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BLUE HOUSE WORKS, INC.
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ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

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Clerk of the Superior Court
By Lee McAlister, Deputy Clerk

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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION**

11
12 GEORGE SHARP,

13 Plaintiff,

14 v.

15 IDO Security, Inc., Henry Shabat, Irit
Pnina Reiner, Michael Goldberg, Mustang
16 Alliances, Inc., Leonard Sternheim, Mendel
Mochkin, Empire Post Media, Inc., Peter
17 Dunn, Fidelity Ltd., Stand Online Ltd.,
Natti Reach Ltd., Plaster Knol Ltd., and
18 DOES 1 through 500, inclusive,

19 Defendants.
20

Case No. 37-2012-00101057-CU-NP-CTL

**DEFENDANT BLUE HOUSE WORKS, INC.'S
FIRST AMENDED ANSWER TO
PLAINTIFF'S COMPLAINT FOR (1)
VIOLATIONS OF CALIFORNIA
RESTRICTIONS ON UNSOLICITED
COMMERCIAL E-MAIL ADVERTISERS
(CAL. BUS. & PROF. CODE §17529.5); AND
(2) VIOLATIONS OF CONSUMER LEGAL
REMEDIES ACT (CAL. CIV. CODE §1750 ET
SEQ.)**

Dept: 72

Judge: Hon. Timothy B. Taylor

Date Action Filed: July 23, 2012

Trial Date: March 21, 2014

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24 Defendant Blue House Works, Inc. ("BHW" or "Defendant") hereby answers Plaintiff
25 George Sharp's ("Plaintiff") Complaint for (1) Violations of California Restrictions on
26 Unsolicited Commercial E-mail Advertisers (Cal. Bus. & Prof. Code § 17529.5); and, (2)
27 Violations of Consumers Legal Remedies Act (Cal. Civ. Code § 1750 et seq.) (the "Complaint")

1 as follows:

2 **GENERAL DENIAL**

3 1. Pursuant to California Code of Civil Procedure section 431.30(d), Defendant
4 denies, generally and specifically, each and every allegation contained in the Complaint, and each
5 and every purported cause of action set forth in the Complaint, and further generally and
6 specifically denies that Plaintiff has sustained any damage or injury or is entitled to any relief or
7 recovery affecting Defendant.

8 **BLUE HOUSE WORKS, INC.'S AFFIRMATIVE DEFENSES**

9 2. Plaintiff filed an Amendment to Complaint adding BHW as a defendant, replacing
10 "Doe 5." The Complaint alleges no facts specific to Doe 5 or BHW. If the Complaint did allege
11 facts specific to BHW, it is possible that BHW would assert additional or different affirmative
12 defenses.

13 3. Moreover, Plaintiff's lack of factual allegations in the Complaint specific to BHW
14 renders the Complaint vague, ambiguous, uncertain, and unintelligible as to BHW. As such,
15 BHW is precluded from alleging specific factual allegations in its affirmative defenses. BHW
16 sets forth its affirmative defenses to the extent possible under these circumstances.

17 4. Without undertaking any burden of proof not otherwise assigned to it by law or
18 equity, BHW asserts the following separate and affirmative defenses to each and every
19 purported cause of action as may be alleged against it by Plaintiff. All such defenses are pled in
20 the alternative, and do not constitute an admission of liability, an admission that any allegation in
21 the Complaint is true, or that Plaintiff is entitled to any relief whatsoever.

22 **FIRST AFFIRMATIVE DEFENSE**

23 **(Failure to State a Cause of Action)**

24 **(As to each Cause of Action)**

25 5. The Complaint, and each cause of action contained therein, fails to state facts
26 sufficient to constitute a cause of action against BHW. The First Cause of Action, for violations
27 of California restrictions on unsolicited commercial e-mail advertisers (Cal. Bus. & Prof. Code

1 §17529.5), fails to state facts sufficient to constitute a cause of action against BHW because the
2 Complaint lacks any factual allegations specific to BHW and does not plead factual allegations
3 which would satisfy the elements of unlawful conduct pursuant to California Business and
4 Professions Code section 17529.5. The Second Cause of Action also fails to state facts sufficient
5 to constitute a cause of action against BHW because the Complaint lacks any factual allegations
6 specific to BHW and does not plead factual allegations which would satisfy the elements of
7 unlawful conduct pursuant to the Consumer Legal Remedies Act, specifically California Civil
8 Code section 1770(a)(16). In addition, Plaintiff lacks standing to assert the Second Cause of
9 Action, for violations of Consumer Legal Remedies Act (Cal. Civ. Code §1750 et seq.), as the
10 allegations of the Complaint demonstrate that (1) Plaintiff is not a “consumer” pursuant to the
11 Consumer Legal Remedies Act; and (2) Plaintiff has not suffered “damage” as a result of alleged
12 unlawful conduct. Nor does Plaintiff allege an actionable representation. Plaintiff’s allegation
13 that “the spammers, acting on behalf of all the Defendants” violated section 1770(a)(16) of the
14 CLRA by sending spam emails with a “de facto” misrepresentation that they were “sent in
15 accordance with the Plaintiff’s previous opt-in request” cannot constitute a CLRA violation
16 because Plaintiff alleges no facts connecting such a misrepresentation to the purchase of penny
17 stocks. Further, Plaintiff neither alleges that he relied on any misrepresentation nor that such
18 reliance resulted in damage to plaintiff.

19 **SECOND AFFIRMATIVE DEFENSE**

20 **(Statute of Limitations)**

21 **(As to the First Cause of Action)**

22 6. The applicable statutes of limitations, including Business and Professions Code
23 17529.5(b) and Code of Civil Procedure 340(b), bar some or all recovery by Plaintiff for alleged
24 unlawful conduct prior to the statutory period.

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THIRD AFFIRMATIVE DEFENSE

(Waiver)

(As to each Cause of Action)

7. BHW is informed and believes that, among other acts or omissions, by virtue of consenting to the receipt of emails allegedly at issue in the Complaint with awareness that he would likely receive one or more such emails as a result, Plaintiff knowingly and voluntarily waived, relinquished, and/or abandoned each claim for relief against BHW with respect to such emails. BHW is precluded from alleging more specific facts because Plaintiff's Complaint fails to allege any specific facts with respect to BHW. Other defendants in this action have alleged that Plaintiff was aware at all times of the acts allegedly committed by defendants and knowingly acquiesced, consented to, or authorized those acts. Those defendants are informed and believe and on that basis allege that Plaintiff directly and/or indirectly requested and consented to the receipt of the emails at issue in this lawsuit with the intent that his conduct would result in allegedly unsolicited emails being sent to his email address. Those defendants are further informed and believe and on that basis allege that Plaintiff failed to effectively notify defendants of his desire not to receive allegedly unsolicited email, with the intent that his conduct would result in his continued receipt of the emails at issue. If the above allegations are true, Plaintiff violated the purpose of the respective statutes upon which each cause of action is based. If the above allegations are true, assuming that BHW caused the e-mails at issue to be sent to Plaintiff, which it denies, by his own conduct Plaintiff is barred from recovery on the ground that Plaintiff has waived the claims alleged in the Complaint.

FOURTH AFFIRMATIVE DEFENSE

(Consent)

(As to each Cause of Action)

8. BHW is informed and believes that, at all times described in the Complaint, by virtue of acquiescing to the receipt of emails allegedly at issue in the Complaint and failing to effectively notify defendants of his desire not to receive such emails with the intent that his

1 conduct would result in his continued receipt of such emails, Plaintiff deliberately, voluntarily,
2 and freely consented to and approved any and all acts and omissions alleged therein, implicitly
3 and/or expressly. BHW is precluded from alleging more specific facts because Plaintiff's
4 Complaint fails to allege any specific facts with respect to BHW. Other defendants in this action
5 have alleged that Plaintiff was aware at all times of the acts allegedly committed by defendants
6 and knowingly acquiesced, consented to, or authorized those acts. Those defendants are informed
7 and believe and on that basis allege that Plaintiff directly and/or indirectly requested and
8 consented to the receipt of the emails at issue in this lawsuit with the intent that his conduct
9 would result in allegedly unsolicited emails being sent to his email address. Those defendants are
10 further informed and believe and on that basis allege that Plaintiff failed to effectively notify
11 defendants of his desire not to receive allegedly unsolicited email, with the intent that his conduct
12 would result in his continued receipt of the emails at issue. If true as to BHW, assuming that
13 BHW caused the emails at issue to be sent to Plaintiff, which it denies, by his own conduct
14 Plaintiff is barred from recovery on the ground that Plaintiff has consented to the receipt of the
15 emails.

16 **FIFTH AFFIRMATIVE DEFENSE**

17 **(Ratification)**

18 **(As to each Cause of Action)**

19 9. To the extent Plaintiff had knowledge of the allegedly wrongful conduct and by his
20 failure to effectively report the allegedly wrongful conduct and request removal from the email
21 list, Plaintiff accepted the benefits of the allegedly unsolicited emails, ratified, and approved the
22 purported acts and/or omissions of which Plaintiff now complains. BHW is precluded from
23 alleging more specific facts because Plaintiff's Complaint fails to allege any specific facts with
24 respect to BHW. Other defendants in this action have alleged that Plaintiff was aware at all times
25 of the acts allegedly committed by defendants and knowingly acquiesced, consented to, or
26 authorized those acts. Those defendants are informed and believe and on that basis allege that
27 Plaintiff failed to effectively notify defendants of his desire not to receive allegedly unsolicited

1 email, with the intent that his conduct would result in his continued receipt of the emails at issue.
2 If true as to BHW, Plaintiff is barred from any recovery in this action.

3 **SIXTH AFFIRMATIVE DEFENSE**
4 **(Complaint Vague, Ambiguous and Uncertain)**
5 **(As to each Cause of Action)**

6 10. The omission of any allegation in the Complaint specific to BHW, which was
7 named only as a Doe Defendant, and the nature of the allegations of the Complaint, causes the
8 allegations of the Complaint as to BHW to be vague, ambiguous and uncertain. As such, Plaintiff
9 should be denied relief, if any, under the Complaint absent clarification of his allegations against
10 BHW.

11 **SEVENTH AFFIRMATIVE DEFENSE**
12 **(Failure To State Fraud Allegations With Requisite Particularity)**
13 **(As to Second Cause of Action)**

14 11. With respect to Complaint allegations of intentional misrepresentation or other
15 fraudulent conduct, Plaintiff is barred from recovery to the extent that such allegations are not
16 pleaded with requisite particularity. Plaintiff's allegation that defendants violated section
17 1770(a)(16) of the Consumer Legal Remedies Act based on a "de facto representation" that
18 emails were "sent in accordance with the Plaintiff's previous opt-in request" fails to provide
19 sufficient notice of the alleged misrepresentation. Moreover, such an allegation cannot constitute
20 a CLRA violation because Plaintiff has not alleged any connection to the purchase of penny
21 stocks, the subject of the other allegations in the Complaint.

22 **EIGHTH AFFIRMATIVE DEFENSE**
23 **(Laches)**
24 **(As to each Cause of Action)**

25 12. BHW is informed and believes that Plaintiff unreasonably delayed for
26 approximately seven months from July 2012, when he filed the Complaint in this action, until
27 February 2013, when he amended the Complaint to add BHW as "Doe 5." The delay was

1 unreasonable because, among other reasons, at the time he filed the Complaint in July 2012,
2 Plaintiff was aware that BHW provided the MyNewsletterBuilder email marketing service
3 platform from which Plaintiff alleges that he received unsolicited emails. Moreover, Plaintiff
4 alleges that prior to filing the Complaint, all defendants were “notified of their violations of the
5 CLRA by email and through the Plaintiff’s multiple attempts to opt out of the SPAMMERS’
6 email lists.” Despite knowledge of BHW’s identity prior to filing the Complaint in July 2012,
7 Plaintiff waited seven months to pursue the causes of action against BHW. BHW is prejudiced
8 by Plaintiff’s delay because, among other things, BHW no longer has access to evidence
9 including email records potentially relevant to Plaintiff’s claims because they were automatically
10 deleted from BHW’s system during the period in which Plaintiff delayed in adding BHW as a
11 party. Had BHW been aware of the claims against it in July 2012, it would have been able to
12 retain such potential evidence. In addition, Plaintiff has gained a litigation advantage by
13 affording himself an unwarranted additional seven months to conduct discovery and develop legal
14 theories. Moreover, Plaintiff has agreed to dismiss other defendants in this action who may have
15 been liable for the conduct alleged in the Complaint and may have evidence relevant to BHW’s
16 defenses. Thus, Plaintiff is barred by the doctrine of laches from asserting the causes of action in
17 the Complaint, and each of them, and is further barred by the doctrine of laches from obtaining
18 the requested relief for each cause of action.

19 **NINTH AFFIRMATIVE DEFENSE**

20 **(Federal Preemption)**

21 **(As to each Cause of Action)**

22 13. The causes of action, and each of them, are preempted by federal law, including 15
23 U.S.C. §7704(a) and 18 U.S.C. §1037.

24 **TENTH AFFIRMATIVE DEFENSE**

25 **(Lack of Standing)**

26 **(As to the Second Cause of Action)**

27 14. Plaintiff lacks standing to assert the causes of action, and each of them, for reasons

1 including that the allegations of the Complaint reveal that Plaintiff is not a consumer pursuant to
2 Civil Code section 1761(d) and that Plaintiff has not suffered any damage as a result of any action
3 taken by BHW. Plaintiff's allegations demonstrate that he is not a "consumer" who entered a
4 "transaction" because he does not allege that he purchased or attempted to purchase common
5 stock as a result of any email, the subject of an alleged email advertising misrepresentation. In
6 addition, Plaintiff neither alleges that he relied on any misrepresentation nor that such reliance
7 resulted in damage to plaintiff. For each of these reasons, Plaintiff lacks standing to assert the
8 Second Cause of Action.

9 **ELEVENTH AFFIRMATIVE DEFENSE**

10 **(Failure To Mitigate Damages)**

11 **(As to each Cause of Action)**

12 15. Without admitting liability, Plaintiff's alleged damages or injuries, if any, were
13 aggravated by the Plaintiff's failure to use reasonable diligence to mitigate them. Among other
14 reasons, to the extent Plaintiff was able but failed to immediately and effectively notify Defendant
15 and request the termination of the allegedly wrongful conduct alleged in the Complaint, Plaintiff
16 has failed to make reasonable efforts to mitigate his damages. Thus, Plaintiff's damages, if any,
17 were proximately caused or increased by its own acts or failures to act and any judgment
18 sustained herein by Plaintiff must be reduced by the percentage and degree of fault by which
19 Plaintiff's failure to mitigate contributed to any damage allegedly suffered by Plaintiff.

20 **TWELFTH AFFIRMATIVE DEFENSE**

21 **(Routine Transmission of Emails)**

22 **(As to the First Cause of Action)**

23 16. Without admitting the allegations of the Complaint, BHW alleges that it is not
24 liable to the extent it has only been involved in the routine transmission of e-mails pursuant to
25 Business and Professions Code section 17529.5. BHW permits clients which subscribe to its
26 electronic marketing service platform to transmit emails to third party email addresses of the
27 client's choosing using BHW's Internet servers. Emails sent by a BHW client are disseminated

1 directly by the client through the client's account, without any involvement by BHW.

2 **THIRTEENTH AFFIRMATIVE DEFENSE**

3 **(Adoption of Reasonable Practices and Procedures)**

4 **(As to the First Cause of Action)**

5 17. Without admitting liability, BHW alleges that, to the extent applicable, it has
6 established and implemented, with due care, practices and procedures reasonably designed to
7 effectively prevent unsolicited commercial email advertisements that are in violation of Business
8 and Professions Code Section 17529.5.

9 **FOURTEENTH AFFIRMATIVE DEFENSE**

10 **(Good Faith)**

11 **(As to each Cause of Action)**

12 18. Other defendants in this action allege that they are informed and believe and on
13 that basis alleged that Plaintiff directly and/or indirectly requested and consented to the receipt of
14 the e-mails at issue in this lawsuit with the intent that his conduct would result in allegedly
15 unsolicited e-mails being sent to his e-mail address. Those defendants are further informed and
16 believe and on that basis allege that Plaintiff failed to effectively notify defendants of his desire
17 not to receive allegedly unsolicited e-mails with the intent that his conduct would result in his
18 continued receipt of the e-mails at issue. To the extent this applies to BHW, Plaintiff's action is
19 barred. BHW is ignorant of the true state of facts. Assuming that BHW caused the e-mails at
20 issue to be sent to Plaintiff, which it denies, BHW acted in reliance upon Plaintiff's conduct as
21 alleged herein. Thus, BHW acted reasonably and in good faith at all times, based on all relevant
22 facts and circumstances known by it at the time it so acted. Accordingly, Plaintiff is barred from
23 any recovery.

24 **FIFTEENTH AFFIRMATIVE DEFENSE**

25 **(Contribution)**

26 **(As to each Cause of Action)**

27 19. BHW alleges that the incident and injuries allegedly suffered by Plaintiff, if any

1 exist, were actually and proximately caused and contributed to by the carelessness, negligence
2 and/or wrongdoing of persons other than BHW and that such third parties failed to exercise
3 reasonable care at and prior to the time of the alleged damages. Accordingly, the liability of
4 BHW, if any be found, should be abated, reduced or eliminated in direct proportion to the
5 percentage of fault actually attributable to this answering Defendant, if any.

6 **SIXTEENTH AFFIRMATIVE DEFENSE**

7 **(Apportionment)**

8 **(As to each Cause of Action)**

9 20. The matters complained of in the Complaint were proximately caused, in whole or
10 in part, by the acts or omissions of a third party or parties or Plaintiff. Accordingly, the liability
11 of the Plaintiff and responsible parties, named or unnamed, should be apportioned according to
12 their respective degrees of fault or other legal responsibility, and the liability, if any, of BHW
13 should be reduced accordingly.

14 **SEVENTEENTH AFFIRMATIVE DEFENSE**

15 **(Indemnity)**

16 **(As to each Cause of Action)**

17 21. BHW alleges that any damages suffered by Plaintiff were the direct and proximate
18 result of the acts and omissions of Plaintiff and/or other third parties, and that Plaintiff and/or
19 such other third parties should indemnify BHW and hold BHW harmless from any and all
20 damages, claims, costs, judgments, or any and all liabilities that may be recovered against BHW
21 by Plaintiff.

22 **EIGHTEENTH AFFIRMATIVE DEFENSE**

23 **(Failure to File Affidavit of Venue)**

24 **(As to the Second Cause of Action)**

25 22. Plaintiff is barred from asserting the causes of action, and each of them, because
26 Plaintiff failed to comply with the filing requirements of Civil Code §1780(d).

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NINETEENTH AFFIRMATIVE DEFENSE

(Incorporation of Defenses of Others)

(As to each Cause of Action)

23. BHW adopts by reference any applicable defense pleaded by any other defendant not otherwise expressly set forth herein.

TWENTIETH AFFIRMATIVE DEFENSE

(Right To Assert Additional Defenses)

(As to each Cause of Action)

24. Certain separate and additional defenses, to the entire Complaint or to individual causes of action therein, may be available to BHW; however, these separate and additional defenses require discovery before they can be properly alleged. BHW will move to amend its answer, if necessary, to allege such separate and additional defenses after they have been ascertained by BHW or according to proof at trial.

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