

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF CASS

EAST CENTRAL JUDICIAL DISTRICT

John Doe,

Civil No. 09-05-C-543

Plaintiff,

Hon. Frank Racek

vs.

Ed Falk,

Defendant.

DIRECT TESTIMONY AFFIDAVIT OF ED FALK

ED FALK, being first duly sworn, and deposes and says as follows:

1. I am a resident of the State of California and have continuously resided in California for over 19 years. I have had a driver's license issued by the State of California for at least the last 19 years. I am registered to vote in the State of California. I own real estate (i.e., my home) in the State of California, and do not own real estate in any other state, including North Dakota.

2. I am a computer programmer employed a corporation in the State of California, and have been employed as a professional computer programmer since approximately 1978.

3. I have never lived in the State of North Dakota, nor have I ever traveled to or visited the state of North Dakota.

4. I have never engaged in any business transaction in the State of North Dakota, nor have I engaged in any business transaction involving a resident of the State of North Dakota.

5. I do not have any officers, employees, or agents in the State of North Dakota.

6. I do not own any personal or real property in the State of North Dakota.

7. I do not maintain any bank accounts in the State of North Dakota.

8. I have not had any direct contact with the Plaintiff in this case, nor have I had knowingly had any contact with any business or other entity owned or operated by the Plaintiff.

9. With the exception of legal counsel, I have never initiated contact with any person or entity that I knew to be in, or a resident of, North Dakota.

10. I have never been a plaintiff or witness in any proceeding in any state or federal court located in the State of North Dakota. I have been named as a Defendant in two proceedings in North Dakota state courts: the above-captioned action, and Sierra Corporate Design, Inc. v. David Ritz and Ed Falk, Case No. 09-05-C-01660.

11. "Spam" is a colloquial term used to describe unwanted electronic junk mail and newsgroup postings. Spam usually takes the form of unsolicited commercial advertisements for various products and services. E-mail spam is sometimes referred to as "unsolicited commercial e-mail" (or "UCE"). The term "spam" can also be used to refer to any sort of unwanted message sent via the Internet to a large group of people.

12. Spam is a great waste of Internet resources, as it consumes bandwidth, making e-mail, newsgroups, and all other forms of communication slower and less efficient. More importantly, spam wastes the time of its ultimate recipients, who must wade through the large volumes of unwanted and unsolicited messages in order to find any actual or desired communications. In some circumstances, recipients receive spam messages in such a large volume that it destroys the Internet's utility as a means of communication or obtaining sought-after information.

13. Spam also costs consumers money through the increased costs that Internet service providers pass on to the consumers in order to pay for the increased bandwidth and various countermeasures put in place to reduce spam. Costs are often passed directly on to the user in the form of increased per-hour connection costs, subscription fees, and other charges.

14. "Usenet" is a world-wide distributed discussion system. Users can read and post messages to any of thousands of Usenet newsgroups that are named and organized by subject.

15. In approximately 1994, I first became aware of Usenet spam as a serious problem, and I began taking part in various online discussions about what could be done to curb or stop Usenet spam.

16. Most Internet service providers have terms of service or other rules governing the use of their Internet resources by their subscribers and/or customers. These terms of service frequently prohibit the use of the service provider's resources to send unsolicited commercial e-mail messages or Usenet postings (i.e., spam). Many Internet service providers are self-policing and, when they discover that one of their subscribers or customers is sending spam, will immediately terminate that customer's account and access to their resources.

17. In order to protect their access to the Internet, most spammers engage in various forms of forgery (often referred to as “spoofing”) by which they attempt to hide, alter, or otherwise conceal the actual origin of their unwanted messages. Because the origin or transmission path of these messages is deliberately false or misleading, any investigation to determine who is responsible for sending the spam must look at many additional indicia of the messages’ origins.

18. A few Internet service providers are either indifferent to, or actually permit, spamming by their customers or subscribers.

19. At all times, the goal of my investigations into the sources of e-mail and Usenet spam on the Internet has been to reduce spam. My investigations were, at all times, dedicated to: (1) identifying the spammer, (2) informing the spammers’ service providers that the providers’ services were being used to send spam, and (3) maintaining a careful history of those companies that permitted spammers to continue to operate using their computer resources.

20. In 1996, one particular service provider became home to spammers who were flooding the Internet with sexually explicit advertisements for pornography. When it became clear that the service provider was not responsive to complaints from the community, I developed a computer program which would monitor the affected Usenet newsgroups for spam and automatically generate a daily report, which I forwarded to the provider and also posted on the Internet in an electronic, “Open Letter.”

21. Over time, I began to apply this same technique to other identified sources of spam. My computer would automatically monitor specific newsgroups for spam from known sources, and then automatically generate a report that was forwarded to the service providers that originated the spam, and would publicly share the reports with a specific Usenet newsgroup monitored by others concerned about the effects of spam (news.admin.net-abuse.usenet).

22. Eventually, the number of service providers and spammers that I monitored exceeded 400, and the owner of the Internet domain “rahul.net” offered to provide me with web space where I could provide a ready reference to the various “case files” I had generated in my investigation of spam sources.

23. I created the website at issue and used it to provide a collected catalog for all of the information contained in the “case files” that I had developed since 1996, and to archive the daily spam reports generated by my computer program.

24. Attached hereto as **Exhibit 1** is a CD that contains a true and correct archived copy of my web site at www.rahul.net/falk as it existed on approximately February 8, 2005. The main web pages and the Netzilla case file are exactly as they were at the time the lawsuit was filed. I fixed a number of broken links in the html. This will have no effect on the content of the web pages.

25. Each case file on the website contained a short description of the subject as well as the five most recent daily reports that had been generated relating to that subject.

26. At all times, my purpose in creating, updating, and maintaining the web site has been to provide a central repository for information collected or received by me, relating to the investigation of the more than four hundred identified spammers and “spam friendly” service providers responsible for e-mail and Usenet spam. This information was collected, organized, and displayed in such a way on the web site to make it a useful reference for myself and others in the Internet anti-spam community.

27. The site is organized and configured in such a way that it is a ready reference for readers. The web site does not solicit information from its users, and there is no mechanism for any reader or user to submit, update, change, or, in any other way, interact with the information on the site other than to read the information thereon.

28. I have always been the only person that updates or otherwise changes the content of the web site. The content of the web site does not change unless I access the various files and change the information or organization of the web site.

29. The web site does not have any function, application, or ability to perform any sort of interactive search for information. While I have attempted to structure the web site and organize the information in a logical manner that will permit a user to navigate to whatever specific information they desire, the user must have some knowledge about the specific spammer, service provider, or case file in order to quickly gain access to any particular information. This is very similar to an encyclopedia, in that the user must either know (or be able to recognize) the proper subject or topic heading – or be willing to page through the volumes of content to effectively search for any specific item.

30. There is no reference to North Dakota on the home page of my web site. All of the information on spammers and spam-friendly service providers on the web site is organized and categorized by the name of the spammer or service provider. None of the information is organized geographically whatsoever. That is, there is no collection of information about North Dakota spammers or service providers, or about the spammers or service providers associated with any other state, country, or region.

31. There is no case file on the web site for the Plaintiff, or for any alias or entity that I know of to be associated with the Plaintiff.

32. The Plaintiff’s name and information linking the Plaintiff to a specific Usenet pornography spammer known as “Netzilla” appears on only three pages on the web site: the “Netzilla Info Page,” which is one of over four hundred such case files on the web site, the “Spammer Quick Reference” page which lists over seven hundred entities, and the “What you can do” page which contains a single reference to the Plaintiff as the owner of Netzilla. Plaintiff’s name is one of many names, as well as business entities, associated with the “Netzilla” Usenet spammer and included in the Netzilla case file.

33. There is no reference to Plaintiff on the home page of my web site. There is no reference to Netzilla, the Netzilla case file, or the "Netzilla Info Page" on the home page of my web site.

34. For a user to reach the "Netzilla Info Page" (and the allegedly defamatory information identified by the Plaintiff), a visitor to the web site has only two options: first, to enter the exact address of the Netzilla Info Page into the address bar of their web browser; or, second, to navigate to the Netzilla Info Page from the home page of the web site.

35. In order to navigate to the Netzilla Info Page from the home page, the user must select the "List of sites being monitored" link, the "Spammer Quick Reference" link, the "Older news" link or the "What you can do" link from the more than twenty-five general topics links and more than four hundred other links on the home page.

36. In total, there were nine links to the Netzilla Info Page out of over three thousand links on the main web site. None of these links are on the home page.

37. The "List of sites being monitored" page contains an index of the case files maintained at the web site. The "List of sites being monitored" is arranged alphabetically, and provides links to the individual case files.

38. The "Spammer Quick Reference Page" page contains a large number of entries for Internet domain names, known or suspected spammers, groups or "gangs" of spammers, and service providers that have appeared in investigations of e-mail and Usenet spam. The "Spammer Quick Reference Page" page is arranged alphabetically, and the entries contain text information and links that will direct a user either to a new page or to the associated entry on the "Spammer Quick Reference Page."

39. Neither the Plaintiff's name or any alias or entity associated with the Plaintiff appears as a distinct entry, or in the associated information for any entry, on the "List of sites being monitored."

40. Plaintiff's name appears only once on the "Spammer Quick Reference Page" out of over seven hundred entries.

41. No entry on the "Spammer Quick Reference Page" contains any mention or reference to the State of North Dakota. That is, there is no entry on the "Spammer Quick Reference Page" that is specifically about, concerning, or directed to the residents of North Dakota.

42. To reach the "Netzilla Info Page" from the "Spammer Quick Reference Page," the user must select a link that appears only in the quick-reference entry for the Netzilla spammer, the link that appears in the entry for Newsfeed.com, or the link that appears in the entry for the Netzilla internet address.

