

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

NEW YORK
COUNTY CLERK'S OFFICE

MAR 22 2006

NOT COMPARED
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THE PEOPLE OF THE STATE OF :
NEW YORK, by ELIOT SPITZER, :
Attorney General of the State of New York, :
 :
Petitioners, :
 :
-against- :
 :
GRATIS INTERNET, INC. :
a/k/a FREEPAY, ROBERT JEWELL, :
individually, and PETER MARTIN, :
individually, :
Respondents. :
-----X

NOTICE OF
VERIFIED PETITION

Index No.: 401210/06

PLEASE TAKE NOTICE, that upon the annexed Verified Petition, verified on March 22, 2006, and the accompanying Affirmation of Assistant Attorney General Karen A. Geduldig, executed March 21, 2006, with exhibits annexed, Petitioners will move this Court, Motion Support Office Courtroom, at Room 130 of 60 Centre Street, New York, New York, on the 24th day of April, 2006, at 9:30 o'clock in the forenoon or as soon thereafter as counsel may be heard, for a Judgment and Order:

WHEREFORE, Petitioners request that this court grant relief pursuant to Executive Law § 63(12) and General Business Law §§ 349 and 350, against respondents by issuing an Order and Judgment as follows:

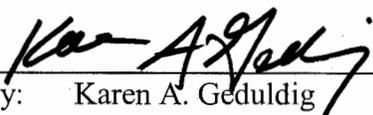
- i. permanently enjoining respondents from further engaging in any of the fraudulent, deceptive, and/or illegal acts and practices alleged herein;
- ii. directing respondents to maintain adequate records relating to its collection of data from consumers or users, including:

- (a) a copy of every privacy policy, or statement regarding privacy or sharing of information, appearing on their sites, and a record of any amendment of such policies or statements, including the date on which such amendment occurred;
 - (b) a copy of every sale, license, rental, or other method by which any collected information has been shared with any third party; and
 - (c) as to any retained consumer information, a searchable record of when, and from what web site(s), such information was collected;
- iii. directing that a money judgment be entered against each and all respondents in the sum of unjust enrichment and/or damages;
- iv. directing that a money judgment for civil penalties pursuant to G.B.L. § 350-d be entered against each and all respondents in favor of the State of New York, based upon the sum of \$500, or such other amount as the Court deems appropriate, per each instance of a deceptive or unlawful practice; namely, per each user record that was wrongfully delivered into the State of New York, and per each user record wrongfully shared with any entity, where such user record was likely (based upon direct evidence or extrapolation) that of a New York user;
- v. directing that a money judgment be entered against respondents in favor of petitioners in the sum of \$2,000 against each respondent, pursuant to C.P.L.R. § 8303(a)(6) and for costs; and

vi. granting Petitioners such other and further relief as this Court finds just
and proper.

Date: March 22, 2006
New York, New York

**ELIOT SPITZER
ATTORNEY GENERAL
OF THE STATE OF NEW YORK**


By: Karen A. Geduldig
Internet Bureau
Attorney for Petitioner
120 Broadway, 3rd Floor
New York, New York 10271
(212) 416-8433

KENNETH M. DREIFACH
Assistant Attorney General In Charge
Internet Bureau

KAREN A. GEDULDIG
Assistant Attorney General
Of Counsel

clients.

3. 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.

4. During the relevant time period, Gratis was a closely held company, owned by its officers, the individual respondents, Peter Martin and Robert Jewell (“individual respondents”), who were its only directors. (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.

5. 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 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.

Parties

6. Petitioners are the People of the State of New York, by their attorney, Eliot Spitzer, Attorney General of the State of New York. Petitioners have offices in the County of New York, located at 120 Broadway, New York, New York.

7. Petitioners bring this summary proceeding pursuant to the Attorney General's authority under Executive Law § 63(12), and General Business Law ("GBL") §§ 349-350, and his common law authority, to enjoin respondents from engaging in persistent deceptive, fraudulent, and illegal practices, and false advertising, in the improper collection and/or sale of personal data from consumers, through web sites that they own and operate.

8. 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. As set forth in greater detail in the Affirmation of Karen Geduldig dated March 21, 2006 ("Geduldig Affirmation"), Gratis has engaged in deceptive practices and false advertising, in its operation of several web sites, and its violation of privacy policies on those web sites.

9. Respondents Jewell and Martin have at all times served as co-Presidents of Gratis as well as its Treasurer (Jewell) and Secretary (Martin).

Statutory Framework

10. GBL §§ 349 and 350 empower the Attorney General to seek injunctive relief when any person or entity has engaged in deceptive acts or practices, or false advertising, in the conduct of any business.

11. GBL § 350-d empowers the Attorney General to seek, *inter alia*, civil penalties in the amount of \$500 for each violation of GBL § 350, the False Advertising Statute, and/or of GBL § 349, the Deceptive Practices Statute. In addition, 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. Finally, under Civil Practice Law and Rule ("CPLR") § 8303(a)(6), the

Court may also award petitioners a sum not to exceed \$2,000.

Factual Allegations:

Gratis's Business Model

12. During the relevant time period, Gratis owned and 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"). On or about January 31, 2006, Gratis discontinued FreeDVDs.com, FreeVideoGames.com, FreeGiftPlanet.com, and FreeCDs.com. It continues to operate FreeiPods.com and FreeCondoms.com.

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

14. In order for consumers to get these free products, they have been required by Gratis to participate in at least one of a range of promotions that its sites offer on behalf of third party retailers and service providers. These promotions often involve a free trial of a service, with the third party companies hoping to acquire permanent consumers.

15. In turn, these third party companies pay Gratis between \$20 and \$70 per participating consumer. Three of the many examples of such offers include a "FREE 30 day trial" of GamePass offered by RealArcade; an offer of 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.

16. In addition to requiring consumers to accept at least one such promotional offer, Gratis requires consumers to refer friends to its site, the requisite number varying with the "free" product sought. For instance, a consumer must generate three referrals in order to receive an

iPod Shuffle audio player, but 20 to get a free laptop.

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

18. To participate in the offers on Gratis's web sites, consumers must also submit to Gratis an email address, unique password, postal address, and telephone number.

19. Gratis has operated its web sites in this manner from in or about February 2000 to the present.

20. Respondents Jewell and Martin founded Gratis in February 2000. During the relevant time period, each owned 50 percent of the company and were its only directors. Jewell and Martin were responsible for all web site content on Gratis's sites.

Gratis Makes Privacy Promises to Consumers

21. During the relevant time period, 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."

See Geduldig Affirmation ¶ 22 and accompanying Exhibits.

23. These promises were identical on each Gratis site. Gratis placed these promises on its sites on or about the following dates:

WEB SITE	DATE
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

24. Beginning sometime in 2003, Gratis made an additional privacy promise to consumers, on the web pages on which consumers signed up for free offers, promising that it “does not . . . sell/rent emails,” presumably meaning consumers’ email addresses. This promise was conspicuously placed immediately below the field where consumers were asked to submit their email addresses and unique passwords.

25. This promise existed on the Gratis sites’ sign-up pages from sometime in 2003 through June 9, 2004.

Gratis Violates its Privacy Promises

26. All of the above statements that Gratis made to consumers, set forth herein at ¶¶ 22 and 24, 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.

27. Gratis sold, or “licensed” access to its users’ personal information, to three separate email marketing companies: Datran Media, LLC, JDR Media, Inc., and Jumpstart Technologies, LLC. Each of those entities in turn used this information to send millions of unsolicited emails (often known as “spam”), on behalf of each entity’s own advertising clients. Gratis’s transactions with each of these companies are discussed below, and in greater detail in the Geduldig Affirmation.¹

28. First, on or about June 9, 2004, through a “Data License and List Management Agreement,” Gratis “licensed,” or sold email marketer Datran Media, LLC (“Datran”) access to names, postal addresses, e-mail addresses, telephone numbers, and IP addresses of approximately 7,200,000 consumers.² Datran is located in New York County, New York, where it has offices. 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.” 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.

¹ 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). The allegations herein pertain solely to the initial file data, which (unlike the live feed data) was collected during the relevant time period.

² Upon receipt, Datran determined approximately 1,200,000 of these consumer records to be incomplete, inaccurate, outdated, or duplicated, leaving Datran with approximately 6,000,000 consumer records that it thereafter used.

29. Gratis's next breach of its privacy promises occurred six months later. On or about December 20, 2004, through a "Data License Agreement," Gratis "licensed," or sold email marketer JDR Media, Inc. ("JDR") access to the email addresses and other personal information of approximately 7,572,425 consumers, a large but indeterminate number of which were likely collected during the time period when Gratis's restrictive privacy promises applied. By this agreement, Gratis shared with JDR consumers' email addresses and "any other demographic . . . data as available," which in turn, according to a separate provision, apparently included "names, physical addresses and email addresses." The agreement contemplated that JDR would "use the Data to prospect on behalf of itself and its clients." (It is unclear to what extent the consumer information provided to JDR overlapped in content with the list that Gratis shared with Datran.) 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.

30. On or about March 22, 2005, through a "Data License and List Management Agreement," Gratis sold email marketer Jumpstart Technologies, LLC ("Jumpstart") access to approximately 1,880,382 names, email addresses, and IP addresses it had collected, all of which had Hotmail or MSN email addresses. More than 1,300,000 of these records were collected when Gratis's restrictive privacy promises were in place, and thus were improperly shared. This agreement contemplated that Jumpstart would "contact and market offers to Users listed on the Mailing List via e-mail." (It is unclear to what extent the customer information on this list overlapped in content with the lists that Gratis shared with JDR and Datran.) 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.

31. Gratis committed further deceptive practices by making false representations in its agreements with Datran, JDR, and Jumpstart. Namely, Gratis falsely represented to each that it had received its users' permission to share the data.

32. 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." See Geduldig Affirmation ¶ 42.

33. Gratis misrepresented to Jumpstart that "[t]he [initial file] has been lawfully collected from consumers pursuant to a notice in Licensor's Privacy Policy that advised them that their personal data was being collected and of the intended uses of that data" In that same paragraph of the Jumpstart Agreement, Gratis misrepresented that the files "consist[ed] of only those Users that have given Affirmative consent to receiving marketing offers from third-parties for products and services via email," and 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. See Geduldig Affirmation ¶ 43.

34. 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[.]" See Geduldig Affirmation ¶ 44.

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

35. By its own (presumably 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 email addresses that Gratis provided to it.

36. By its own estimate, Jumpstart sent approximately 41,343,000 commercial emails to the email addresses that Gratis provided to it. A high percentage of these emails (based on estimates described in the Geduldig Affirmation, roughly 73 percent) were sent to consumers whose addresses were collected during the relevant time period, when Gratis promised it would never share users' email addresses with third parties.

37. JDR sent approximately 200,634,435 commercial emails to the email addresses Gratis provided to it. Based on estimates described in the Geduldig Affirmation, roughly 73 percent of the JDR emails were sent to users whose email addresses were collected when Gratis promised it would never share users' email addresses with third parties.

Revenue Earned by Gratis

38. Between August 2004 and May 2005, Gratis received approximately \$367,012 from Datran. Between February 2005 and July 2005 Gratis received approximately \$68,718 from JDR. Between April 2005 and July 2005, Gratis received approximately \$22,613 from Jumpstart. An indeterminate portion of this revenue is attributable, respectively, to the illegally shared files.

39. 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.

**Respondents Jewell and Martin are
Personally Liable for Gratis's Deceptive Marketing Practices**

40. 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. They also drafted the similar privacy promise on the Gratis sites' sign-up pages, on which consumers registered to receive free items. Martin has testified that he himself "looked at the web pages every day."

41. 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 Datran, JDR, and Jumpstart, which contained deceptive representations and warranties regarding Gratis's right to share the consumer data.

42. Martin executed the Datran Agreement. Jewell executed the JDR and Jumpstart Agreements.

Pre-Litigation Notice

43. 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 Tab A (certified letters to respondents and counsel containing Notice of Proposed Litigation).

**FIRST CAUSE OF ACTION AGAINST ALL RESPONDENTS
(DECEPTIVE ACTS AND PRACTICES)**

44. By engaging in the acts and practices described above, respondents repeatedly and persistently have engaged in deceptive business practices in violation of GBL § 349.

45. GBL § 349 makes unlawful “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any services in [New York].”

46. Respondents’ violations of GBL § 349 constitute repeated and persistent illegal conduct in violation of Executive Law § 63(12).

**SECOND CAUSE OF ACTION AGAINST ALL RESPONDENTS
(FALSE ADVERTISING)**

47. GBL § 350 makes unlawful “false advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state.”

48. By repeatedly and persistently engaging in the acts and practices described above, respondents repeatedly and persistently have engaged in false advertising in violation of GBL § 350.

49. Respondents’ violations of GBL § 350 constitute repeated and persistent illegal conduct in violation of Executive Law § 63(12).

**THIRD CAUSE OF ACTION AGAINST ALL RESPONDENTS
(FRAUDULENT CONDUCT IN
VIOLATION OF EXECUTIVE LAW § 63(12))**

50. Executive Law § 63(12) prohibits “repeated fraudulent or illegal acts [and] persistent fraud or illegality in the carrying on, conducting or transaction of business” in the State of New York.

51. By repeatedly and persistently engaging in the acts and practices described

above, respondents have violated Executive Law § 63(12).

WHEREFORE, Petitioners request that this Court grant relief pursuant to Executive Law § 63(12), General Business Law §§ 349 and 350, and New York common law, against respondents by issuing an Order and Judgment as follows:

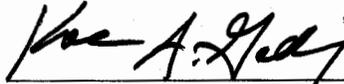
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- iv. directing that a money judgment for civil penalties pursuant to G.B.L. § 350-d be entered against each and all respondents in favor of the State of New York, based upon the sum of \$500, or such other amount as the Court deems appropriate, per each instance of a deceptive or unlawful

practice; namely, per each user record that was wrongfully delivered into the State of New York, and per each user record wrongfully shared with any entity, where such user record was likely (based upon direct evidence or extrapolation) that of a New York user;

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Date: March 22, 2006
New York, New York

**ELIOT SPITZER
ATTORNEY GENERAL
OF THE STATE OF NEW YORK**



By: Karen A. Geduldig
Internet Bureau
Attorney for Petitioner
120 Broadway, 3rd Floor
New York, New York 10271
(212) 416-8433

KENNETH M. DREIFACH
Assistant Attorney General In Charge
Internet Bureau

KAREN A. GEDULDIG
Assistant Attorney General
Of Counsel

above, respondents have violated Executive Law § 63(12).

WHEREFORE, Petitioners request that this Court grant relief pursuant to Executive Law § 63(12), General Business Law §§ 349 and 350, and New York common law, against respondents by issuing an Order and Judgment as follows:

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**SUPREME COURT OF THE STATE OF NEW YORK
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a/k/a FREEPAY, ROBERT JEWELL, :
individually, and PETER MARTIN, :
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Respondents. :
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VERIFICATION

Index No.: _____

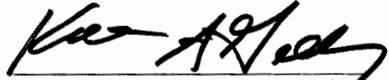
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

KAREN A. GEDULDIG, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of ELIOT SPITZER, Attorney General of the State of New York, and am duly authorized to make this verification.

I have read the foregoing petition and know the contents thereof, which is to my knowledge true, except as to matters stated to be alleged upon information and belief, and as to those matters, I believe them to be true. The grounds of my belief as to all matters stated upon information and belief are investigatory materials contained in the files of the Attorney General's office.

The reason this verification is not by petitioners is that petitioners are a body of politic and the Attorney General is their duly authorized representative.


KAREN A. GEDULDIG

Tab A



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
www.oag.state.ny.us

ELIOT SPITZER
Attorney General

DIETRICH L. SNELL
Deputy Attorney General
Division of Public Advocacy

**NOTICE OF PROPOSED LITIGATION
PURSUANT TO SECTION 12 OF NEW YORK
EXECUTIVE LAW AND SECTIONS 349 AND 350
OF THE NEW YORK GENERAL BUSINESS LAW**

KENNETH M. DREIFACH
Assistant Attorney General In Charge
Internet Bureau

March 3, 2006

By Certified Mail

Mr. Peter Martin
Mr. Robert Jewell
Gratis Internet, Inc.
700 12th Street, NW, Suite 1050
Washington, DC 20005

Re: State of New York v. Gratis Internet, Inc. a/k/a FreePay, et al.

Dear Messrs. Martin and Jewell:

You are hereby notified that it is the intention of the Attorney General to commence litigation against Gratis Internet, Inc. a/k/a FreePay ("Gratis"), Peter Martin, and Robert Jewell pursuant to New York Executive Law Section 63(12) and General Business Law ("GBL") Sections 349 and 350 to enjoin various unlawful and deceptive acts and practices and to obtain disgorgement, civil penalties, costs and/or such other relief as the Court may deem proper pursuant to those Sections. The acts and practices complained of consist of:

1. repeatedly and persistently engaging in deceptive acts and practices in connection with the collection of consumers' names, email addresses, physical addresses, telephone numbers, and/or IP addresses (collectively "personal consumer information");
2. repeatedly and persistently engaging in deceptive acts and practices in connection with the sale, rental, license, disclosure, and/or sharing of personal consumer information with third parties; and

3. repeatedly and persistently engaging in deceptive acts and practices in connection with misrepresentations made to third parties as to Gratis's authority or ability to sell, rent, license, disclose, and/or otherwise share personal consumer information.

Please be advised that, pursuant to Sections 349(c) and 350-c of the GBL, you are hereby afforded the opportunity to show orally or in writing, within five business days after receipt of this notice, why such proceedings should not be instituted.

Sincerely,



Karen A. Geduldig
Assistant Attorney General
Internet Bureau
(212) 416-6307



Kenneth M. Dreifach
Assistant Attorney General in Charge
Internet Bureau

cc: *By Certified Mail*
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Womble Carlyle Sandridge & Rice
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Raleigh, North Carolina 27601