

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

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**THE PEOPLE OF THE STATE OF** :  
**NEW YORK, by ELIOT SPITZER,** :  
**Attorney General of the State of New York,** :  
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                                  **Petitioners,** :  
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                                  **-against-** :  
 :  
**GRATIS INTERNET, INC.** :  
**a/k/a FREEPAY, ROBERT JEWELL,** :  
**individually, and PETER MARTIN,** :  
**individually,** :  
                                  **Respondents.** :  
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**AFFIRMATION OF**  
**KAREN A. GEDULDIG**

Index No.: 401210-06

KAREN A. GEDULDIG, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following under penalty of perjury:

1. I am an Assistant Attorney General in the office of ELIOT SPITZER, Attorney General of the State of New York, assigned to the Internet Bureau. I am familiar with the facts and circumstances of this proceeding.
2. The facts set forth in this affirmation are based upon information contained in the files of the Internet Bureau.
3. I submit this affirmation in support of the Attorney General’s application for an order and judgment which, inter alia, (a) enjoins respondents Gratis Internet, Inc., a/k/a FreePay, Robert Jewell, and Peter Martin (collectively the “respondents”) from engaging in fraudulent, deceptive, and/or illegal acts and business practices; and (b) requires respondents to disgorge unjust enrichment from such practices and to pay penalties and costs to the State of New York.

### Preliminary Statement

4. Between February 2000 and June 9, 2004 (the “relevant time period”), respondents collected users’ email addresses and other personal information, through six web sites they owned and operated. During this time, respondents explicitly (and repeatedly) promised these consumers that it never would “lend, sell or give out” this information. These representations were false and deceptive: in 2004 and 2005, respondents did indeed “lend, sell, or give out” this information, licensing it to email marketers (i.e., companies that send promotions and advertisements by email) who in turn sent millions of unsolicited emails on behalf of their own clients.

5. In all, respondents sold the email addresses and other personal information of more than 7,000,000 of its users, in separate licensing agreements with three email marketers. As the agreements contemplated, these email marketers then sent these users millions of unsolicited emails.

6. During the relevant time period, Gratis Internet, Inc. was a closely held company owned by its officers, the individual respondents, Peter Martin and Robert Jewell (“individual respondents”). (Martin and Jewell now own a combined 99 percent of the company.) Martin and Jewell not only knew of and participated in the deception described above, but also engineered it, as described at further length herein. They are therefore individually liable for penalties, costs, and disgorgement, and subject to injunctive relief. As used herein, “Gratis” refers to each and all respondents, acting individually and jointly.

7. Gratis’s deceptive acts and representations violate New York General Business Law §§ 349 and 350 and Executive Law § 63(12).

## Parties

8. Petitioners are the People of the State of New York, by their attorney Eliot Spitzer, Attorney General of the State of New York.

9. Gratis Internet, Inc. is a foreign business corporation incorporated in Delaware with its principal place of business at 819 7th Street, Suite 200, N.W., Washington, D.C. 20005. Exh. 1 (Certificate of Incorporation).

10. Respondents Robert Jewell ("Jewell") and Peter Martin ("Martin") founded Gratis in February 2000. See Exh. 2 at 1 (Letter from Pressly M. Millen to Karen A. Geduldig, dated April 20, 2005 ("April 20, 2005 Written Responses")); Exh. 3 (Transcript of Peter Martin's Hearing, dated October 20, 2005 ("Martin Hrg. Tr.") at 9:4-9:7). During the relevant time period, they each owned fifty percent of the company and were its only directors. Exh. 2 at 7 (April 20, 2005 Written Responses). Jewell and Martin have at all times served as co-Presidents of Gratis as well as its Treasurer (Jewell) and Secretary (Martin). Exh. 2 at 7 (April 20, 2005 Written Responses); Exh. 3 (Martin Hrg. Tr. at 6:4-6:5). Jewell and Martin were responsible for all web site content. Exh. 3 (Martin Hrg. Tr. at 22:5-22:25; 37:8-37:12; 44:10-45:7). See also Exh. 4 at 4 (Letter from Pressly M. Millen to Karen A. Geduldig, dated June 9, 2005 ("June 9, 2005 Written Responses")).

11. Gratis has transacted business with, and collected the personal information of, a large but indeterminate number of New York consumers. If roughly proportionate to New York's percentage among the total United States population, then this number is several hundred thousand. As described herein, Gratis has also wrongfully transmitted its users information into New York State, (to Datran Media, LLC), contrary to its promises to its users.

### Statutory Framework

12. Executive Law §§ 63(12) and 63(15) empower the Attorney General to seek injunctive and equitable relief when any person or business entity has engaged in, or otherwise demonstrated, repeated fraudulent or illegal acts in the transaction of business in the State of New York.

13. General Business Law (“GBL”) §§ 349 and 350 empowers the Attorney General to seek injunctive relief when any person or entity has engaged in deceptive acts or practices in the conduct of any business, or in false advertising, and § 350-d empowers the Attorney General to seek, *inter alia*, civil penalties in the amount of \$500.00 for each violation of GBL § 350, the False Advertising Statute, and/or of GBL § 349, the Deceptive Practices Statute. Finally, under CPLR § 8303(a)(6), the Court may also award petitioners a sum not to exceed \$2,000.

### Factual Allegations

#### **A. Gratis’s Business Model**

14. At various times between February 2000 (Gratis’s inception) and June 9, 2004, Gratis has operated six web sites: (i) FreeCondoms.com, (ii) FreeDVDs.com, (iii) FreeVideoGames.com, (iv) FreeGiftPlanet.com, (v) FreeCDs.com, and (vi) FreeiPods.com (collectively the “Gratis sites”). Exh. 3 (Martin Hrg. Tr. at 18:10-20:4). On or about January 31, 2006, Gratis discontinued FreeDVDs.com, FreeVideoGames.com, FreeGiftPlanet.com, and FreeCDs.com. Exh. 5 at Exhibit 6, screens 5-6 (Affidavit of Joseph Rivela, dated February 27, 2006 (“Rivela Aff.”)). It continues to operate FreeiPods.com and FreeCondoms.com, as well as thirteen other web sites not at issue herein. See Exh. 5 at Exhibit 6, screens 5-6 (Rivela Aff.); Exh. 6 <http://www.gratisinternet.com/properties.html> (visited on March 14, 2006).

15. On its sites, Gratis has offered consumers "free" products ranging from Apple iPods, to CDs, to DVDs, to condoms.

16. In order for consumers to get these free products, they have been required to participate in at least one of a range of promotions that its sites offer on behalf of third party retailers and service providers. Exh. 5, ¶ 13 and Exhibit 11 (Rivela Aff.). These promotions often involve a free trial of a service, as the third party companies hope to acquire permanent consumers.

17. In turn, these third party companies pay Gratis commissions of between \$20 and \$70 per participating consumer. Exh. 2 at 1-2 (April 20, 2005 Written Responses). Three of the many examples of such offers include a "FREE 30 day trial" of GamePass from RealArcade, unlimited online DVD rentals from Blockbuster for \$9.99, and a credit card from CitiPlatinum Select Cards with favorable terms regarding annual fees and APR on credit. Exh. 5 at Exhibit 11 (Rivela Aff.).

18. In addition to requiring consumers to accept at least one such promotional offer, Gratis requires consumers to submit to Gratis an email address, unique password, postal address, and telephone number, Exh. 2 at 2-3 (April 20, 2005 Written Responses); Exh. 5, ¶¶ 10-13 and Exhibits 7-10 (Rivela Aff.), and to refer other persons, e.g., their friends, to the same web site. See, e.g., Exh. 5 at Exhibit 6 (Rivela Aff.). Once they generate a requisite number of referrals to the site (thus generating revenue for Gratis), the consumers get the "free" product. The requisite number varies depending on the value of the free item; for instance three referrals are required to earn an iPod Shuffle digital audio player, while 20 are required for a laptop computer. Exh. 7 (Terms and Conditions for [www.ipodshuffles.freepay.com](http://www.ipodshuffles.freepay.com)); Exh. 8 (Terms and Conditions for

[www.laptops.freepay.com](http://www.laptops.freepay.com)).<sup>1</sup>

19. Gratis uses the revenue it obtains from third party companies for finding participating customers to defray the cost of the free products it provides to consumers.

20. Gratis has operated its web sites in this manner from in or about February 2000 to the present. Exh. 2 at 1-2 (April 20, 2005 Written Responses) (discussing Gratis's business model over the course of its five-year existence).

**B. Gratis Makes Privacy Promises to Consumers**

21. During the relevant time period, each of the Gratis sites explicitly promised consumers that their personal information (i.e., name, address, telephone number, email address) would "never" be shared with third parties.

22. Specifically, each of the sites' privacy policies promised:

- "We will never give out, sell, or lend your name or information to anyone";
- "We will never lend, sell, or give out for any reason your email address or personal information";
- "We at [Gratis web site] respect your privacy and do not sell, rent, or loan any personally identifiable information regarding our customers to any third party"; and
- "Please note that we do not provide your E-mail address to our business partners."

Exh. 3 (Martin Hrg. Tr. at 33:24-35:5; 36:3-37:7; 38:2-38:14 and Hrg. Exhibits 5 and 6)

23. These promises were identical on each Gratis site – each of which was an identical "stamp" of the another. Exh. 3 (Martin Hrg. Tr. at 38:2-38:14; 43:15-43:23).

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<sup>1</sup> This business model, while unorthodox, is not in itself the subject of this action.

24. Gratis placed these promises on its sites when it began collecting consumers' personal information, namely, on or about the following dates:

<b>WEB SITE</b>	<b>DATE</b>
FreeCondoms.com	September 26, 2000
FreeDVDs.com	November 14, 2002
FreeGiftPlanet.com	April 29, 2003
FreeVideoGames.com	July 11, 2003
FreeCDs.com	October 7, 2003
FreeiPods.com	May 13, 2004

Exh. 3 (Martin Hrg. Tr. at 26:7-26:19; 27:8-27:16 and Hrg. Exhibit 3).

25. Beginning sometime in 2003, Gratis made an additional privacy promise to consumers, on the web pages on which consumers signed up for its free offers, promising that it “does not . . . sell/rent emails,” presumably meaning consumers' email addresses. Exh. 3 (Martin Hrg. Tr. at 44:4-44:23; 46:8-46:17). This promise was conspicuously placed immediately below the field where consumers were asked to submit their email addresses and unique passwords. Exh. 3 (Martin Hrg. Tr. at 44:10-44:23 and Hrg. Exhibit 7). This promise remained on the Gratis sites' sign-up pages from sometime in 2003 through June 9, 2004. Exh. 3 (Martin Hrg. Tr. at 46:8-46:17).

26. In the words of its co-President and Secretary, respondent Peter Martin, Gratis made this promise in order to “confirm to our users that [Gratis] was not a business of reselling information.” Exh. 3 (Martin Hrg. Tr. at 45:12-45:14).

### C. Gratis Violates its Privacy Promises

27. All of the above statements that Gratis made to consumers, set forth herein at ¶¶ 22 and 25, were false and deceptive. After explicitly promising consumers that it would never “give out,” “provide” or “sell, rent or loan,” their information to anyone – including to its “business partners” – Gratis did just that, for a quick payday.

28. Gratis sold, or “licensed” access to, its users’ personal information, in separate deals with three email marketing companies: Datran Media, LLC, JDR Media, Inc., and Jumpstart Technologies, LLC. Each of these transactions are discussed below.<sup>2</sup>

#### (i) Gratis’s Agreement with Datran Media, LLC

29. On or about June 9, 2004, through a “Data License and List Management Agreement,” Gratis sold email marketer Datran Media, LLC (“Datran”) access to the names, postal addresses, e-mail addresses, telephone numbers, and IP addresses of approximately 7,200,000 consumers (referred to as the “initial file”).<sup>3</sup> Exh. 9 at 1 and Exhibit A, ¶ 1.1 (Datran Agreement); Exh. 14 at 1 (Email from Peter Martin to Susan Weiner, dated June 11, 2004; Email from Susan Weiner to Peter Martin, dated June 11, 2004) (confirming the transfer of “7.2 + mm

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<sup>2</sup> Under its license agreements with the email marketing companies, Gratis was to share two types of consumer information with the email marketers: consumer information it already had collected from its web sites (referred to in the license agreements as, among other terms, an “initial file,”) and consumer information Gratis was to collect from its web sites going forward (referred to in the agreements as “live feed” data). Exh. 9 at Exhibit A, ¶ 1.2 (Datran Agreement); Exh. 10 at Exhibit A, ¶ A (JDR Agreement); Exh. 11 at Exhibit A, ¶ 3 (Jumpstart Agreement). The allegations herein pertain solely to the initial file data, which (unlike the live feed data) was collected during the relevant time period.

<sup>3</sup> Upon receipt, Datran ran a “scrub” process, which removed duplicate, outdated, and inaccurate information, leaving it with more than 6,000,000 valid email addresses, which it then used. Exh. 12 (Transcript of Alan Laifer’s Hearing, dated September 20, 2005 (“Laifer Hrg. Tr.”) at 28:9-28:15; 35:23-36:13); Exh. 13 (Datran Import Analysis).

records”); Exh. 3 (Martin Hrg. Tr. at 29:9-30:14 and Hrg. Exhibit 4) (testimony regarding records “delivered to Datran by Gratis”). Datran is located in New York County, New York, where it has its offices.

30. The Gratis-Datran agreement contemplated that Datran would “use the Data to prospect on behalf of itself and/or Customers,” and that Datran or its “third-party service provider(s) will execute and deliver all e-mail communications related to any such e-mail prospecting.” Exh. 9 at Exhibit A, ¶ 3 (Datran Agreement). The primary restriction on Datran’s marketing efforts (set forth in an email), was that Datran avoid sending emails promoting certain of Gratis’s competitors. Exh. 14 at 3-4 (Email from Peter Martin to Susan Weiner, dated June 9, 2004).<sup>4</sup>

31. In exchange, Datran shared with Gratis one half of the revenue Datran would receive from its own advertising clients, for sending millions of emails on those clients’ behalf. Exh. 9 at Exhibit A, ¶ 4 (Datran Agreement).

**(ii) Gratis’s Agreement with JDR Media, Inc.**

32. Gratis’s next breach of its privacy promises occurred six months later. On or about December 20, 2004, through a “Data License Agreement,” Gratis sold email marketer JDR Media, Inc. (“JDR”) access to the email addresses and other personal information of approximately 7,572,425 consumers. Exh. 15, ¶ 14 (Affidavit of Siby Thomas, dated March 20, 2006 (“Thomas Aff.")). According to this agreement, JDR was given access to email addresses

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<sup>4</sup> In addition to this restriction, Datran was only permitted to share the information under similar contractual restrictions; Datran had limited rights to resell the information; Datran was prohibited from creating a “derivative product” from the data; and Datran was prohibited from “publicly display[ing] the Data on the Internet.” Exh. 9, ¶ 5.1 (Datran Agreement).

and “any other demographic . . . data as available,” which, according to a separate provision, included “names, physical addresses and email addresses.” Exh. 10 at 1 and Exhibit A, ¶ A (JDR Agreement).

33. This agreement contemplated that JDR would “use the Data to prospect on behalf of itself and its clients,” subject to the limited restriction that JDR would avoid sending emails on behalf of the following companies: AzoogleAds.com, CoverClicks, Metareward, SubscriberBASE, Theuseful, and YFDirect. JDR was also restricted from sending emails that promoted Gratis. Exh. 10 at Exhibit A, ¶ C (JDR Agreement).

34. In exchange, JDR was to share with Gratis one half of the revenue JDR would receive from its own advertising clients, for sending millions of emails on those clients’ behalf. Exh. 10 at Exhibit A (JDR Agreement).

35. Based on available evidence (including a copy of the initial file Gratis sold to JDR), it is impossible to determine precisely how many of the 7,572,425 consumer records were licensed to JDR in violation of Gratis’s privacy promises, as it is unclear how many of these records were collected prior to June 9, 2004, the time period during which the promises were made. See Exh. 15, ¶ 12 (Thomas Aff.). (It is unclear to what extent the consumer information provided to JDR overlapped with the consumer information that Gratis shared with Datran.)

36. However, an analysis of the initial file Gratis sold to Jumpstart Technologies, LLC (“Jumpstart”) in March 2005, only three months later (a copy of which Jumpstart provided to the Attorney General), reveals that 73 percent of those consumer records were collected prior to June 9, 2004, and thus subject to the restrictive privacy promises. See infra ¶ 40.

37. It is reasonable to apply this same percentage to Gratis's license of data to JDR, and thus to estimate that roughly 5,500,000 million (or 73 percent) of the consumer records Gratis licensed to JDR were similarly collected prior to June 9, 2004, i.e., during the time period when Gratis promised such information never would be shared. (This is conservative: it actually stands to reason that the file JDR received in December 2004 had a higher percentage of pre-June 2004 records than did the file Jumpstart received in March 2005, given that Jumpstart's file also included data collected in January, February, and March 2005.)

**(iii) Gratis's Agreement with Jumpstart Technologies, LLC**

38. On or about March 22, 2005, through a "Data License and List Management Agreement," Gratis sold email marketer Jumpstart access to approximately 1,880,382 names, Hotmail and MSN email addresses, and IP addresses it had collected. Exh. 11 at Exhibit A, ¶ 1 (Jumpstart Agreement). See also Exh. 16 (Email from Vadim Brusilovsky (of Jumpstart) to "Dylan" (of Jumpstart), dated March 25, 2005). This agreement contemplated that Jumpstart would "contact and market offers to Users listed on the [initial file] via e-mail." Exh. 11, ¶ 1.2 (Jumpstart Agreement). The only restrictions on such marketing were that Jumpstart would not send emails on behalf of certain of Gratis's competitors, Exh. 11, ¶ 1.4 (Jumpstart Agreement), and would not send obscene, illegal, racist, or hate-oriented emails. Exh. 11, ¶ 1.3 (Jumpstart Agreement).

39. In exchange, Jumpstart was to share with Gratis 30 percent of the revenue Jumpstart would receive from its own advertising clients, for sending millions of emails on those clients' behalf. Exh. 11, ¶ 2.1 (Jumpstart Agreement).

40. According to evidence provided by Jumpstart and analyzed by the Office of the Attorney General, approximately 1,370,150 of these consumer records (or 73 percent of 1,880,382) were collected by Gratis prior to June 9, 2004, when Gratis had promised consumers it would not share their data.. Exh. 15, ¶¶ 2-9 (Thomas Aff.). (The extent of overlap between the records Jumpstart received from Gratis, and the records Datran and JDR received from Gratis, is unclear.)

**D. Gratis Made Deceptive Statements to the Email Marketers With Whom It Dealt, Regarding Its Rights to Share Consumers' Personal Information**

41. Gratis committed further deceptive practices in its representations to Datran, JDR, and Jumpstart, representing that it had received consumers' permission to share their data, though it clearly had not.

42. In its agreement with JDR, Gratis falsely warranted that "the Data consists of record of persons who have opted to receive third party commercial email advertising messages." Exh. 10 ¶ 11 (JDR Agreement).

43. Gratis made even broader misrepresentations to Jumpstart. It misrepresented to Jumpstart that "[t]he [initial file] has been lawfully collected from consumers pursuant to a notice in [Gratis]'s Privacy Policy that advised them that their personal data was being collected and of the intended uses of that data . . . ." Exh.11, ¶ 6.1(g) (Jumpstart Agreement). In that same paragraph of the Jumpstart Agreement, Gratis misrepresented that it was "not bound by any contract or arrangement of any kind that conflicts with the terms of this Agreement" – failing to disclose the privacy promises posted on Gratis's own web sites. Exh. 11, ¶ 6.1(b) (Jumpstart Agreement). Finally, Gratis misrepresented that "[t]he [initial file] consists of only those Users

that have given Affirmative consent to receiving marketing offers from third-parties for products and services via email . . .” – another plainly false statement. Exh. 11, ¶ 6.1(h) (Jumpstart Agreement).

44. In its agreement with Datran, Gratis similarly warranted that the data being shared consisted of “records of persons who have supplied Affirmative Consent (as defined in the CAN-SPAM Act of 2003) to receive third party commercial e-mail advertising messages[.]” Exh. 9, ¶ 11.1(c) (Datran Agreement).<sup>5</sup>

**E. The Email Marketers were Independent Parties, not Agents of Gratis**

45. During this office’s investigation, Gratis has taken the disingenuous (at best) position that it did not breach its privacy promises because the email marketers to whom it sold access to consumer information were in effect its agents, acting on its behalf. See, e.g., Exh. 4 at 1 (June 9, 2005 Written Responses) (“Datran . . . acted on behalf of Gratis in handling the logistics of the Gratis House Email Marketing list[.]”). Using terms such as “list management service provider,” Gratis apparently views Datran (and the other email marketers) akin to an in-house, rather than independent, party. Exh. 4 at 3 (June 9, 2005 Written Responses) (“Datran acted as Gratis’s list management service provider[.]”).

46. Gratis thus persistently has taken the factually absurd position that “[a]t all times during its existence . . . Gratis has never sold, rented, or lent email addresses or personal information of its users to any third-party and the company has always maintained control over

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<sup>5</sup> Notwithstanding this deceptive statement in their agreement, Datran apparently knew about, or discovered, the restrictions on the data, prior to accepting it. For this and related practices, Datran entered into a voluntary Assurance of Discontinuance with the Attorney General dated March 6, 2006, and paid penalties, disgorgement, and costs amounting to \$1,100,000.

and ownership of such information.” Exh. 4 at 1 (June 9, 2005 Written Responses).

47. This factual assertion, which the Attorney General anticipates Gratis will again assert here, is plainly, demonstrably false. So disingenuous (if not an outright lie) is Gratis’s claim that it “has never sold, rented, or lent email addresses or personal information of its users to any third-party” (supra ¶ 46), that its own Director of Marketing for Advertiser Services, Rani Nagpal,<sup>6</sup> has described Gratis’s agreement with Datran as a rental of consumers’ information. Exh. 17 at 2 (Email from Rani Nagpal to Heidi Berger of non-profit privacy group TRUSTe, dated August 5, 2004) (stating “I think there was some miscommunication about our email list: we just started renting it out to one company[.]”).

48. Moreover, Gratis’s contracts with each of the email marketers make clear that the parties are independent contractors, and not agents. The agreements with Datran and JDR each provide that:

The parties to this Agreement are independent contractors. There is no relationship of partnership, agency, employment, franchise or joint venture between the parties. Neither party has the authority to bind the other or incur any obligation on its behalf.

See Exh. 9, ¶ 19.7 (Datran Agreement); Exh. 10, ¶ 21 (JDR Agreement). The agreement with Jumpstart similarly provides:

The Parties are independent contracting entities and there is not any partnership or agency relationship between them. Neither of the Parties will represent to third parties that it is the agent or representative of the other.

Exh. 11, ¶ 12 (Jumpstart Agreement).

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<sup>6</sup> On January 4, 2006, an Attorney General Investigator called Gratis’s switchboard, which confirmed that Ms. Nagpal has this title. It is unclear whether she held this same title in August 2004.

49. By their own terms, the agreements thus make plain that the email marketers were independent and that Gratis, therefore, was not permitted to share consumer information with them.

50. Other facts make these independent relationships clear as well. Each marketer had clients wholly separate from Gratis. It was on behalf of those clients (and not Gratis) that they sent emails. See supra ¶ 30 (Datran acted on behalf of “itself and/or customers,” and ¶ 33 (JDR acted on behalf of “itself and its clients”).

51. Moreover, it was the purchasers (or “licensees”) of the lists, not Gratis, who controlled the email campaigns to Gratis’s users. The Jumpstart Agreement specifically provides that:

[J]umpstart shall have sole and exclusive management of all Campaigns, including the management and selection of third-party advertisers and advertising networks, soliciting and contracting with third-party advertisers and advertising networks, the pricing and selection of products and services offered and the content, timing and placement of all offers.

Exh. 11, ¶ 1.6 (Jumpstart Agreement).

52. Gratis cannot deny any of this. Gratis admitted that Datran is an independent company, having no corporate relationship to Gratis, separate offices, and separate officers and directors. Exh. 3 (Martin Hrg. Tr. at 59:21-60:15). Similarly, Gratis admitted that it did not place any hard or fast limitations on Datran’s use of the 7,200,000 consumer records. Exh. 3 (Martin Hrg. Tr. at 70:10-70:21; 72:13- 73:10). Rather, Gratis understood that Datran would send “their own” promotions and emails to the email addresses. Exh. 17 at 1 (Email from Rani Nagpal to Heidi Berger, dated August 6, 2004).

53. Nor did Gratis participate in the negotiations between Datran and Datran's advertiser clients. Exh. 3 (Martin Hrg. Tr. at 62:10-62:22). Gratis did not draft the graphical and textual content of the commercial emails sent on behalf of Datran's advertiser clients. Exh. 3 (Martin Hrg. Tr. at 85:13-85:23). It certainly did not make hiring decisions for Datran, nor did it monitor Datran's employees' behavior. Exh. 3 (Martin Hrg. Tr. at 60:10-60:15). Indeed, once Gratis sent Datran the initial file of consumer records, it did not even "know the physical location of those servers" on which the initial file resided. Exh. 3 (Martin Hrg. Tr. at 55:5-55:15). Rather, the file resided on Datran's servers, or on servers under Datran's control. Exh. 3 (Martin Hrg. Tr. at 57:11-57:17).

**F. Datran, JDR and Jumpstart Send Consumers Millions of Unwanted, Unsolicited Emails**

54. Datran sent huge volumes of unexpected and unsolicited emails to the email addresses it obtained from Gratis. The precise number cannot be determined, but is in the tens, if not hundreds, of millions. By its own (presumably quite conservative) estimate, after Gratis delivered (into New York) its users' records, Datran sent (from New York) between 85,000,000 and 100,000,000 unsolicited emails to the approximately 6,000,000 email addresses that it used from the initial file Gratis provided. See Exh. 12 (Laifer Hrg. Tr. at 85:19-86:3).

55. By its own estimate, Jumpstart sent approximately 41,343,000 emails to the email addresses in its initial file. Exh. 18 (Email from Louis Willacy to Karen A. Geduldig, dated November 4, 2005 with attachment). As discussed supra at ¶ 40, roughly 73 percent of these addresses were collected when Gratis's privacy promises were in place and thus should not have been shared. Thus, roughly 73 percent of the unsolicited emails (and in any event, certainly a

high percentage of them) were likely sent to consumers whom Gratis promised it would never share their email addresses with third parties.

56. JDR sent approximately 200,634,435 commercial emails to the 7,572,425 email addresses in its initial file. Exh. 19 (Letter from David E. Rosen to Karen A. Geduldig, dated January 25, 2006). Using the same estimate as in the prior paragraph, roughly 150,000,000 emails were probably sent to users whose email addresses were collected when Gratis's privacy promises were in place, and which thus wrongfully were shared.

57. Accepting these companies' own presumably conservative estimates (and accounting for the "scrubbing" of inaccurate data, supra note 3), this amounts to multiple unsolicited emails sent by third parties to each Gratis user – each of whom received a promise from Gratis that it would never "give out, sell, or lend" their email address.

#### **G. Revenue Earned by Gratis**

58. Between August 2004 and May 2005, Gratis received approximately \$367,012 from Datran. Exh. 20 (Datran Media Vendor Quick Report June 1, 2003 through June 20, 2005); Exh. 12 (Laifer Hrg. Tr. at 92:10-93:23). An indeterminate portion of this revenue is attributable to the impermissibly shared email addresses (as opposed to the "live feed" addresses). See supra note 2.

59. Between February 2005 and July 2005, Gratis received approximately \$68,718 from JDR. Exh. 21 at 2 (Letter from Pressly M. Millen to Karen A. Geduldig, dated August 12, 2005 ("August 12, 2005 Written Responses")). An indeterminate portion of this revenue is attributable to the impermissibly shared email addresses (as opposed to the "live feed" addresses). Exh. 21 at 2 (August 12, 2005 Written Responses).

60. Between April 2005 and July 2005, Gratis received approximately \$22,613 from Jumpstart. Exh. 21 at 2 (August 12, 2005 Written Responses). An indeterminate portion of this revenue is attributable to the impermissibly shared email addresses (as opposed to the “live feed” addresses). Exh. 21 at 2 (August 12, 2005 Written Responses).

61. In addition, Gratis unjustly earned several million dollars in commissions from third parties, by providing those parties with consumers for promotions even through the consumers were deceptively promised that Gratis would not share their information. Gratis’s revenue in 2004 alone was approximately \$20,000,000. Exh. 3 (Martin Hrg. Tr. at 117:16-117:19). That same year, Martin and Jewell individually earned between \$1,500,000 and \$3,000,000. Exh. 3 (Martin Hrg. Tr. at 118:20-118:22; 119:11-119:14; 120:5-120:10).

**H. Respondents Robert Jewell and Peter Martin are Personally Liable for Gratis’s Deceptive Marketing Practices**

62. Gratis’s co-Presidents, respondents Jewell and Martin, directed and carried out virtually each step of the deceptive practices at issue. They drafted the policies that promised consumers Gratis would never share their personal information and email addresses with third parties. Exh. 3 (Martin Hrg. Tr. at 22:18-22:21). They also drafted the similar privacy promise on the Gratis sites’ sign-up pages, on which consumers registered to receive free items. Exh. 3 (Martin Hrg. Tr. at 44:19-45:7). Martin testified that he himself “looked at the web pages every day.” Exh. 3 (Martin Hrg. Tr. at 99:10-99:11.)

63. After making these privacy promises to more than seven million consumers, Jewell and Martin made the decision to share these consumers’ information with Datran, JDR, and Jumpstart. Jewell and Martin each reviewed and approved Gratis’s licensing agreements

with the email marketers, discussed above, which contained deceptive representations and warranties regarding Gratis's right to share the consumer data. Exh. 3 (Martin Hrg. Tr. at 16:12-17:13).

64. Martin executed the Datran Agreement. Exh. 9 at 7 (Datran Agreement). Jewell executed the JDR and Jumpstart Agreements. Exh. 10 at 4 (JDR Agreement); Exh. 11 at 10 (Jumpstart Agreement).

65. Martin plainly knew that Gratis's restrictive privacy promises were inconsistent with sharing consumer information with third parties, yet went ahead with the agreements anyway. In fact, on June 9, 2004, the date of the Datran Agreement, Susan Weiner, Datran's then-Director of Sales, called to Martin's attention his web site's promise, "Please note that we do not provide your E-mail address to our business partners." Exh. 22 at 1 (Email from Susan Weiner to Peter Martin, dated June 9, 2004).

66. Weiner told Martin that this promise had to be removed "for obvious reasons" before she could "submit [the Datran Agreement] to my legal dept for sign-off!" Exh. 22 at 1 (Email from Susan Weiner to Peter Martin, dated June 9, 2004). The next day, Weiner requested that Martin also remove from Gratis's web site two promises that read: "we will never sell your name or information to anyone," and "We at FreeCds.com respect your privacy and do not sell any personally identifiable information regarding our customers to any third party." Exh. 14 at 2-3 (Email from Susan Weiner to Peter Martin, dated June 10, 2004).

67. Immediately after removing all of the privacy promises from Gratis's web sites, Martin confirmed that Gratis had delivered, and Datran received, 7,200,000 email addresses – email addresses Martin knew were governed by the "do not sell" promises. Exh. 14 at 1 (Email

from Peter Martin to Susan Weiner, dated June 11, 2004; Email from Susan Weiner to Peter Martin, dated June 11, 2004).

**I. Pre-Litigation Notice**

68. Pre-litigation notice as provided for in New York General Business Law §§ 349 and 350-c has been given, by certified mail delivered on five or more days notice to respondents. See accompanying Verified Petition at Tab A (certified letters to respondents and counsel containing Notice of Proposed Litigation).

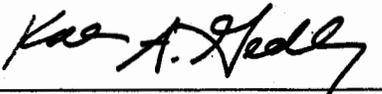
**Conclusion**

69. Respondents must be held accountable for their blatant deceit of consumers. They lured millions of consumers into submitting personal information to them, promising that it would be kept out of the hands of third parties. Instead, respondents sold access to these lists of personal information to email marketers, in exchange for quick cash payments.

70. Even when this particularly sneaky practice (unlikely ever to have been discovered) came to this office's attention, respondents misleadingly argued that "Gratis has never sold, rented, or lent email addresses or personal information of its users to any third-party[.]"

71. The relief requested in the accompanying Verified Petition requires that respondents answer for their deceptive, illegal, and fraudulent business practices.

Dated: New York, New York  
March 21, 2006

  
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Karen A. Geduldig