COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

TRIAL COURT OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT
SMALL CLAIMS SESSION

JONATHAN KAMENS

Plaintiff,

v.

BENCHMARK BRANDS, INC.

Defendant.

Docket No. 200508SC000261

ANSWER OF DEFENDANT, BENCHMARK BRANDS, INC.

As a preliminary matter, Benchmark Brands, Inc. ("Benchmark Brands") requests that this filing be accepted as both the Answer to the Complaint and appearance at the Magistrate trial scheduled for November 9, 2005 at 2:00 p.m.

For the reasons stated below, Plaintiff's claim fails to state a cause of action. Benchmark Brands, Inc. requests that the Court either dismiss the claim or, in the alternative, transfer the claim to the Court's regular civil docket pursuant to G.L.c. 218, § 24 and Local Rule 4.

Benchmark Brands is a Tennessee corporation with its principal place of business in Atlanta, Georgia. Benchmark Brands also maintains a distribution facility in Memphis, Tennessee. Benchmark Brands has no presence in the State of Massachusetts.

Benchmark Brands engages in direct to consumer sales of health, fitness and leisure products for the lower leg. Benchmark Brands sells its products through a mail order catalog and from its website.

The Plaintiff, Jonathan Kamens, is a former customer of Benchmark Brands. He claims to be aggrieved because he received over the Internet, electronic advertisements from Benchmark Brands. He alleges that Benchmark Brands failed to stop sending these advertisements after he requested that it do so. Mr. Kamens claims that these e-mail advertisements violate the CAN-SPAM Act, 15 USC §7701 et. seq. He also seems to claim that Benchmark Brands agreed to pay him $1,000 for every e-mail advertisement that Benchmark Brands sent to Mr. Kamens after he asked Benchmark Brands to stop. Neither claim is viable.

CAN-SPAM ACT

Attached to this answer, as Exhibit A is a copy of the Act. Congress was very specific in delineating who could bring an action under the Act. In 15 U.S.C. § 7706, Congress determined how the Act could be enforced. Congress limited the enforcement power to the Federal Trade Commission, certain other federal agencies, the several states and providers of Internet access service. Nowhere in the Act did Congress provide individual recipients of electronic mail, such as Mr. Kamens, with a cause of action under the Act. In his communications with Benchmark Brands (see Exhibit B) Mr. Kamens has stated that despite the language of his complaint, he is not pursuing a claim under the CAN-SPAM Act. ("Please note that I am not attempting to pursue private action under the CAN-SPAM act.") Mr. Kamens appears to recognize that as an individual, he does not have a cause of action under the Act.

BREACH OF CONTRACT

Mr. Kamens has waged a very public fight against Benchmark Brands over the e-mail advertisements that he received. Mr. Kames maintains a "blog" on the Internet on which he has posted information concerning his dispute with Benchmark Brands. A copy of these postings is

attached hereto as Exhibit B. These postings provide insight into Mr. Kamens' complaint and demonstrate the impropriety of his claim.

Mr. Kamens has attempted to construct a breach of contract claim based upon the following alleged facts:

1. As a former customer of Benchmark Brands, Mr. Kamens received electronic advertisements that he would have preferred not to receive;

2. Mr. Kamens responded via e-mail in accordance with Benchmark Brands' terms of use, that he no longer wished to receive e-mail communications from Benchmark Brands;

3. Mr. Kamens included in his electronic communication, a statement that if Benchmark Brands continued to send him unsolicited e-mails, he would bill Benchmark Brands at the rate of $1,000 per additional e-mail message;

4. Mr. Kamens stated in his electronic transmission that if Benchmark Brands responded in any way to his e-mail, it would amount to Benchmark Brands' acceptance of Mr. Kamens' right to charge $1,000 per e-mail received;

5. Benchmark Brands sent an electronic response indicating that it would remove Mr. Kamens from its e-mail list; this computer generated response did not make any mention of Mr. Kamens' threat to charge Benchmark Brands $1,000 for each additional e-mail; and

6. Mr. Kamens continued to receive e-mail from Benchmark Brands following Benchmark Brands' electronic indication that it would remove Mr. Kamens from its e-mail list.

By no stretch of the imagination or stretch of legal principals, did a contract come into existence based upon Mr. Kamens' e-mail and Benchmark Brands' computer generated response. First, there was no consideration to support an agreement by Benchmark Brands to pay Mr. Kamens $1,000 for each subsequent e-mail. Second, an automatic, computer generated response cannot represent the requisite intent to agree to the terms of Mr. Kamens' "offer." Furthermore, even if a contract could arise in these far fetched circumstances, Mr. Kamens would nonetheless have an obligation to mitigate his damages, which he has failed to do. The surreal character of

Mr. Kamens' claim is framed by Mr. Kamens' admission that he could have prevented the delivery of e-mail from Benchmark Brands at any time. He simply chose not to do so. As Mr. Kamens stated in a letter to Benchmark Brands that he posted on his blog:

> Although I appreciate your offer to compensate me for the time I spent dealing with your spam, I'm not in this for the money. I'm trying to get you to stop spamming not just me, but others as well. This is why I did not simply tell my email filters to discard your spam. (emphasis added)

Thus, it is clear that Mr. Kamens could have easily prevented the delivery of any subsequent email from Benchmark Brands. He simply elected not to do so. The law does not permit him to sit back and do nothing in an effort to enhance his damages.

CONCLUSION

Mr. Kamens is a crusader. If one reads all of the material posted on his blog concerning Benchmark Brands, it becomes clear that he has taken it upon himself to try to "teach Benchmark Brands a lesson." Mr. Kamens has used his extensive knowledge of how the on-line world works to attempt to set Benchmark Brands up. Mr. Kamens has hypothecated a contract from an automatic, computer-generated e-mail response that he knew he would receive, followed by the subsequent delivery of e-mail that Mr. Kamens could have blocked at his email filter at any time.

Benchmark Brands does not distribute Spam email. Benchmark Brands communicates electronically with those persons who have visited its website or otherwise made their e-mail addresses available to Benchmark Brands. Mr. Kamens' crusade against Benchmark Brands is misplaced.

Mr. Kamens is smart and creative, but he does not have a viable legal claim against Benchmark Brands. Benchmark Brands, therefore, respectfully requests that the Court either

dismiss Mr. Kamens' claim at Mr. Kamens' cost or transfer the case to the regular trial docket for further proceedings.

Respectfully submitted,

BENCHMARK BRANDS, INC.
By its attorney,

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