

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

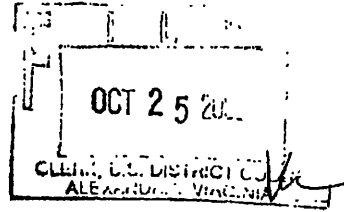
AMERICA ONLINE, INC.)

Plaintiff,)

v.)

[REDACTED])

Defendants.)



Civil Action No. [REDACTED]

Under Seal

REDACTED VERSION
FOR PUBLIC ACCESS

ORDER

For the reasons set forth in the accompanying
Memorandum Opinion, it is ORDERED that:

- Judgment is awarded in favor of the plaintiff, America Online, Inc., against the respondents, Joseph Warshowsky, Rolf Wicksell, Scott Young, American Barristers, [REDACTED] Data Manage, Inc., [REDACTED] Exotic, Ltd., Global Internet, Ltd., [REDACTED] Net Services, Inc., [REDACTED] Total Internet, Ltd., Trustee Accounting, Inc., Universal Asset Institute, Universal Documents, Byron Hatcher, Kim Reinhart-Hatcher, Jay Nelson and Hal Uhrig, jointly and severally in the amount of [REDACTED] for actual damages suffered by plaintiff and disgorgement of profits retained by the respondents, less payments made by settling co-contemnors in this contempt action.

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2. Judgment is awarded in favor of the plaintiff against the respondents, Joseph Warshowsky, Rolf Wicksell, Scott Young, American Barristers, [REDACTED] Data Manage, Inc., [REDACTED] Exotic, Ltd., Global Internet, Ltd., [REDACTED] Net Services, Inc., [REDACTED] Total Internet, Ltd., Trustee Accounting, Inc., Universal Asset Institute, Universal Documents, Byron Hatcher, Kim Reinhart-Hatcher, Jay Nelson and Hal Uhrig, jointly and severally, in the amount of [REDACTED] for attorneys' fees and costs.
3. The Court's February 10, 1999 injunction remains in full effect indefinitely.
4. The Clerk of the Court shall forward copies of this Order and the accompanying Memorandum Opinion to all counsel of record.

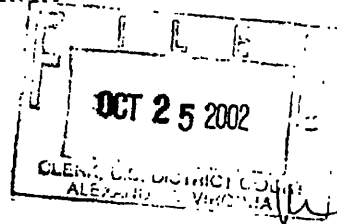
October 25th, 2002
Alexandria, Virginia


UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

AMERICA ONLINE, INC.)
)
Plaintiff,)
)
v.)
)
[REDACTED])
)
Defendants.)



Civil Action No. [REDACTED]
Under Seal

MEMORANDUM OPINION

This matter concerns the assessment of damages arising out of the civil contempt of the February 16, 1999, Order (the "Injunction") prohibiting CN Productions, Inc., Jay Nelson, and their agents, assignees, and those in privity with them, from, inter alia, sending un-solicited bulk electronic mail to America Online, Inc. ("AOL"), or its customers. (See Feb. 16, 1999, Order.)

A prolonged and tortuous period of discovery commenced after AOL filed an Order to Show Cause to determine the extent of an alleged conspiracy to violate the Injunction. Subsequently, the Court entered default judgment against various individuals and corporate entities (collectively the "Contemnors") allegedly involved in the misconduct.¹ The Court, satisfied that AOL's pleadings established the liability of these Contemnors, set a

¹ A number of the respondents entered into settlement agreements with AOL. (See infra Findings of Fact ¶ 8).

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July 9, 2002, hearing date to determine the amount of damages resulting from the contemptuous conduct of Contemnors.

At the July 9, 2002, hearing, certain of the Contemnors, including Hal Uhrig, Byron Hatcher, Kim Reinhart-Hatcher, and Jay Nelson, challenged the validity of AOL's exhibits pertaining to the profits earned by the Contemnors as a result of the conspiracy. These Contemnors also argued that any damages awarded should be reduced by any settlements reached with other alleged members of the conspiracy. They further contended that the extent of their individual culpability should be used to adjust their penalties. Finally, Jay Nelson, for whom an automatic stay had been granted during the pendency of his bankruptcy proceedings, raised the issue of whether a party for whom an automatic stay in bankruptcy had issued should be held liable for the full attorneys' fees and costs to prosecute the Order to Show Cause.

The Court set various briefing schedules to address issues raised at the hearing, including a schedule for objections to exhibits, a call for briefs on the issue of the effect of bankruptcy on the amount of attorneys' fees awarded, and a call for briefs with respect to the issue of reduction or set-off of damage awards for settlements already collected by a prevailing

party in a conspiracy or multi-defendant action.² With these issues and the question of damages in mind, the Court now makes the following Findings of Fact and Conclusions of Law, pursuant to Federal Rule of Civil Procedure 52.

I. Findings of Fact

A. Procedural History

1. AOL, an internet service provider incorporated in Delaware with its principal place of business in Dulles, Virginia, filed this civil action for compensatory damages and injunctive relief against CN Productions, Inc., and Jay Nelson ("Defendants") alleging, inter alia, the delivery of unsolicited bulk electronic mail ("UBE") to AOL and its members in violation of the Lanham Act, 15 U.S.C. § 1125(a) et seq.; the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a); the Virginia Computer Crimes Act, Va. Code § 18.2-152.3; as well as common law claims of trespass to chattels and conspiracy to commit trespass to chattels and violate federal and state statutes. (Feb. 10, 1999, Mem. Op. at 1; see also Feb. 10, 1999, Order ¶ 1.)
2. On November 6, 1998, the Court declared the Defendants in default as a result of discovery abuses. (Nov. 6, 1998, Mem. Op. (Bryan, J.).) After conducting a hearing as to

² Finally, the Court, determining that an award of attorneys' fees and costs is warranted in this case, ordered the parties to file briefs as to the amount of reasonable attorneys' fees and costs to prosecute this case.

damages, the Court awarded a total judgment of \$1,819,863.00 in favor of AOL on all counts of the Complaint. (See Feb. 10, 1999, Order ¶ 1 (Bryan, J.).)

3. The damages award included actual damages in the amount of \$165,360.00, resulting from the Defendants' unlawful use of "aol.com" in their UBE advertisements for adult websites and related hardware processing costs, which the court trebled pursuant to the Lanham Act to \$496,080.00, and profits of \$1,323,783.00 earned by Defendants as a result of their infringing activity, based on uncontroverted evidence of deposits made by Defendants during the relevant time period. (Feb. 10, 1999, Mem. Op.)
4. In addition to awarding damages, the Court granted an injunction prohibiting Defendants and their agents, assignees, and those in privity with them from "directly or indirectly engaging in," inter alia, "sending or transmitting, or directing, aiding, facilitating or conspiring with others to send or transmit, any electronic mail message, or any electronic communication of any kind, to or through AOL or its members." (Feb. 10, 1999, Order ¶ 8; see Feb. 10, 1999, Mem. Op. at 4.) The Court also awarded AOL \$117,847.00 in attorneys' fees and \$8,257.00 in costs pursuant to Blum v. Stenson, 465 U.S. 886, 897 (1984), and Barber v. Kimbell's, Inc., 577 F.2d 216, 226 n.28 (4th

Cir. 1981). (Feb. 10, 1999, Mem. Op. at 4-5.)

5. On December 17, 1999, the Court found Defendants in civil contempt for violating the Injunction. The Court also gave AOL the authority to undertake discovery of third parties involved in an alleged conspiracy to violate the Injunction, stating specifically that "[u]pon completion of discovery, Plaintiff . . . is authorized to bring additional Motions for Contempt and request compensatory damages and attorneys' fees and costs, jointly and severally against all contemnors." (Dec. 17, 1999, Order.)
6. On March 30, 2000 Contemnor Jay Nelson filed for bankruptcy in the Bankruptcy Court for the Northern District of Illinois. The bankruptcy court, in reference to AOL's claim in this contempt proceeding, denied Contemnor Jay Nelson discharge of AOL's claim by order of the court on May 2, 2001.
7. After continuing to receive UBE after the entry of the Injunction, AOL filed a request for an Order to Show Cause on May 24, 2001, requesting that sixteen individuals and thirteen corporate entities appear and explain why the Court should not hold them in civil contempt.³ AOL specifically

³ The individuals and corporate entities included [REDACTED] Jay Nelson, Hal Uhriq, Byron Hatcher, Kim Reinhart-Hatcher, [REDACTED] Joseph Warshowsky, Rolf Wicksell, Scott Young, [REDACTED] American Barristers, [REDACTED] Data Manage, Inc., [REDACTED] Exotic, Ltd., Global Internet, Ltd., [REDACTED] Net Services, Inc.,

alleged that these individuals and corporate entities had aided Defendants in violating the Injunction by: (1) conspiring with Defendants to transmit e-mail messages advertising adult websites to AOL and its customers, (2) funneling profits from such advertisements through offshore bank accounts, and (3) hiding Jay Nelson's connection to the conduct. (Pl.'s Proposed Findings of Fact and Conclusions of Law Pertaining to Contempt Damages ¶ 8.) Although the Court denied AOL's motion for an Order to Show Cause, it allowed the action for civil contempt to proceed as if filed as a new matter - permitting discovery by all parties as to the contempt allegations -- and scheduled a trial on the issue of contempt for April 23, 2002.

8. Prior to and some time after the April 23, 2002, trial date, the following alleged Contemnors entered into settlement agreements with AOL: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

9. In addition, the Court entered default judgment against the remaining Contemnors. Specifically, on August 10, 2001, Magistrate Judge Poretz directed the Clerk to enter default against Data Manage, Inc., Exotic, Ltd., Net Services, Inc.,

[REDACTED] Total Internet, Ltd., Trustee Accounting, Inc., Universal Asset Institute, and Universal Documents.

██████████ Trustee Accounting, Inc., Universal Documents, Inc., Joseph Warshowsky, Rolf Wicksell, and Scott Young. On March 15, 2002, the Court entered default judgment against American Barristers for its failure to answer or otherwise respond to Plaintiff's allegations of contempt. (Mar. 15, 2002, Entry of Default (Poretz, J.)) Furthermore, the Clerk entered default against Universal Asset Institute, Global Internet, Ltd., Total Internet Ltd., ██████████ ██████████ and ██████████ on April 9, 2002. Lastly, on April 23, 2002, adopting magistrates' reports and recommendations and upon the Contemnors' consent to the entry of default judgment, this Court entered default judgment against Hal Uhrig, Byron Hatcher, and Kim Reinhart-Hatcher.

10. Satisfied that Plaintiff had sufficiently alleged the elements necessary to find the defaulting Contemnors in violation of the Injunction, the Court scheduled a non-jury hearing on the issue of damages for July 9, 2002. The Court gave Plaintiff twenty days to produce all documents it intended to use to prove damages and gave the contemnors against whom default judgment had been entered thirty-five days to identify all documents they intended to use at the July 9, 2002, trial. (See April 23, 2002, Order.)
11. During the April 23, 2002, hearing, the Court entered an

Order extending the time for filing exhibit lists and objections to the exhibit list.

12. Prior to the July 9, 2002, hearing, Plaintiff submitted an Exhibit List and Proposed Findings of Fact and Conclusions of Law Pertaining to Contempt Damages. Contemnors submitted no filings.

B. July 9, 2002, Damages Hearing

13. Pursuant to Plaintiff's Motion for Default Judgment and receiving no objections, the Court entered default judgment against the remaining Contemnors against whom default already had been entered, including [REDACTED] Data Manage, Inc., [REDACTED] Exotic, Ltd., Global Internet, Ltd., [REDACTED] Joseph Warshowsky, Net Services, Inc., [REDACTED] Rolf Wicksell, Scott Young, Total Internet, Ltd., Trustee Accounting, Inc., Universal Asset Institute, and Universal Documents.
14. After the Court entered default judgment against the remaining Contemnors, Plaintiff moved for damages against all of the Contemnors, including CN Productions and Jay Nelson.
15. Plaintiff's damages evidence showed damages permitted under the Virginia Computer Crimes Act of \$25,000.00 per day for each day of illegal transmission of UBE, Va. Code 18.2-152.12(C), during the period between July 1, 1999, and

December 31, 1999,⁴ plus amounts representing the disgorgement of profits accumulated by Contemnors as a result of their contemptuous activity. (See Feb. 10, 1999, Mem. Op.)

16. Plaintiff's evidence supports damages owing to disgorgement based on the bank records of certain Contemnors showing deposits made to six specific bank accounts totaling \$1,244,837.06 plus \$1,015,000.00 deposited into offshore bank accounts. Contemnors funded these accounts with proceeds obtained through a third-party adult website called Impulsive.com. Impulsive.com is owned by Quixotic, Inc. - one of the Contemnors. Quixotic then deposited the \$1,015,000.00 for [REDACTED] - another of the Contemnors - in these six accounts. (07/09/02 Tr. at 17:25-19:18; Pl.'s Ex. 288.)
17. The Court finds actual damages of \$4,500,000.00 based on the "conservative estimate of six months of spam" proffered by Plaintiff, (07/09/02 Tr. at 21:24-22:19), beginning on July 1, 1999, and ending on December 31, 1999, pursuant to the per day penalty rate of \$25,000.00 provided under the

⁴ Plaintiff noted the availability of an alternative damages estimate, in lieu of actual damages and per the Virginia Computer Crimes Act, of \$10.00 per offending e-mail message received. See Va. Code 18.2-152.12(C) ("If the injury arises from the transmission of [UBE], an injured electronic mail service provider may also recover attorneys' fees and costs, and may elect, in lieu of actual damages, to recover the greater of ten dollars for each and every [UBE] message transmitted in violation of this article, or \$25,000 per day.") (emphasis added). Plaintiff, however, does not seek the \$10-per-offending-UBE damages alternative.

Virginia Computer Crimes Act. See Va. Code § 18.2-152.12.

18. Plaintiff does not seek the alternative damages estimate of \$10.00 per offending UBE. The Court, therefore, limits its findings on damages by analogy to the Virginia Computer Crimes Act to \$25,000.00 per day for the duration of the offensive conduct identified by Plaintiff.
19. Plaintiff has identified at least six bank accounts to which deposits were made in the months following the entry of the Injunction. (See 07/09/02 Tr. at 17:25-18:13; AOL Ex. 288.) The accounts are held by Contemnors ██████████ Data Manage, Hal Uhrig d/b/a American Barristers, ██████████ Trustees Accounting, and Universal Documents and are maintained by Regions Bank in Florida. The accounts received a total of \$1,244,837.00 in deposits after the entry of the Injunction. /
20. Each of the six accounts is associated with Contemnors. (See Pl.'s Exs. 285, 288, 300, 319, 323, 324, 325, 326, 327, 328, 329, 330, 331.)
21. Contemnors offered no evidence as to expenses, deductions, or costs of goods sold to reduce the profit estimate. (07/09/02 Tr. at 36:8-24.) In addition, no evidence exists in the record to suggest that the source of these deposits was anything but profits generated by Contemnors' transmission of UBE to AOL members after the entry of the Injunction. (See Pl.'s Exs. 285, 288, 300, 319, 323, 324,

325, 326, 327, 328, 329, 330, 331.)

22. Contemnors transmitted UBE advertising adult websites owned by Quixotic. (See AOL's Request for an OSC, at 23-24.) All UBE messages sent by Contemnors on behalf of Quixotic contained the advertiser code "552." (See id.) Quixotic used advertising code 552 to track the amount of traffic directed to Quixotic's adult websites by Contemnors, the volume of sales generated by that traffic, and the resulting commissions that Quixotic owed to the Contemnors. (See id. (specifying that Quixotic assigned advertising code 552 to [REDACTED])
23. Quixotic wired a total of \$1,015,000.00 to Contemnors' offshore bank accounts for their transmissions of UBE between February and August 1999. In particular, Quixotic wired \$920,000.00 to Contemnors' account at the Royal Bank of Scotland (Nassau) for transmissions sent with the advertising code 552. (See AOL's Request for an OSC, at 24, n.100 and Pl.'s Ex. 288.) Quixotic also wired \$95,000 to [REDACTED] account at Barclays Bank PLC in the Bahamas. (See id.)
24. As a result of the Contemnors' contumacious conduct, AOL received at least 368,354 UBE complaints over the course of six months, some time between July 1, 1999, and December 31, 1999.

25. The record reflects that Contemnors repeatedly refused to participate in and thwarted the discovery process, which prevented Plaintiff from ascertaining an accurate figure of the profits gained by Contemnors as a result of their contumacious activity.
26. In addition to damages, Plaintiff has incurred attorneys' fees and costs, the supporting affidavits for which the Court has received.
27. Plaintiff will be harmed if the Court does not enter a permanent injunction to prevent further contumacious activity by these Contemnors or those in privity with them.
28. The Court rejects Contemnors' arguments with respect to the use of the ratio established in the February 10, 1999, Memorandum Opinion because (1) the Court does not recognize that theory of damages in this case and (2) Plaintiff has not requested compensation based on the prior calculations determined in the February 10, 1999, Memorandum Opinion.
29. Defendants confirmed that no objections were officially filed by Mr. Uhrig, Mr. and Mrs. Hatcher, or Mr. Nelson, or any other Contemnor against the entry of Plaintiff's exhibits numbered 284 and higher prior to the July 9, 2002, hearing.

II. Conclusions of Law

A. Jurisdiction

1. The Injunction is a binding court order, the violation of which constitutes contempt. See, e.g., United States v. United Mine Workers, 330 U.S. 258, 293-94 (1947) (determining that properly issued injunction must be obeyed); see also In re Clowser, 39 B.R. 883, 884 (Bankr. E.D. Va. 1984) ("An act committed in disregard of a court order is a contempt of that court and is within the inherent power of the court to punish.").
2. This Court has jurisdiction to enforce the Injunction and remedy violations. See, e.g., Roadtechs, Inc. v. MJ Highway Tech., Ltd., 83 F. Supp. 2d 677, 685 (E.D. Va. 2000) (stating that "federal courts have inherent jurisdiction to protect and enforce their orders and judgments"); Omega World Travel, Inc. v. Omega Travel, Inc., 710 F. Supp. 169, 170 (E.D. Va. 1989), aff'd, 905 F.2d 1530 (4th Cir. 1990).

B. Liability

3. Civil contempt requires clear and convincing evidence of (1) the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) a showing that the decree was in the movant's favor; (3) a showing that the alleged contemnor by its conduct violated the terms of the decree, and had knowledge - at least

constructive knowledge - of such violations; and (4) a showing that the movant suffered injuries as a result. See, e.g., Omega World Travel, 710 F. Supp. at 170.

4. The allegations contained in AOL's Order to Show Cause satisfy each of the elements for civil contempt. Moreover, the entry of default judgment forecloses any question as to the Contemnors' liability. In particular, by entering default judgment against Contemnors, the Court finds them to have admitted all well-pled allegations of the Order to Show Cause and therefore liable for civil contempt. See Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc., 722 F.2d 1319, 1323 (7th Cir. 1983) (explaining general rule that "default judgment establishe[s], as a matter of law, that defendants are liable to plaintiff as to each cause of action alleged in the complaint") (internal quotations omitted).
5. Individuals and entities who "join together to evade a judgment . . . become jointly and severally liable for the amount of damages resulting from the contumacious conduct." NLRB v. Laborers Int'l Union of North America, 882 F.2d 949, 955 (5th Cir. 1989) (citing Vuitton v. Carousel Handbags, 592 F.2d 126 (2d Cir. 1979)); see also Colonial Williamsburg Found. v. Kittinger Co., 792 F. Supp. 1397, 1407 (E.D. Va. 1992) (Williams, J.) (finding imposition of joint and several

liability against several contemnors appropriate where each was complicit in violating the Consent Judgment) aff'd, 38 F.3d 133 (4th Cir. 1994); cf. Burlington Indus., Inc. v. Milliken & Co., 690 F.2d 380, 391 (4th Cir. 1982)

("[T]ortfeasors who act in concert to commit a wrong are jointly and severally liable for the entire amount of the resulting damages.").

6. Jay Nelson cannot avoid joint and several liability by arguing that once his present counsel entered the case, the offending behavior ceased as to him.
7. The facts of this case justify the imposition of joint and several liability against each Contemnor against whom the Court entered Default Judgment. Specifically, as stated in the February 10, 1999, Order, and as outlined above, the Injunction applies to Defendants, as well as their agents, assignees, and those in privity with them. By virtue of the Contemnors' failure to cooperate with discovery, and as a result of the admission of all material facts alleged in the Order to Show Cause through the entry of default judgment, the Court finds that joint and several liability is appropriate in this case. Furthermore, the Court rejects Contemnors' assertions that damages should be determined based on each contemnors level of culpability.

C. Relief

8. A "'sanction imposed on a party held to be in civil contempt generally may serve either or both of two purposes: to coerce the contemnor into complying in the future with the court's order, or to compensate the complainant for losses resulting from the contemnor's past noncompliance.'" Colonial Williamsburg, 792 F. Supp. at 1407 (quoting Perfect Fit Indus., Inc. v. Acme Quilting Co., 673 F.2d 53, 56 (2d Cir. 1982), and citing Omega World Travel, 710 F. Supp. at 171)).
9. Because Contemnors' violation of the Injunction harmed AOL, it is entitled to compensatory relief. Colonial Williamsburg, 792 F. Supp. at 1407 (stating that sanctions in civil contempt proceedings compensate the complainant for losses resulting from non-compliance).
10. Proof of damages for civil contempt must be demonstrated by a preponderance of the evidence, or a reasonable degree of certainty. See In re General Motors Corp., 110 F.3d 1003, 1018 (4th Cir. 1997) (finding that, after civil contempt liability is established by clear and convincing evidence, "the damages issue should be treated no differently tha[n]. any other run-of-the-mill civil action or fee application").
11. "'[A] court has broad discretion to fashion a remedy based on the nature of the harm and the probable effect of

alternative sanctions.'" Connolly v. J.T. Ventures, 851 F.2d 930, 933 (7th Cir. 1988) (citing United Mine Workers, 330 U.S. at 303-04).

1. Actual Damages

12. Civil contempt damages should reimburse the injured party for the losses and expenses incurred as a result of the contemnors' violation of a court order. Roadtechs, 83 F. Supp. 2d at 686.
13. Actual damages need not be determined with exact certainty. See, e.g., Omega World Travel, 710 F. Supp. at 171-72 (granting civil contempt damages to plaintiff even though plaintiff was "unable to offer any quantification of the harm it suffered from [the contumacious behavior] either in lost business or in loss of good will").
14. Courts may make inferences in computing damages, particularly where the inability to compute damages is attributable to a defendant's wrongdoing. See, e.g., Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264-65 (1946) (explaining that court may rule upon probable and inferential, as well as direct and positive, proof in awarding damages because "[a]ny other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim"); Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359, 378 (1927) (noting that "[t]he wrongdoer may not

complain of inexactness where his actions preclude precise computation of the extent of injury”).

15. A court also may rely on statutory remedies as an analog for computing actual damages suffered by a civil contempt plaintiff. See Feb. 10, 1999, Mem. Op.; see, e.g., Howard Johnson Co. v. Khimani, 892 F.2d 1512, 1519-22 (11th Cir. 1990) (relying on Lanham Act to fashion civil contempt damages award where case involved confluence of trademark infringement subject matter of the statute and the facts of the case).
16. Moreover, a court may use analogous statutory provisions to compute civil contempt damages when actual damages are real, but difficult to quantify. See Feb. 10, 1999, Mem. Op., see, e.g., Colonial Williamsburg, 792 F. Supp. at 1407 n.4 (employing Lanham Act provision on damages for trademark infringement by analogy to determine damages award for civil contempt of Consent Judgment).
17. In using a statutory remedy as a proxy for the computation of damages, the civil contempt plaintiff need not establish all the elements of the analogous statutory cause of action. Colonial Williamsburg, 792 F. Supp. at 1407 (explaining that plaintiff need not establish all elements of analogous statute to receive damages).
18. Under the Virginia Computer Crimes Act, “an injured

electronic mail service provider may . . . recover the greater of ten dollars for each and every [UBE] transmitted in violation of this article, or \$25,000 per day." Va. Code Ann. § 18.2-152.12(c) (Michie 2000) (as amended by 1999 Va. Acts Ch. 905 (HB 1714) (effective date July 1, 1999)).

19. As a result of the Contemnors' contumacious conduct, AOL received at least 368,354 UBE complaints over the course of six months, some time between July 1, 1999, and December 31, 1999. (See Findings of Fact, supra.) Applying the Virginia Computer Crimes Act's statutory damages figure of \$25,000.00 per day for each day Plaintiff's have shown Contemnors' transmitted the offending UBE to AOL customers, the Court holds that Plaintiff is entitled to \$4,500,000.00 in actual damages. The Court finds the \$25,000 per day penalty to represent the fair computation of damages where Plaintiff sufficiently demonstrated that the offending conduct lasted at least six months, but has not provided evidence throughout that period of the exact number of UBEs received.

2. Disgorgement of Profits

20. Civil contempt damages are not solely dependent on proof of actual loss. See, e.g., General Motors, 110 F.3d at 1019 n.16. Rather, "where a 'harm' amount is difficult to calculate, a court is wholly justified in requiring the party in contempt to disgorge any profits it may have

received that resulted in whole or in part from the contemptuous conduct." Id.; see also Colonial Williamsburg, 792 F. Supp. at 1407-08 (noting that disgorged profits constitute an equitable measure of compensation in a civil contempt proceeding involving violation of an injunction). As a means of deterring future contumacious behavior, a court may award a disgorging of profits in addition to the award of actual damages. Colonial Williamsburg, 792 F. Supp. at 1407-08 (explaining that contempt award limited to actual damages would place contemnor in a better position than it would have been in had it complied with the Consent Judgment); see also Oral-B Labs, Inc. v. Mi-Lor Corp., 810 F.2d 20, 25-26 (2d Cir. 1987); cf. Feb. 10, 1999, Mem. Op. (holding that AOL was entitled to disgorgement of Defendants' profits because Defendants had "apparently concluded that . . . actual damages . . . can be absorbed as a cost of doing business").

21. Contemnors have the burden to "'prove any deductions for [their] costs from the gross revenues attributable to [their] contempt.'" Colonial Williamsburg, 792 F. Supp. at 1407-08 (quoting Oral-B, 810 F.2d at 26, and 15 U.S.C. § 1117(a)), aff'd, 38 F.3d 133 (4th Cir. 1994)); cf. Feb. 10, 1999, Mem. Op. (finding that, because Defendants refused to produce any document related to profits, income, or

expenses of e-mail advertising, the amount in Defendants' bank account "represents gross deposits and it is reasonable to infer that they were from gross sales from [D]efendants' UBE").

22. Contemnors offered no evidence to refute the profit calculation or to reduce the damage calculation proffered by Plaintiff. The Court therefore holds Contemnors liable for the disgorgement of profits shown by Plaintiff in the amount of \$2,259,837.06.

3. Attorneys' Fees and Costs

23. Courts may award reasonable attorneys' fees and costs as a component of civil contempt damages. See, e.g., Folk v. Wallace Business Forms, Inc., 394 F.2d 240, 244 (4th Cir. 1968) ("No one would seriously question the correctness of including attorneys' fees as an element of civil contempt damages.").
24. The award of attorneys' fees and costs in a contempt proceeding is appropriate where the contemnors' disobedience of a court order is willful. See, e.g., Colonial Williamsburg, 792 F. Supp. at 1408.

a) Standard of Review

25. The court must conduct a twelve-step inquiry to determine the reasonableness of a proposed award of attorneys' fees. See Barber v. Kimbrell's, Inc., 577 F.2d 216, 226 (4th Cir.

1978). Relevant factors include (1) the time and labor expended; (2) the novelty and difficulty of the question raised; (3) the skill required to perform the legal services rendered; (4) the opportunity costs that the attorneys sustained in pressing the litigation; (5) the customary fee for like work; (6) the expectations that the attorneys had at the outset; (7) any time limitations imposed by the client or the circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case within the legal community; (11) the nature and length of the professional relationship between the attorneys and the client; (12) the size of the fees awarded in similar cases. See Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 175 (4th Cir. 1994) (citing, inter alia, Daley v. Hill, 790 F.2d 1071 (4th Cir. 1986)). The ultimate decision depends on the facts and circumstances of the case, see Hensley v. Eckerhart, 461 U.S. 424, 429 (1983), with particular attention to how the amount of damages awarded compares to the amount of damages sought. See Farrar v. Hobby, 506 U.S. 103, 114 (1992) (quoting Riverside v. Riviera, 477 U.S. 561, 585 (1986)).

b) Analysis

26. In this case, Plaintiff has submitted attorneys' fees and

costs amounting to [REDACTED] (See Pl.'s Documentation in Support of its Request for Attorneys' Fees and Costs 07/23/02). In support of this request, Plaintiff submitted an appendix addressing how its request for attorneys' fees meets the requirements of the twelve-factor Rum Creek Coal and Barber tests. (See Pl.'s Reply Br., Attachment A).

27. In opposition to Plaintiff's request, Contemnors set forth the general argument that the fees submitted by the Plaintiff are "unreasonable." (See Verified Opposition at 2-5; Jay Nelson Opposition at 5-8). In support of this allegation, the Contemnors (1) identify instances in which they claim excessive amounts of time were expended on "simple" motions and (2) state that the hourly fees charged by the attorneys and paraprofessionals in this matter were excessive given their experience and training. See id.
28. In light of the parties' submissions to the Court and pursuant to the standards set forth by the Fourth Circuit, the Court makes the following findings concerning the request for attorneys' fees:
29. Despite Contemnors' protestations, the Court finds that the time and labor expended by Plaintiff's attorneys was reasonable. Specifically, Contemnors' claims that excessive time was spent on "simple" motions is a mischaracterization of the request submitted by Plaintiff. For instance,

Contemnors' claim that it was unreasonable for Plaintiff's attorneys to expend almost ten hours to prepare and attend a ten-minute pre-trial conference. (See Verified Opposition at 3; Jay Nelson Opposition at 6). But Contemnors' claims are unfounded. A review of the billing sheets submitted by Plaintiff's attorneys reveals that the ten hours spent preparing for this ten minute conference also included the drafting of a discovery plan and discussion of discovery strategy in preparation for this conference. Moreover, the Court finds that the time expended in plotting discovery strategy was reasonable in light of the fact that Contemnors have persistently defied discovery attempts throughout this case. Furthermore, the "simple" motions to compel initial disclosures and change the scheduling order were necessitated by the Contemnors stubborn refusal to obey this Court's rudimentary orders and procedures. Similarly, Contemnors' complaints that time used to assemble documents for and execute service of the Plaintiff's Order to Show Cause were excessive are also invalid. The Order to Show Cause was voluminous chiefly because of the vast conspiracy employed by the Contemnors in an effort to defy this Court's Injunction. Additionally, the extensive time used to serve process was mandated by the Contemnors demonstrated intent to avoid service throughout this litigation. In sum, the

extensive time expended by Plaintiff's attorneys in this case comes almost directly as a result of the Contemnors' brazen defiance of this Court's orders and procedures. Cf. In re General Motors Corp., 110 F.3d 1003, 1006 (4th Cir. 1997) (observing that the Contemnor "may have had to pay less however, if he had not followed an ill-advised policy of contesting each and every aspect of this contempt proceeding."). Therefore, the Court finds that the time expended by the Plaintiff's attorneys was reasonable.

30. The legal questions raised by this case were not particularly novel or difficult. The factual investigation, involving exposing the conspiracy and tracking the manner in which it disbursed its ill-received gains, however, was a complex task. Further, the Court notes that this tedious task was persistently hindered and at no time aided by the Contemnors' efforts.
31. The skill underlying the legal services rendered in this case was necessarily highly technical, given the subject matter of the dispute - a cyber-oriented, multi-state and multi-national conspiracy.
32. Plaintiff's attorneys incurred substantial opportunity costs in pursuing this litigation. Specifically, the attorneys could have made use of the efforts spent on pursuing the Contemnors for violation of the Injunction in other efforts

to pursue similar complaints involving UBE sent to AOL customers. (See Reply Br., Attachment A).

33. Pursuit of a contempt action, even when the underlying claim is undisputed, can produce significant legal fees in excess of [REDACTED] See Colonial Williamsburg, 38 F.3d at 138 (affirming award in excess of \$360,000.00 in an action for contempt of a consent order). Consequently, the Court determines that the attorneys fees borne by the Plaintiff were customary.
34. At the outset, Plaintiffs' attorneys indicated that they expected to recover significant damages and attorneys fees and costs for violation of the Injunction. Indeed, Plaintiff's attorneys stated that they declined pursuit of other UBE senders in favor of this action. (See Reply Br., Attachment A). In light of the facts and law involved in this case, the Court finds these expectations were reasonable.
35. Given that the actions of the Contemnors in this case injured not only the Plaintiff, but also its customers, the need for a timely resolution to the contumacious behavior is evident.
36. Given an award of over \$6,500,000.00 - the entirety of the award requested by Plaintiff - in damages for the Contemnors' contumacious behavior, the Court finds that the

Plaintiff's expenditure of approximately [REDACTED] in attorneys fees and costs is reasonable.

37. The Court has reviewed the curricula vitae for the attorneys and paralegals employed by Plaintiff. (See Abid R. Qureshi Decl. ¶ 6; 7/23/02). The Court also notes Contemnors specific objections that the rates charged by attorney Abid R. Qureshi and by the paralegals employed in this matter were excessive. (See Verified Opposition at 4; Jay Nelson Opposition at 7). Turning first to attorney Qureshi's fees, which range from \$185.00 per hour to \$320.00 per hour as this litigation and Qureshi's experience progressed, the parties agree that these fees are at the "top end" of fees charged by attorneys with similar experience in similar sized firms. (See Pl.'s Reply Br. at 10; Verified Opposition at 4; Jay Nelson Opposition at 7). But given attorney Qureshi's qualifications, combined with this Court's first-hand observation of attorney Qureshi's performance throughout this case, the Court finds that his fee is reasonable. However, although the underlying facts giving rise to this action were complex and required appreciable investigative skill, the fees charged by paralegals in this matter are excessive. Specifically, the Court does not believe that paralegal fees in excess of

██████████ per hour are reasonable in this case.⁵ Indeed, although Plaintiff documented the comparative reasonableness of attorney Qureshi's fees, it could not similarly substantiate its paralegal fees. Consequently, the Court caps the recoverable attorneys' fees and costs charged for paralegal work at ██████████ per hour.

38. The desirability of this case within the legal community is difficult to measure and in any event provides grounds neither for supporting nor weakening a request for attorneys' fees.

39. The Plaintiff and its attorneys in this action have teamed in litigating several "junk e-mail" cases in the past several years. (See Reply Br., Attachment A). This partnership, especially on this particular brand of case, indicates that the attorneys involved have developed a specialized talent for litigating this specific type of case and strengthens their request for fees.

40. As noted in Conclusion of Law 33 supra, an award of attorneys' fees of over ██████████ for litigation of a civil contempt case is precedented and consequently, the Court determines, reasonable.

⁵ Although paralegal Elise A. Houlik possesses a Juris Doctorate, her activities in this case, with the exception of "researching case law", were those traditionally associated with a paralegal. Consequently, the Court cannot justify as reasonable a fee in excess of ██████████ per hour for these paralegal activities, regardless of Ms. Houlik's education.

41. Analysis of the twelve factors for determining reasonable attorneys fees, as prescribed by the Fourth Circuit in Barber, Rum Creek Coal and their progeny, leads this Court to determine that Plaintiff's proposed award is unreasonable. Consequently, the court reduces the Plaintiff's proposed award by [REDACTED]

4. Reductions

42. The Contemnors argue that any award against them should be reduced by: (1) the amounts of settlements reached with Contemnors who settled with Plaintiff and (2) the amount of attorneys' fees accumulated while an automatic bankruptcy stay was in place in favor of Contemnor Jay Nelson.⁶

a) Reduction by Settlements Previously Reached

43. The general rule in apportioning damages among those held jointly and severally liable is that the amount of any settlement or release by one defendant reduces, dollar-per-dollar, the remaining damages owed by the non-settling defendants. See Va. Code Ann. § 8.01-35.1(a) (Michie 2000) ("When a release or a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury . . . any amount recovered against the other

⁶ Only Contemnor Jay Nelson requests this latter reduction.

tort-feasors or any one of them shall be reduced by any amount stipulated by the covenant or release[.]"); see also Lemke v. Sears, Roebuck & Co., 853 F.2d 253, 255 (4th Cir. 1988) ("Under present Virginia law a non-discharged tortfeasor may claim a setoff based on any sums paid by another to obtain a release[.]"); Burlington Indus. Inc., 690 F.2d at 391 ("Under traditional principles of compensation, however, a coconspirator is entitled to the defense of payment to the extent of any sum received by the plaintiff in settlement with another coconspirator." (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971))).

44. The Court concludes that these "traditional rules of compensation" are applicable to this case. Consequently, the damages assessed against the non-settling Contemnors are reduced by [REDACTED] the aggregate sum of all payments paid by the settling contemnors to Plaintiff.

b) Reduction of Award of Attorneys' Fees Against Jay Nelson

45. Contemnor Jay Nelson claims that any award of attorneys' fees in this case should be reduced against him personally, because during much of the litigation of this contempt action he was proceeding in bankruptcy court on his voluntary petition for bankruptcy protection. (See Findings of Fact ¶ 6 supra.) Indeed, Jay Nelson claims that his

March 30, 2000 petition for bankruptcy triggered an automatic stay of the continuation of legal proceedings against him, including these contempt proceedings. See 11 U.S.C. § 362(a). Consequently, Jay Nelson claims that because the automatic stay provision should have shielded him from these contempt proceedings, he cannot be held responsible for the imposition of attorneys' fees for the time period in which the stay was operative.

46. In general, the Bankruptcy Code provides an "automatic stay" of all judicial or administrative proceedings against the debtor. See generally, 11 U.S.C. § 362. Specifically, "a petition filed under section 301, 302 or 303 of this title . . . operates as a stay . . . of (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative or other action or proceeding against the debtor[.]" 11 U.S.C. § 362(a).
47. But the "automatic stay" provided by the Bankruptcy Code is neither universal nor perpetual in nature, meaning that it does not bar all judicial proceedings against the debtor.
48. Indeed, the automatic stay provision does not protect the debtor indefinitely. Specifically, "the stay of any other act under subsection (a) of this section continues until . . . [inter alia] the time a discharge is granted or denied." 11 U.S.C. § 362(c)(2)(C).

49. In this case, the Court finds that automatic stay protection of Section 362 was operative. But the automatic stay was not operative during the entirety of these contempt proceedings. Specifically, the automatic stay was operative between March 30, 2000, when Jay Nelson filed his petition for bankruptcy, and May 2, 2001, when the Bankruptcy Court for the Northern District of Illinois denied discharge of Plaintiff's claim for damages arising out of this contempt proceeding.
50. Further, "there is an exception to the operation of the automatic stay; it does not bar orders to show cause or findings of contempt when necessary to uphold the dignity of a court order." America Online, Inc. v. CN Productions, Inc., 272 B.R. 879, 881 (E.D. Va. 2002) (Ellis, J.) (denying Contemnor Uhrig's request that the court automatically stay contempt proceedings against him pursuant to Section 362.)
51. If the contempt proceeding is not conducted to uphold the dignity of a court order, but rather the proceeding is simply to assess damages for violation of the court order, then the stay is operative to bar those proceedings. See id. at 882 ("[I]t follows that the automatic stay operates to bar any effort by AOL to obtain damages from Uhrig, but not any effort to determine whether Uhrig should be held in contempt of court and sanctioned.").

52. Consequently, although the automatic stay was operative between March 30, 2000 and May 2, 2001, it did not operate to bar any of the actions taken by Plaintiff's attorneys during this 13 month period. Indeed, a review of the bills and costs submitted by Plaintiff reveals that during the time when the bankruptcy stay was operative, Plaintiff's attorneys' fees and costs were all incurred in an "effort to determine whether [Jay Nelson and others] should be held in contempt of court and sanctioned." Id.; see also Pl.'s Documentation in Support of its Request for Attorneys Fees and Costs, Attachment 1, pp. 8-18.

53. Therefore, although the stay was operational between March 20, 2000 and May 2, 2001, it did not bar the actions taken by AOL during this time and consequently Plaintiff's claim for the attorneys fees and costs accumulated between March 30, 2000 and May 2, 2001 are collectible from Contemnor Jay Nelson.

5. Additional Relief

54. The terms of the Injunction shall remain in effect indefinitely as against any of the Defendants' or Contemnors' agents, assignees, or those in privity with Defendants or Contemnors.

D. Evidentiary Issues

55. Having considered Contemnors Hal Uhrig, Byron Hatcher, Kim

Reinhart-Hatcher, and Jay Nelson's oral arguments and briefs in opposition to the exhibits submitted by Plaintiff in support of the profits to be disgorged from Contemnors, the Court overrules the objections to the exhibits as without merit.⁷

56. As stated in the Findings of Fact, the Court extended the time for filing exhibits on the initial trial date. Defendants' objections to the exhibits as being filed out of time and not in accordance with the original Scheduling Order therefore are without merit. Plaintiff has shown that it provided Contemnors with ample notice of its intent to rely on the bank records now in question through its Initial Disclosures made on July 31, 2001, interrogatory responses and Rule 26(a)(3) disclosures. Moreover, as soon as Plaintiff received third-party subpoena responses, it notified Contemnors that it was continuing to receive such responses and provided copies of the documents to Contemnors. Finally, all exhibits relied upon in support of damages were filed and identified by the deadline provided by the Court. Therefore, because Plaintiff has submitted all exhibits in a timely fashion, and because the objecting Contemnors have not shown they have been prejudiced in any

⁷ The Court notes that the objecting Contemnors have produced woefully inadequate briefs in support of their objections to the admission of exhibits numbered 284 and higher.

way,⁸ the Court rejects Contemnors' objections with respect to timeliness.

57. Furthermore, Contemnors' arguments that the documents are inadmissible hearsay pursuant to Federal Rule of Evidence 801(d)(2)(E) and not authenticated are misplaced. The bank records constitute self-authenticating and admissible business records. See, e.g., Midfirst Bank v. C.W. Haynes & Co., 893 F. Supp. 1304, 1311 (D.S.C. 1994) (admitting computer records prepared by another entity under Federal Rule of Evidence 803(6)), aff'd Nos. 95-2515, 95-216, 1996 WL 308285 (4th Cir. May 31, 1996); see also Federal Rule of Evidence 803(6) (governing records of regularly conducted activity). In rejecting Contemnors' assertions, the Court observes that this entire evidentiary argument was no more than Contemnors thinly veiled attempt to now challenge liability on the contempt claim after entry of default judgment.

⁸ Counsel for Uhrig and The Hatchers stated that the exhibits should be excluded because they were filed after the filing deadline. However, when asked whether he had read the exhibits, counsel avoided the question by answering that whether he read the exhibits was beside the point. The Court disagrees and finds that counsel has not shown prejudice resulting from the filing of these exhibits past the deadline.

III. Summary of Damages Awarded

The Court's award of \$6,904,712.63 in damages to the Plaintiff is based, in summary, on the following computations:

\$4,500,000.00 (Actual Damages)
+ \$2,259,837.06 (Disgorged Profits)
[REDACTED] (Plaintiff's requested attorneys' fees
of [REDACTED]
[REDACTED]
[REDACTED] (Reduction for amount of settlements
reached with other co-contemnors)

= \$6,904,712.63 (Final award).

October 25th, 2002
Alexandria, Virginia


UNITED STATES DISTRICT JUDGE