Citibank, MasterCard, Merck, SBC Communications, Verizon, Apple, Chase, Circuit City, Dell, Expedia, Netflix, Vonage, British Airways and The Gap.

JURISDICTION AND VENUE

5. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1332, *as amended*. The matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and no more than one-third of the members of the Plaintiff Class reside in New York.

6. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a), because during the class period, eXact Advertising resided, transacted business, was found, or had agents in this District and because a substantial part of the events giving rise to Plaintiff's claims occurred, and a substantial portion of the affected interstate trade and commerce described below has been carried out, in this District.

7. This Court has *in personam* jurisdiction over eXact Advertising because, *inter alia*, eXact Advertising (a) transacted business throughout the United States, (b) caused its harmful spyware and adware to be downloaded onto computers located throughout the United States, and (c) maintained its principal place of business in New York, New York.

FACTUAL ALLEGATIONS

8. "Spyware" is a form of computer software which, as its name implies, is surreptitiously installed onto an end-user's computer over the Internet and permits the company from which the software was downloaded to observe, track, monitor, profile, record and analyze an unwitting computer user's Internet activity, for purposes of sending targeted advertising (commonly referred to as "adware") which the company can place for its "clients" for a fee.

9. "Adware" is computer software that is commonly bundled with spyware, for purposes of transmitting unwanted advertisements, often transmitting intrusive "pop-up" and banner advertisements onto users' monitors when they browse various Internet websites on the World Wide Web.

10. "Cookies" are electronic data files that online companies implant onto computer users' hard drives when browsing Internet websites. Cookies are mainly created by web servers and implanted on users' computers when they first establish their Internet connection with the web site maintained or controlled by that particular web server. Generally, Cookies perform numerous convenient and innocuous functions, such as keeping track of a website visitor's purchases, and remembering usernames and passwords, thereby making it easier for users to access their frequently visited web sites without having to input these authentication requirements upon each visit. In recent years, however, Cookies have been subverted by various companies that use them to track and record computer users' web-browsing activities so that subsequent advertisements posted on a user's screen can be catered to their recent web browsing activity. Moreover, in some instances, Cookies are used for "identity theft," illegally gathering unwitting users' personal and confidential information, bank account numbers, credit card numbers, and even social security numbers.

11. eXact Advertising operates many distinct web domains offering a wide range of interactive content, including games, screensavers and cursors for users to download. By embedding additional hidden programs such as spyware and adware within such content, in a process commonly referred to as "bundling," eXact Advertising has surreptitiously installed onto millions of users' computers several types of invasive and annoying computer programs, which

advertise and promote the products of its clients through “pop-up” and banner advertising, toolbars, and website redirectors that invade and obstruct users’ web browsing activities.

12. eXact Advertising has generated substantial revenue from paid advertisers through the use of spyware and adware, by bombarding users of its “free” programs with constant pop-up advertisements, collecting the web-surfing habits of its users, utilizing users’ computer cookies, and catering future pop-up ads to reflect those browsing activities discovered through its use of spyware.

13. eXact Advertising distributes its bundled spyware and adware along with its “free” software programs and “free” shopping tools through websites such as www.yubilee.com (offering games, “money-saving” software, organizational tools, and search tools bundled with adware); www.fungamedownloads.com (offering games bundled with spyware programs like Bargain Buddy, a shopping rewards service; NaviSearch, a web search toolbar; and eXactSearchbar, a toolbar); www.photogizmo.com (digital photograph editing and organization software, which comes bundled with Bargain Buddy, NaviSearch and eXactSearchbar); and www.exactmatches.com (shopping software with real-time coupons, special offers, and deals from retailers which comes bundled with Bargain Buddy, NaviSearch and eXactSearchbar).

14. Bargain Buddy (a/k/a Acup, adp.exe, Panda, Bargains, Bullseye Network, eXactCashBack and Ikena) is an Internet Explorer browser helper that is designed to run at startup and constantly monitor a user’s internet browsing through the web pages requested and the terms entered into the browser. Once there is a match with a present list of sites and keywords entered by the user, a pop-up advertisement from one of eXact Advertising’s clients is shown. If a user clicks on that pop-up advertisement, revenue is generated by eXact Advertising for directing traffic to the advertiser’s website. Bargain Buddy is also geared at offering rebates

to users on their purchases at participating retailers by displaying pop-up ads (or coupons) onto users' screens. Bargain Buddy is also designed to automatically download software updates onto users' computers.

15. Bargain Buddy is distributed to users either via a bundled download with other "legitimate" software (i.e., games, screensavers, etc.) as described in paragraph 13 above, or directly through eXact Advertising's www.cashbackbuddy.com website. This website attempts to entice users to deliberately infect their computers with Bargain Buddy spyware by stating that it "helps the end-user maximize his/her savings and gain cash back commissions from purchases made at all participating on-line and some offline merchants." Those users who choose to download Bargain Buddy provide their personal information in order to receive the rebate payments. These users, however, are never informed of the invasive nature of the software at any point prior to or during its download. These users are not informed that once the software is downloaded onto their computer it permanently tracks their online activity, constantly displays intrusive pop-up advertisements on their monitor as they browse the Internet, takes up space on their hard drive, and will ultimately cause their computer to 'crash.'

16. Many users have not provided payment instructions to eXact Advertising in order to receive their rebates because they were not aware that Bargain Buddy was installed onto their computers, as a result of it being bundled with the "legitimate" game or other software they chose to download. Where such users are uninformed of Bargain Buddy's presence on their computers, users are rightly hesitant to provide their personal information to eXact Advertising. Without the user's personal information, eXact Advertising ends up retaining the affiliate's rebate as a commission in addition to generating income from displaying the advertisement.

17. NaviSearch is an adware program for Microsoft Windows operating systems designed to hijack a user's browser settings. The program displays advertisements, in the form of pop-up advertisements of its clients' and affiliates' products and services, during a user's Internet Explorer browsing session. NaviSearch is designed to replace existing advertising on non-eXact Advertising websites with pop-up ads from eXact Advertising's clients. Oftentimes, eXact Advertising will substitute an advertisement from the direct competitor of that website's advertiser. NaviSearch also monitors and collects a user's web browsing activity in order to generate a user profile to best serve up pop-up advertisements geared towards that user's interests.

18. eXact Advertising promotes NaviSearch as "providing relevant search results when a user's action would normally result in 'Page Not Found,'" and when users type searches directly into the address bar. NaviSearch can even automatically direct users to their intended destination when they misspell the URL or forget to type in the '.com.'" As a "redirector" program, its purpose is to automatically transfer (or redirect) a user to the "correct" and/or "intended" web site when he or she incorrectly misspells the domain address in the address bar. Instead, NaviSearch redirects both correct and misspelled domain addresses to eXact Advertising's own websites, thereby impeding a user's freedom to browse the web. After eXact Advertising forces users onto its own websites, through the use of its "redirector" spyware, it generates revenue each time a user accesses one of its paid advertisers' sites by clicking on that advertiser's posted link.

19. eXactSearchbar is another "redirector" spyware program distributed by eXact Advertising. Much like NaviSearch, eXactSearchbar forces users onto eXact Advertising's clients' and affiliates' websites, preventing users from freely browsing the web.

20. After being installed onto the user's hard drive, eXact Advertising's malicious spyware and adware programs run continuously during subsequent web browsing sessions, advertising eXact Advertising's clients and affiliates, as well as reporting information about the user (including personal information and web browsing activity) back to eXact Advertising and its affiliates, even after the user has stopped browsing eXact Advertising websites.

21. eXact Advertising does not obtain users' consent before installing its spyware or adware onto their computers. Thus, when the computer user downloads and installs "free" software from eXact Advertising's websites, the user simultaneously (and unknowingly) also downloads eXact Advertising's spyware and adware, which are deceptively bundled with the advertised "free" game or screensaver.

22. Oftentimes, eXact Advertising fails to show a license agreement, commonly referred to as an "End User Licensing Agreement" (or "EULA"), that purports to inform users about the advertisements and/or monitoring that may result in accepting the terms by downloading the "free" software. When eXact Advertising does attempt to provide such an agreement, its terms pertaining to users' authorization of spyware and/or adware downloads are vague, incomplete, deceptively buried deep within a lengthy EULA, factually incorrect or deceptively worded, or are not even contained in the agreement itself.

23. eXact Advertising often fails to prominently disclose important characteristics about its software. For example, eXact Advertising emphasizes its software's purported potential for savings (rebates with Bargain Buddy), but fails to mention that it will incessantly bombard users' computers with pop-up ads every time they browse the Internet. When users click "download now" from a list of games at www.fungamedownloads.com, they are presented with a prompt telling them that they will receive CashBackBuddy, NaviSearch and Bullseye as a

bonus as well as assuring them that all the contents of the download are "safe." This prompt, however, fails to mention that these "bonus" programs are spyware, will monitor their web browsing activities, and will ultimately impede their computer's performance. In fact, the only disclosure anywhere on this website occurs if and when a user clicks on the "Terms & Conditions" link at the bottom of the page. The user is not required to view these Terms prior to downloading the programs, and is never shown them, either during or after download and installation of the software.

24. Even today after many complaints and increased regulation, Users are able to download eXact Advertising's "free" software from www.photogizmo.com without ever accepting, or even viewing, any sort of license agreement.

25. eXact Advertising markets much of its spyware and adware to children by bundling it with games that may be attractive to younger web browsers. Examples of these games include: "Alu's Revenge" and "Mr. Munch." These child users, who lack the capacity to agree to any terms that may be contained within a EULA or privacy policy, unwittingly download these 'free' games along with eXact Advertising's malicious spyware and adware.

26. After installing its spyware and adware, eXact Advertising engages in a uniformly deceptive course of conduct and complex tricks to prevent both the detection and removal of its malicious software. As described *supra*, eXact Advertising does not adequately inform users of the installation of its spyware and/or adware onto their computers. Thus, when users later begin to receive persistent pop-up ads or redirected web page requests, they have difficulty identifying and uninstalling the offending programs, often not knowing how or why they were installed on their computers in the first place. Compounding this deception, eXact Advertising prevents its spyware and adware from being listed in the commonly accessed "All Programs" or "Programs"

list, accessible through the "Start" button on Microsoft Windows. Oftentimes these programs are saved to folders on a user's hard drive that are not easily detectable, thereby forcing a user to purchase anti-adware or anti-spyware programs that sort through every file on one's hard drive, just to detect their presence.

27. eXact Advertising fails to provide its own "uninstall" utility feature within many of its spyware programs' files or folders, further preventing users from ridding their computers of the intrusive software. Such functions are common in the software industry, particularly when a given program cannot be uninstalled by the operating system's "Add or Remove" programs feature. In the rare instance when eXact Advertising allows for the un-installation of its software, often it does not work properly, leaving many spyware files and its functionality installed.

28. eXact Advertising derives a substantial amount of its revenue from corporate advertisers paying sums of money to be placed prominently throughout the Internet via pop-up and banner ads. Each time a computer user clicks one of these advertiser's ads, eXact Advertising receives money from that advertiser.

29. eXact Advertising's generated advertisements are sent in a manner that breaches the security of affected computers by bypassing commonly-used "pop-up" blocker software, designed to stop ads from popping up on users' computer screens.

30. Once a pop-up or banner advertisement is sent, it generally remains on the user's computer screen until such time as the user actually closes the advertisement. Even when the computer user closes one advertisement, more advertisements are sent over and over again. Many times users receive the same ads repeatedly, even after closing the exact same pop-up ad.

31. Through the use of eXact Advertising's spyware software, advertisers have access to millions of computers for their targeted advertisements. Each and every time eXact Advertising's spyware or adware software connects a user with an advertiser, eXact Advertising generates revenue for itself, creating a further incentive for abusive practices.

32. eXact Advertising's spyware destroys other software programs installed on users' computers. Furthermore, spyware and adware cause computers to slow down, take up bandwidth over an Internet connection, use up a computer's memory, utilize pixels and screen space on monitors, and frustrate computer users. Spyware and pop-up advertisements decrease the productivity of a user's computer by requiring hours and additional money to be spent in trying to determine how to get the intrusive programs off of a computer, closing advertising, and waiting for a slower machine to operate. Furthermore, computer users are forced to keep their computers running longer (due to the slowed performance), thereby utilizing more electricity, decreasing the useful life of their computers, and causing increased Internet access charges. The cumulative impact of not only multiple ads, but also the threat of future ads, impedes computer usage.

33. Users infected with eXact Advertising's spyware must incur the cost in retaining a computer specialist to help eradicate eXact Advertising's spyware from their computer, in an effort to restore their computer back to its condition prior to eXact Advertising's download(s). Oftentimes, these computer specialists are unable to rid one's computer from this spyware due to the fact that the spyware is often deceptively hidden on a user's hard drive, and may have programmed itself to periodically change its file name to prevent detection.

34. eXact Advertising has not taken any steps toward correcting or rectifying the substantial problems that it has caused. eXact Advertising's spyware and adware continue to occupy and adversely affect computers owned by members of the Class.

35. Plaintiff, at all times relevant hereto, has been subjected to the illegal practices of Defendant eXact Advertising and/or its agents, as aforesaid; has downloaded purportedly "free" computer software from eXact Advertising's or its agents' websites resulting in the illicit installation of additional, unwanted and malicious spyware and/or adware onto Plaintiff's computer, without adequate and meaningful disclosure that he would be subjected to these harmful and offensive installations; and consequently has been subjected to the other practices outlined in more detail above, and has been damaged thereby.

36. At all times relevant hereto, Plaintiff's computer was unlawfully and maliciously used by the Defendant and/or infected with spyware and adware installed by Defendant eXact Advertising or its agents without Plaintiff's authorization and was subject to repeated intrusions of Plaintiff's privacy and continued obstruction of Plaintiff's use of his computer.

CLASS ALLEGATIONS

37. Plaintiff brings each of the claims in this action on his own behalf and on behalf of a class of all persons similarly situated ("the Class") pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure.

38. The Class definition is as follows:

"All United States residents who, during the period from September 30, 2002 to the present, had spyware or adware put onto their computers by eXact Advertising."

39. The Class is so numerous that joinder of all members is impractical. It is estimated that there are over 20 million computers in the United States affected by the spyware distributed by eXact Advertising.

40. There are questions of law and fact which are common to the Class which predominate over any questions affecting only individual members, including:

- a. Whether eXact Advertising committed a trespass to chattels;
- b. Whether eXact Advertising intended to deceive people into downloading software;
- c. Whether eXact Advertising has unfairly profited by using Class Members' computers;
- d. Whether eXact Advertising has been unjustly enriched as a result of their misconduct;
- e. Whether eXact Advertising has violated N.Y. Gen. Bus. Law § 349; and
- f. Whether eXact Advertising violated N.Y. Gen. Bus. Law § 350.

41. The representative party will fairly and adequately protect the interest of the class. Plaintiff's claims are typical of the claims of the Class. All are based upon the same factual and legal theories. Plaintiff has retained counsel who are competent and experienced in class litigation. Plaintiff had eXact Advertising's distributed spyware downloaded to his computer and was sent the typical amount of advertisements experienced by other Class members.

42. The class action is a superior method for the fair and efficient adjudication of the controversy. The likelihood of individual recovery would not warrant a separate lawsuit due to the expensive nature of litigation, hiring experts, and retaining attorneys. Plaintiff anticipates no difficulty in the management of this action as a class action.

COUNT ONE

Trespass to Chattels

43. Plaintiff re-alleges and re-avers paragraphs 1 through 42 as if fully set forth herein. This Count is asserted against eXact Advertising, on behalf of the Plaintiff, the Class, and the general public.

44. At all times relevant hereto, Plaintiff owned a computer that was infected with Defendant's spyware.

45. At all relevant times, Defendant and or its agents intentionally and without Plaintiff's consent used Plaintiff's computer and internet connections, gained access to Plaintiff's computer, monitored Plaintiff's Internet usage, sent advertisements to Plaintiff's computer, accessed various components and systems within Plaintiff's computer, obtained access to information about Plaintiff and his computer, took up space on the hard drive of Plaintiff's computer, exercised dominion over Plaintiff's computer, and/or dispossessed Plaintiff of access to his computer.

46. In doing so, Defendant has intentionally intermeddled with, damaged, and deprived Plaintiff of his computer and/or Internet connections, or a portion thereof, without authorization.

47. Defendant, without authorization, intentionally through the use of a computer or computer network, used Plaintiff's computer in such a manner and extent as to exercise dominion over such property or, in the alternative, in such a manner and extent as to deprive Plaintiff of his use and enjoyment of this property thereby in each instance trespassing on Plaintiff's property for its own commercial use.

COUNT TWO

Deceptive Acts and Practices

48. Plaintiff re-alleges and re-avers paragraphs 1 through 46 as if fully set forth herein. This Count is asserted against eXact Advertising, on behalf of the Plaintiff, the Class, and the general public.

49. eXact Advertising knew that its conduct was deceptive and misleading and intended for consumers to be deceived so they would download their spyware along with other legitimate “free” software. eXact Advertising’s method of distributing its spyware created and continues to create a substantial likelihood of confusion, misunderstanding, and deception in the course of trade and commerce.

50. eXact Advertising’s conduct as alleged herein constitutes a deceptive act or practice because it is unlawful, offends public policy, is immoral, unethical, unscrupulous, and results in substantial injury to consumers.

51. By engaging in the acts and practices described above, eXact Advertising repeatedly and persistently has engaged in deceptive business practices in violation of N.Y. Gen. Bus Law § 349.

52. N.Y. Gen. Bus. Law § 349(a) makes it unlawful for “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any services in [New York].”

53. By repeatedly and persistently engaging in the acts and practices described above, eXact Advertising has repeatedly and persistently engaged in deceptive acts or practices in violation of N.Y. Gen. Bus. Law § 349.

54. By promoting its advertisers' products and/or services in connection with the downloading of its "free" games and screensavers as alleged herein, eXact Advertising has engaged in unlawful or deceptive business practices and unfair competition within the meaning of N.Y. Gen. Bus. Law § 349.

55. eXact Advertising's violations of the N.Y. Gen. Bus. Law § 349 have caused the Plaintiff and the Class damage. Unless enjoined by this Court, eXact Advertising will continue these violations.

56. Plaintiff and the Class are entitled to actual damages, treble damages, equitable relief and attorneys' fees pursuant to N.Y. Gen. Bus. Law § 349(h).

57. The unlawful, unfair and deceptive business practices conducted by eXact Advertising present a threat and likelihood of deception to members of the Class and the general public, in that eXact Advertising has systematically perpetrated and continues to perpetrate deceptive, unlawful and unfair acts upon members of the public by not taking any steps toward correcting or rectifying the substantial problems that its spyware and adware have caused, as referenced herein.

58. Since eXact Advertising's spyware and adware continue to occupy the Plaintiff's computer, eXact Advertising's business practices present a continuing threat and likelihood of causing further harm to the Plaintiff, such that injunctive relief would be appropriate, in the form of an order enjoining eXact Advertising from distributing such harmful spyware and adware, distributing a means by which the Plaintiff and members of the Class can rid their computers of such spyware and adware, and ordering eXact Advertising to disgorge all money received as a result of depriving Plaintiff and the members of the Class of their right to use and enjoy their property.

COUNT THREE

False Advertising

59. Plaintiff re-alleges and re-avers paragraphs 1 through 58 as if fully set forth

herein. This Count is asserted against eXact Advertising, on behalf of the Plaintiff, the Class and the general public.

60. N.Y. Gen. Bus. Law § 350 makes unlawful any “false advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state.”

61. eXact Advertising engaged in deceptive and misleading advertisements by downloading its spyware onto computers while computer users thought they were downloading “free” software. This advertising is false because the software is not “free.” To the contrary, the spyware gives eXact Advertising and its affiliates access to engage in ongoing interference with a computer, subjects the computer user to monitoring, and results in the destruction of software already installed on these computers. Furthermore, eXact Advertising falsely tells consumers that it does not track Internet browser behavior.

62. eXact Advertising marketed its spyware and adware software as described above, by reason of material misstatements and omissions in failing to disclose important characteristics in its software.

63. eXact Advertising has failed to notify consumers that its spyware damages computers, is difficult to remove from a computer, will slow down and/or damage the performance of a computer, and will result in persistent and distasteful advertising.

64. By repeatedly and persistently engaging in the acts and practices described above, eXact Advertising has repeatedly and persistently engaged in false advertising in violation of N.Y. Gen. Bus. Law § 350.

65. Plaintiff is entitled to actual damages, treble damages, and attorneys' fees pursuant to N.Y. Gen. Bus. Law § 350(e).

COUNT FOUR

Negligence

66. Plaintiff re-alleges and re-avers paragraphs 1 through 65 as if fully set forth herein. This Count is asserted against eXact Advertising, on behalf of the Plaintiff, the Class and the general public.

67. eXact Advertising, having gained access to Plaintiff's computer, had a duty not to harm the computer and impact its operation. Furthermore, eXact Advertising had a duty to monitor its spyware distributors to assure that they obtained user consent for downloading eXact Advertising's spyware.

68. eXact Advertising breached this duty by damaging Plaintiff's computer and interfering with its operation and by not adequately monitoring its spyware distributors.

69. As a direct and proximate result of eXact Advertising's negligence, Plaintiff was damaged as alleged herein.

COUNT FIVE

Unjust Enrichment

70. Plaintiff re-alleges and re-avers paragraphs 1 through 69 as if fully set forth herein. This Count is asserted against eXact Advertising, on behalf of the Plaintiff, the Class, and the general public.

71. As a result of eXact Advertising's schemes as alleged herein, it unjustly enriched itself at the Plaintiff's detriment.

72. If consumers learned of eXact Advertising's deceptive marketing and advertising as alleged herein, they would have lessened or stopped downloading eXact Advertising's so-called "free" software. In addition, reputable companies would no longer have been willing to advertise through eXact Advertising.

73. eXact Advertising has been unjustly enriched by retaining affiliate rebates offered and owed to consumers who have neglected to provide their personal information to eXact Advertising, as referenced in paragraphs 15-16 above. eXact Advertising's Bargain Buddy software continues to occupy and adversely affect computers owned by members of the Class, and eXact Advertising continues to collect these rebates. eXact Advertising's retention of these benefits and continued practice in retaining these benefits violate fundamental principles of justice, equity and good conscience.

74. eXact Advertising has been unjustly enriched by deriving economic benefit from the dissemination of unsolicited pop-up advertisements through the unauthorized use of Plaintiff's computer. eXact Advertising's retention of these benefits violates fundamental principles of justice, equity and good conscience.

PRAYER FOR RELIEF

WEREFOR, Plaintiff requests of this Court the following relief, on behalf of himself and all others similarly situated:

- a. For an order certifying the Plaintiff Class as set forth herein, with Plaintiff as the Class representative and his counsel as Class counsel;
- b. Injunctive relief enjoining eXact Advertising from continuing to occupy and adversely affect computers owned by members of the Class;

- c. Injunctive relief enjoining the deceptive and misleading marketing practices, the sending of advertisements, and the continuing damage being caused to Plaintiff's and Class Members' computers;
- d. Judgment in favor of Plaintiff in the form of compensatory, punitive, loss of use, diminution of value, loss of enjoyment and use, and disgorgement of ill-gotten gains;
- e. An award of reasonable attorneys' fees, costs, and expenses; and
- f. Such further relief as this Court deems just and proper.

JURY DEMAND

The Plaintiff demands a trial by jury as to all issues so triable.

Dated: September 27, 2005

Respectfully submitted,

SHALOV STONE & BONNER LLP

By: 

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