

ENGLE vs SMS .AC and

MICHAEL POUSTI

Class Action Suit

2004 DEC 14 P 12:48

CLERK-SUPERIOR COURT
SAN DIEGO COUNTY, CA

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10 JERRY ENGEL, on Behalf of Himself
11 and All Others Similarly Situated

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF SAN DIEGO

14 JERRY ENGEL on Behalf of Himself and All) CASE NO. **GIC 839950**
15 Others Similarly Situated,)

16 Plaintiff,) **CLASS ACTION**

17 v.)

) **CLASS ACTION COMPLAINT FOR:**

18 SMS.ac.Inc., a California corporation;)
19 MICHAEL POUСТИ, an individual and DOES) 1) **FAILURE TO PAY MINIMUM**
1 through 100, inclusive,) **WAGES;**
20) 2) **FAILURE TO PAY OVERTIME**
Defendants.) **WAGES; AND**
21) 3) **UNFAIR COMPETITION**
22)

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COPY

1 Plaintiff, JERRY ENGEL, brings this action as a class action on behalf of himself and all
2 other persons similarly situated (hereinafter the aforementioned named Plaintiff and Class will be
3 collectively referred to as "PLAINTIFFS"), and alleges against Defendants SMS.ac.Inc. a California
4 Corporation, MICHAEL POUSTI and Does 1 through 100 (hereinafter collectively referred to as
5 "SMS") as follows:

6 GENERAL ALLEGATIONS

7 1. This is a class action brought against Defendant SMS on behalf of all "consultants"
8 (as defined by SMS) employed by SMS during the four (4) years preceding the filing of this action.
9 This action alleges that SMS: (1) failed to pay overtime and minimum wages to its "consultants" in
10 violation of California Labor Code §§ 201, 202, 203, 510, 515, 551, 552, 558, 1182(b) and 1194, (2)
11 violated the applicable wage order(s) issued by the Industrial Welfare Commission of the State of
12 California; (3) intentionally violated California's Unfair Business Practices Act and California
13 Business & Professions Code §§17200, et seq.; and (4) converted PLAINTIFFS' lost wages for
14 Defendant SMS's own use.

15 JURISDICTION AND VENUE

16 2. Venue is proper in this Court pursuant to *California Code of Civil Procedure* § 395
17 and § 395.5 because Defendant is registered to do business in the State of California and doing
18 business within San Diego County, because the Plaintiff resides within San Diego County, and
19 because many of the acts giving rise to this action took place within San Diego County.

20 PARTIES

21 3. Plaintiff JERRY ENGEL ("Plaintiff") brings this action in his individual capacity
22 and on behalf of all others similarly situated. Plaintiff was employed as a "consultant" during the
23 proposed class period.

24 4. PLAINTIFFS are informed and believe and thereon allege that SMS is a California
25 corporation that is licensed to do business, and is doing business, in the State of California.
26 PLAINTIFFS are informed and believe and, on that basis, allege that SMS's corporate office is
27 located at within the County of San Diego, San Diego Judicial District.

28 5. PLAINTIFFS are informed and believe and thereon allege that MICHAEL POUSTI

1 is an officer of SMS and directly controls and implements all policies regarding compensation for
2 "consultants" at SMS as described herein. MICHAEL POUСТИ is also a resident of San Diego
3 County.

4 6. PLAINTIFFS are informed and believe, and based thereon allege, that each of the
5 Defendant Does are responsible in some manner for the events and happenings referred to herein,
6 and negligently, intentionally, and fraudulently caused injury and damages proximately thereby to
7 PLAINTIFFS as alleged herein.

8 7. PLAINTIFFS are informed and believe, and based thereon allege, that the true names
9 and capacities, whether individual, corporate, associate, or otherwise, of Defendant Does One (1)
10 through one hundred (100) inclusive ("Defendant Does"), are unknown to PLAINTIFFS, who
11 therefore sue said Defendant Does by such fictitious names. PLAINTIFFS will ask leave of court to
12 amend their complaint to show the true names and capacities when the same have been ascertained.
13 PLAINTIFFS are informed and believe, and based thereon allege, that the Defendant Does were the
14 agents, servants and/or employees of SMS and in doing the things hereinafter alleged, and at all
15 times, were acting within the scope of their authority as such agents, servants and employees, and
16 with the permission and consent of SMS.

17 8. PLAINTIFFS are informed and believe, and based thereon allege, that SMS and the
18 Defendant Does ratified, authorized, and consented to each and all of the acts and conduct of each
19 other as alleged herein.

20 CLASS ACTION ALLEGATIONS

21 9. Plaintiff brings this action, on behalf of himself and all others similarly situated, as a
22 class action pursuant to *California Code of Civil Procedure* § 382. The Class which Plaintiff seeks
23 to represent is defined as follows:

24 All persons who, within four year from the date on which this
25 Complaint was filed, was employed as a "consultant" by Defendant
26 SMS.ac.Inc.

27 10. Plaintiff is a member of the Class and is the proposed representative of the Class.
28 While the exact number of members of the Class is unknown to Plaintiff at this time and can only
be determined by appropriate discovery, membership in the Class is ascertainable from the records

1 that Defendant is required by law to maintain. Based upon the investigation conducted to date,
2 Plaintiff believes that the Class includes hundreds of members. Therefore, the Class is sufficiently
3 numerous that joinder of all members of the Class in a single action is impracticable and the
4 resolution of the claims alleged through the procedure of a class action will be of benefit to the
5 parties and the Court.

6 11. Plaintiff will fairly and adequately represent and protect the interests of the members
7 of the Class that Plaintiff proposes to represent. Plaintiff is an adequate representative of the Class,
8 as Plaintiff has no interests that are adverse to the interests of the members of the Class that Plaintiff
9 proposes to represent. Plaintiff is committed to the vigorous prosecution of this action and, to that
10 end, Plaintiff has retained counsel who is competent and experienced in handling employment-
11 related litigation.

12 12. Plaintiff's claims are typical of the claims of the other members of the Class that
13 Plaintiff proposes to represent because Plaintiff and each member of the Class have been subjected
14 to the same improper employment practices.

15 13. Common questions of law and fact exist as to the members of the Class and
16 predominate over the questions, if any, which affect only individual members of the Class.

17 14. There is a well-defined community of interest in the questions of law and fact
18 involved affecting the parties to be represented. The questions of law and fact common to the Class
19 predominate over questions which may affect individual Class members, including the following:

20 (a) Whether Defendant SMS implemented and engaged in a systematic program
21 that failed to pay the requisite minimum wage to its "consultants;"

22 (b) Whether Defendant SMS implemented and engaged in a systematic program
23 that failed to pay overtime to its "consultants" despite the requirement that they work
24 overtime;

25 (c) Whether the systematic acts and practices of Defendants, as alleged herein,
26 violated inter alia, California Labor Code §§1174 and 1194, and California Business & Professions
27 Code §§17200, et seq.

28 15. A class action is superior to other available methods for the fair and efficient

1 adjudication of the claims asserted in this action because:

- 2 (a) the expense and burden of individual litigation make it economically
3 unfeasible for the members of the Class to seek redress other than through the
4 procedure of a class action;
- 5 (b) were separate actions to be brought individually by each member of the
6 Class, the resulting duplicity of lawsuits would cause undue hardship and
7 expense to the Court and the litigants by necessitating multiple trials of
8 similar factual issues;
- 9 (c) the prosecution of separate individual actions would create a risk of
10 inconsistent adjudications of similar factual issues; and
- 11 (d) absent a class action, Defendant likely would retain the benefits of its
12 wrongdoing, and there would be a failure of justice.

13
14 16. Defendant has acted or refused to act on grounds generally applicable to the Class,
15 thereby making appropriate final declaratory relief with respect to the Class as a whole and
16 necessitating that any such relief be extended to the Class on a mandatory, class wide basis.

17 17. Plaintiff is aware of no difficulty that will be encountered in the management of this
18 litigation that would preclude its maintenance as a class action.

19 18. The names and addresses of most, if not all, of the members of the Class are
20 available from Defendant's records. Notice can be provided to the members of the Class via first
21 class mail or through techniques and a form of notice similar to those customarily used in
22 employment class action cases arising under California law.

23 **OPERATIVE FACTS**

24 19. PLAINTIFFS, at all relevant times during the previous four (4) years, have been
25 employed by SMS as "consultants." Under a policy created by Defendant MICHAEL POUSTI,
26 SMS has improperly classified its "consultants" as independent contractors because it wanted to
27 preclude itself from having to follow California's minimum wage and overtime wage requirements.
28 SMS was aware that it improperly misclassified its "consultants" but continued with the policy in

1 order to also avoid paying employer taxes.

2 **FIRST CAUSE OF ACTION FOR FAILURE TO PAY MINIMUM WAGES**

3 (By PLAINTIFFS Against All Defendants)

4 20. PLAINTIFFS hereby re-allege and incorporate by reference all paragraphs above as
5 though fully set forth in detail herein.

6 21. Pursuant to Labor Code § 1182(b), PLAINTIFFS may bring a civil action for failure
7 to pay minimum wages directly against the employer in PLAINTIFFS' names without first filing a
8 claim with the Division of Labor Standards Enforcement. Further, such private class actions have
9 the support and approval of the Division of Labor Standards Enforcement.

10 22. Pursuant to Labor Code §§ 1182(b), 201, 202 and other sections, it is unlawful to
11 employ persons without paying them the minimum wage set by the Industrial Welfare Commission
12 or under conditions prohibited by the applicable IWC Wage Orders. The minimum wage in
13 California is \$6.75 per hour.

14 23. SMS has unfairly and or willfully and wrongfully failed to pay PLAINTIFFS
15 minimum wages, thereby reducing its overhead and operating expenses thereby gaining an unfair
16 advantage over competing companies that comply with the law.

17 24. SMS's failure to retain records of hours of PLAINTIFFS is unfair and/or willful and
18 deliberate, and designed to serve the policy of unlawfully denying minimum wage compensation to
19 persons employed as "consultants."

20 25. SMS cannot provide records indicating the actual hours its employees worked as
21 Defendant SMS intentionally refused to keep the requisite time records.

22 26. PLAINTIFFS, individually, request recovery of minimum wage compensation,
23 according to proof, penalty wages, interest, attorneys' fees and costs as well as the assessment of any
24 other statutory penalties against SMS, and each of them, in a sum as provided by the Labor Code
25 and/or other statutes.

26 **SECOND CAUSE OF ACTION FOR FAILURE TO PAY OVERTIME WAGES**

27 (By PLAINTIFFS Against All Defendants)

28 27. PLAINTIFFS hereby re-allege and incorporate by reference all paragraphs above as

1 though fully set forth in detail herein.

2 28. Pursuant to Labor Code § 1194 (a), PLAINTIFFS may bring a civil action for
3 overtime wages directly against the employer in PLAINTIFFS' names without first filing a claim
4 with the Division of Labor Standards Enforcement. Further, such private class actions have the
5 support and approval of the Division of Labor Standards Enforcement.

6 29. Pursuant to Labor Code §§ 201, 202, 501 and 1194, and other sections, it is unlawful
7 to employ persons for longer than the hours set by the Industrial Welfare Commission or under
8 conditions prohibited by the applicable IWC Wage Orders.

9 30. At all times relevant hereto, IWC Wage Orders provide for payment of overtime
10 wages equal to one and one-half times an employee's regular rate of pay for all hours worked over
11 forty (40) hours in a workweek and or eight (8) hours per day and or double time rates thereafter.
12 Pursuant to Labor Code §§ 201, 202, 510 and 1194, wages must be paid forthwith.

13 31. SMS has unfairly and or willfully and wrongfully failed to pay PLAINTIFFS
14 overtime wages, thereby reducing its overhead and operating expenses thereby gaining an unfair
15 advantage over competing companies that comply with the law.

16 32. During their employment with SMS, PLAINTIFFS were expected and required to
17 work more than forty (40) hours per week to maintain SMS's business operations.

18 33. Furthermore, PLAINTIFFS were regularly and customarily scheduled to and
19 required to work six (6) or seven (7) consecutive days in a row and, in some instances, worked as
20 many as four (4) weeks without a day off in violation of the Labor Code and Wage Order(s).
21 Working such overtime hours was and is expected by SMS of all its "consultants."

22 34. SMS's failure to retain records of hours of PLAINTIFFS is unfair and/or willful and
23 deliberate, and designed to serve the policy of unlawfully denying overtime compensation to
24 persons employed as non-exempt employees.

25 35. Under the provisions of the California's Labor Code and the applicable wage orders
26 by the Industrial Welfare Commission of California, PLAINTIFFS should have received overtime
27 wages in a sum according to proof for the hours worked.

28 36. SMS cannot provide records indicating the actual hours its employees worked as

1 Defendant SMS intentionally refuses to keep the required time records.

2 37. PLAINTIFFS, individually, request recovery of overtime compensation, according to
3 proof, penalty wages, interest, attorneys' fees and costs pursuant to Labor Code §§ 201, 202, 510
4 and 1194 and the relevant California Industrial Wage Commission orders, as well as the assessment
5 of any other statutory penalties against SMS, and each of them, in a sum as provided by the Labor
6 Code and/or other statutes.

7 38. The pattern, practice and uniform administration of corporate policy regarding illegal
8 employee compensation as described herein is unlawful and creates an entitlement to recovery by
9 the Plaintiff and the Class identified herein, in a civil action, for the unpaid balance of the full
10 amount of the straight time compensation and overtime premiums owing, including interest thereon,
11 willful penalties, reasonable attorneys' fees and costs of suit according to the mandate of California
12 Labor Code section 1194 et. seq.

13 THIRD CAUSE OF ACTION FOR UNFAIR COMPETITION

14 (By PLAINTIFFS Against All Defendants)

15 39. PLAINTIFFS hereby reallege and incorporate by reference all paragraphs above as
16 though fully set forth in detail herein.

17 40. The failure to pay minimum wage and overtime wages is either unfair and/or an
18 offense punishable by statutory fine and imprisonment for each violation. The acts constitute a
19 continuing and ongoing unfair and or unlawful activity prohibited by Business & Professions Code
20 §§17200 et seq., and justify the issuance of an injunction, restitution, and other equitable relief
21 pursuant to Business & Professions Code §17203 both as to the company and its managing agents
22 and officers. The court is authorized to order injunctive relief, declaratory relief and restitution to
23 affected members of the general public as remedies for any violations of Business & Professions
24 Code §§17200 et seq. Plaintiff alleges that SMS has violated numerous Labor Code statutes,
25 including, but not limited to: Labor Code §§ 201, 202, 203, 510, 515, 551, 552, 558 and 1194.
26 Furthermore, SMS's unlawful practices violate numerous California Wage Orders.

27 41. SMS has engaged in unfair business practices in California by practicing, employing,
28 and utilizing the employment practices outlined above, including but not limited to, having non-

1 exempt/hourly employees perform overtime without the proper premium overtime compensation or
2 minimum wage. SMS's use of such practices constitutes an unfair business practice, unfair
3 competition, and provides an unfair advantage over its competitors. Plaintiff on behalf of the
4 general public seeks full restitution and disgorgement of said monies by SMS, as necessary and
5 according to proof, to restore any and all monies withheld, acquired and/or converted by SMS by
6 means of the unfair practices complained of herein. Plaintiff seeks on behalf of all current and
7 formerly "consultants" restitution and disgorgement of said monies. Plaintiff further seeks, on
8 behalf of the general public, the appointment of a receiver, as necessary to establish the total
9 monetary relief sought from SMS. Restitution, includes all profits realized as a result of the unfair
10 business practices, including interest thereon. The act complained of herein occurred, at least in part
11 within the last four (4) years preceding the Complaint.

12 42. Plaintiff is informed and believes and on that basis alleges, that at all time herein
13 mentioned, SMS has engaged in unlawful, deceptive and unfair business practices prohibited by
14 California Business and Professions Code section 17200 et seq., including those set for the in
15 Paragraphs 15-30, inclusive, thereby depriving PLAINTIFFS and other members of the general
16 public in the minimum working condition standards and conditions due to them under the California
17 labor laws and Industrial Welfare Commission wage orders as specifically described herein.
18 Plaintiff seeks an injunction preventing SMS from continuing their unfair business practice of
19 improperly depriving PLAINTIFFS of their overtime pay. Plaintiff further seeks an order requiring
20 SMS to identify by full name, social security number and last known address, all non-exempt
21 employees who worked for SMS within the last four (4) years through the date of judgment.
22 Plaintiff further seeks an order requiring SMS to timely pay restitution to all current and former
23 employees, including back wages, penalties, interest, attorney's fess and costs.

24
25 **PRAYER FOR RELIEF**

26 WHEREFORE, Plaintiff prays for judgment and relief as follows:

27 **As To The First Cause Of Action:**

- 28 1. An order certifying that the action may be maintained as a class action;

1 interest, and attorney's fees as a result of the unfair business practices;

2 3. For an order finding and declaring that SMS's acts and practices, as challenged
3 herein, are unlawful, unfair and/or fraudulent;

4 4. For an accounting, under administration of Plaintiff and subject to Court Review, to
5 determine the amount to be returned by SMS and the amounts to be refunded to members who are
6 or were improperly classified as an exempt employee;

7 5. For the creation of an administrative process wherein each injured current and former
8 employee received his or her back wages in the form of overtime pay, or alternatively that each
9 current or former eligible employee may submit a claim in order to receive his/her money;

10 6. For an order requiring SMS to make full restitution and payment pursuant to Labor
11 Code §§ 201, 202, 203, 510, 558 and 1194; and

12 7. For all other appropriate declaratory and equitable relief.

13 **As To All Causes Of Action:**

14 1. For such other and further relief as this Court may deem just and proper; and

15 2. For attorney's fees; and

16 3. For reasonable costs occurred herein.

17 Dated: December 13, 2004

18 BOHM, FRANCIS, KEGEL & AGUILERA, LLP
19 A. ERIC AGUILERA

20
21 By: 

22 A. Eric Aguilera, attorneys for PLAINTIFFS,
23 JERRY ENGEL, on Behalf of Himself and All
24 Other Similarly Situated.

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DEMAND FOR A JURY TRIAL

Plaintiffs hereby demand a jury trial.

Dated: December 14, 2004

BOHM, FRANCIS, KEGEL & AGUILERA, LLP
A. ERIC AGUILERA

By: 
A. Eric Aguilera, attorneys for PLAINTIFFS,
JERRY ENGEL, on Behalf of Himself and All
Other Similarly Situated.

BIRNBAUM vs MICHAEL

POUSTI

False Imprisonment Suit

001/\$191.00

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100 -2 : 57

CURT
CA

Attorneys for Plaintiff

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

AARON BIRNBAUM, an individual

Plaintiff,

vs.

COLLEGECLUB.COM, INC.; a corporation;
MICHAEL POUSTI; an individual; BENNETT
FISCHER; an individual; PAYMON HAMIDI; an
individual; and DOES 1 to 50,

Defendants.

CASE NO. **G10747560**

COMPLAINT FOR DAMAGES

0407 01 20 G1074
02 001 New Civil

\$191.00

[JURY TRIAL DEMANDED]

COMES NOW the plaintiff, Aaron Birnbaum, as and for causes of action against the defendants, and each of them, alleges:

PRELIMINARY ALLEGATIONS

1. The plaintiff, Aaron Birnbaum, at all times mentioned herein was a resident of San Diego County and entitled to possession of the residential premises located at 970 Camino de la Reina, unit no. 37.

2. The defendant, CollegeClub.com, Inc., (sometimes referred to herein as "the Company") is and at all times mentioned herein was a corporation authorized to do business and doing business in the County of San Diego, State of California as an on-line seller of college textbooks. Plaintiff was employed by CollegeClub.com as a Director of Academic Relations until May, 1999.

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RECORDED
INDEXED

1 3. The defendant, Michael Pousti, is and at all times mentioned herein was a resident of San
2 Diego County and the Chief Executive Officer of CollegeClub.com.

3 4. The plaintiff is informed and believes and thereon alleges that the defendant, Bennett
4 Fischer, is and at all times mentioned herein was a resident of San Diego County and employed as an
5 officer of CollegeClub.com.

6 5. The plaintiff is informed and believes and thereon alleges that the defendant, Paymon
7 Hamidi, is and at all times mentioned herein was a resident of San Diego County and employed as an
8 officer of CollegeClub.com.

9 6. The plaintiff is informed and believes and thereon alleges that the defendants, Does 1
10 through 50, inclusive, whether individual, corporate, associate, or otherwise, are fictitious names of the
11 defendants whose true names and capacities are unknown to the plaintiff at this time. The plaintiff is
12 informed and believes and thereon alleges that at all times mentioned each of the defendants sued herein
13 as a Doe was the agent, servant, and employee of his or her co-defendant, and in doing the things alleged
14 was acting in the scope of his or her authority as such agent, servant, and employee, and with the
15 permission and consent of his or her co-defendants, whether an agent, corporation, association, or
16 otherwise, is in some way liable or responsible to the plaintiff on the facts alleged herein, and proximately
17 caused injuries and damages thereby. At such time as the defendants' true names and identities become
18 known to the plaintiff, the plaintiff will ask leave of the court to amend the complaint to add said true
19 names and capacities.

20 7. The plaintiff is informed and believes and thereon alleges that at all times mentioned
21 herein, except as may be otherwise alleged, the defendants, including Does, and each of them, were acting
22 as agents, servants, and employees of each other, and were acting within the scope of their employment,
23 with the full knowledge and consent, either express or implied of each of the other named defendants.

24 8. On or about the morning of May 21, 1999, plaintiff left his residence to pick up his mail.
25 Just outside his front door, plaintiff was confronted by Pousti, Fischer, and Hamidi. Pousti began
26 screaming at plaintiff, falsely accusing him of stealing confidential information from CollegeClub.com.
27 Fischer and Hamidi, who are larger than the plaintiff in stature, stood by as "muscle." Plaintiff advised
28 Pousti that he had not stolen anything from the Company. Pousti demanded entry into plaintiff's

1 residence to search the premises, including plaintiff's personal computer, for the allegedly "secret"
2 information. Plaintiff refused and requested that the defendants leave. Pousti became further enraged,
3 shoving plaintiff in the chest and forcefully extracting plaintiff's house keys from his hand.

4 9. With plaintiff's house keys in-hand, Pousti ran into plaintiff's residence and locked the
5 door behind him. Fischer and Hamidi prevented plaintiff from pursuing Pousti.

6 10. Locked out of his own house by Pousti, plaintiff began knocking on the front door trying
7 to alert his roommate to the situation. Plaintiff's roommate opened the door and let plaintiff back into
8 the house. Fischer and Hamidi, uninvited, followed.

9 11. Once in the house, plaintiff discovered Pousti rummaging through his personal belongings.
10 Plaintiff again requested that the defendants leave immediately because he did not have any "stolen"
11 information and he did not appreciate them "tearing up" the premises. They refused. Plaintiff's
12 roommate called 911

13 12. While plaintiff's roommate was calling 911, Pousti located a computer in the home. He
14 began searching files on the computer. Plaintiff advised Pousti that he had no right to search the
15 computer and turned the monitor off. Undaunted, Pousti began disconnecting the computer from the
16 monitor and the power outlet so that he could take it with him.

17 13. While Pousti was disconnecting the computer, plaintiff's roommate returned with the
18 telephone and advised plaintiff that he had the police on the line. When he attempted to give the
19 telephone to plaintiff, however, Pousti knocked it out of his hand and then threw it against the wall,
20 severing the connection with the police. Pousti, Fischer, and Hamidi then left, taking the computer and
21 the plaintiff's keys with them.

FIRST CAUSE OF ACTION

(For Assault)

24 14. The plaintiff realleges and incorporates by reference paragraphs 1 through 13 of the
25 complaint as though fully set forth at this point.

26 15. In doing the acts as alleged above, defendants intended to cause or to place plaintiff in
27 apprehension of harmful and/or offensive contact with plaintiff's person, and plaintiff was in fact placed
28 in great apprehension of harmful and/or an offensive contact with his person.

1 **THIRD CAUSE OF ACTION**

2 **(For Violation Of Civil Code Section 43)**

3 26. The plaintiff realleges and incorporates by reference paragraphs 1 through 25 of the
4 complaint as though fully set forth at this point.

5 27. Civil Code Section 43 gives every person the right of protection from bodily restraint or
6 harm, from personal insult, from defamation, and from injury to personal relations.

7 28. In doing the acts as alleged above, defendants violated Civil Code Section 43.

8 29. As a direct and proximate result of the defendants' wrongful conduct, the plaintiff has
9 suffered, and will continue to suffer damages in an amount presently unknown, but believed to be in
10 excess of the jurisdiction of this court, to be established at the time of trial, according to proof.

11 30. As a further direct and proximate result of the defendants' wrongful conduct, plaintiff has
12 suffered severe mental anguish, humiliation, nervousness, and anxiety.

13 31. The defendants' conduct as alleged herein, was intentional, despicable, malicious, and
14 oppressive, and in conscious disregard of the plaintiff's rights, justifying an award of exemplary and
15 punitive damages in an amount sufficient to punish and make an example of the defendants.

16 **FOURTH CAUSE OF ACTION**

17 **(For Slander Per Se)**

18 32. The plaintiff realleges and incorporates by reference paragraphs 1 through 31 of the
19 complaint as though fully set forth at this point.

20 33. On or about May 21, 1999, Pousti, wilfully, without justification, and without privilege,
21 published to other persons, defamatory and disparaging statements about the plaintiff.

22 34. Pousti, in the presence of the other defendants, and in the presence of plaintiff's
23 roommate, accused plaintiff of being a thief and liar. He accused plaintiff of stealing confidential
24 information from the Company and then lying to cover it up.

25 35. Said statements were heard and understood by several third parties, including but not
26 limited to, the other defendants and plaintiff's roommate.

27 36. Said statements are in fact false and are defamatory per se because they impute that
28 plaintiff is a criminal of immoral character, untrustworthy, and unfit for employment.

1 **EIGHTH CAUSE OF ACTION**

2 **(For Intentional Infliction Of Emotional Distress)**

3 56. The plaintiff realleges and incorporates by reference paragraphs 1 through 55 of the
4 complaint as though fully set forth herein.

5 57. In doing the acts as alleged above, the defendants intended to cause plaintiff to suffer
6 humiliation, mental anguish, and emotional and physical distress.

7 58. As a direct and proximate result of the defendants' intentional and outrageous conduct,
8 plaintiff suffered sever humiliation, mental anguish, and emotional and physical distress, and has been
9 injured in mind and body in an amount presently unknown, but believed to be in excess of the jurisdiction
10 of this court, to be established at the time of trial, according to proof.

11 59. The defendants' conduct as alleged herein, was intentional, despicable, malicious, and
12 oppressive, and in conscious disregard of the plaintiff's rights, justifying an award of exemplary and
13 punitive damages in an amount sufficient to punish and make an example of the defendants.

14 **NINTH CAUSE OF ACTION**

15 **(For Conversion)**

16 60. The plaintiff realleges and incorporates by reference paragraphs 1 through 59 of the
17 complaint as though fully set forth herein.

18 61. In doing the acts as alleged above, the defendants converted plaintiff's property and
19 property otherwise not belonging to defendants for their own use and benefit, all to the exclusion of
20 plaintiff.

21 62. As a direct and proximate result of the defendants' wrongful conduct, the plaintiff has
22 suffered, and will continue to suffer damages in an amount presently unknown, but believed to be in
23 excess of the jurisdiction of this court, to be established at the time of trial, according to proof.

24 63. The defendants' conduct as alleged herein, was intentional, despicable, malicious, and
25 oppressive, and in conscious disregard of the plaintiff's rights, justifying an award of exemplary and
26 punitive damages in an amount sufficient to punish and make an example of the defendants.

27 ///

WHEREFORE, the plaintiff pray for judgment against defend each of them,

follow

F compensatory general and special damages according to proo

F exen lary and puni damage

ial distr damage

F preudgment interest in amount be determined at the time rial

reasonable attorney fees

cost of suit incurred herein

such other and furth relief this court may stand per

DATED: May 2000

LAW OFFICES OF EUGENE P. YALE

Eugene P. Yale, Attorney for Plaintiff

ASPIRO AB vs SMS .AC

Declaration of Wilfahrt

SAN DIEGO

COUNTY, CA

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Attorneys for Defendant SMS.ac, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

ASPIRO AB, a Swedish business entity,

Case No. GIC 817762 *VIA FAX*

Plaintiff,

**DECLARATION OF GREG WILFAHRT
IN SUPPORT OF MOTION TO SET
ASIDE ENTRY OF DEFAULT**

v

SMS.ac, Inc., a California corporation, and
DOES 1 through 10,

[C.C.P. § 473(b)]

Defendants.

Date: July 30, 2004
Time: 2:30 p.m.
Dept.: 64
Judge: Hon. William R. Nevitt, Jr.

[Appearance Required]

I, Greg Wilfahrt, hereby declare:

1. The following is set forth of my own personal knowledge and, if called as a witness, could and would competently testify thereto.

2. I am the Executive Vice President for SMS.ac, Inc. ("SMS.ac"), the defendant in the above captioned matter. I have been employed by SMS.ac as the Executive Vice President since November 15, 2001.

3. SMS.ac is a California corporation. Its primary business is the delivery of our customers' "short messages" to mobile phones around the world. A "short message" is a typed communication sent from our customers' mobile phones or the SMS.ac website to another or other

mobile phone(s). It is also referred to as "text messaging." It allows individuals to communicate with others throughout the United States and around the world. The costs typically range anywhere from one cent to fifty cents per text message, depending on the destination and application of the message.

4. In order to facilitate delivery of short messages to mobile phone users, it is commercially beneficial for SMS.ac to contract with third parties, referred to as "aggregators." SMS.ac will route its customers' short messages through these aggregators to other individuals that are subscribers of carriers in that aggregator's network.

5. Plaintiff Aspiro AB ("Aspiro") is an aggregator with whom SMS.ac contracted in 2002 to facilitate the delivery of short message services to customers worldwide.

6. I had no idea that Aspiro had filed a lawsuit against SMS.ac. until I was shown a copy of the complaint on or about June 1, 2004.

7. I also learned on or about that date that Aspiro had served the Secretary of State, and received an entry of default against SMS.ac on April 29, 2004.

8. This utterly surprised me, because during this time frame, I had been in regular contact with Aspiro through Irena Färemo, Aspiro's representative contact. A true and correct copy of e-mail correspondence between myself and Ms. Färemo are attached hereto as Exhibit 1. As you will see, Ms. Färemo and I corresponded both days before and days after the Court entered the default on April 29, 2004. As late as May 2, 2004, Ms. Färemo indicated that she would have Per-Fredrik Hagermark, the Director of Sales, contact me about pursuing additional future business opportunities. And indeed, Aspiro was still receiving monthly payments from SMS.ac via wire transfer as recent as April 13, 2004. There was never any indication that there was dissatisfaction with the business relationship. Clearly, during any of these correspondences, Ms. Färemo could have notified me of her discontent with the current relationship status or requested our new address in order to serve us.

9. I also corresponded with plaintiff's attorneys in this matter. A true and correct copy of a letter I sent to them, as reflected in an e-mail carbon copy to plaintiff itself, is attached hereto as Exhibit 2.

10. In fact, we were not notified of any intent to pursue legal action. A letter we received from Hovey & Kirby on behalf of Aspiro on July 13, 2003 (to which my letter attached as Exhibit 2 responded) was the last I heard from plaintiff's counsel on this matter. A true and correct copy of this letter is attached hereto as Exhibit 3. SMS.ac continued to make monthly payments to Aspiro. To the best of our knowledge, and as evidenced from Aspiro's acceptance of our wired payments since then, we believed Aspiro was satisfied with our efforts and the payments being made.

11. These communications were simply a continuation of a long history between the parties. For example, on November 26, 2003, Aspiro and SMS.ac even went so far as to enter into an amendment to the contract for purposes of enabling SMS.ac to "make good" on outstanding invoices. Under the amendment, SMS.ac was to perform a certain marketing campaign on Aspiro's behalf, which SMS.ac performed. Aspiro had no reason to believe a lawsuit had been filed, or that Aspiro was even troubled by the parties' relationship.

12. At no time did Ms. Färemo or Aspiro's counsel notify me that a lawsuit was pending against SMS.ac. Instead, on May 2, 2004, three days after the default was entered. Ms. Färemo expressed an interest in future collaborations between SMS.ac and Aspiro. See Exhibit 1 hereto.

13. Had Ms. Färemo or her attorney asked me what our current address was or where we could be served with the summons and complaint, I would have told her.

14. SMS.ac concedes that some amount is due Aspiro and has been making \$1,000 monthly payments to Aspiro. However, SMS.ac vigorously disputes that it owes plaintiff \$131,910.80, as set forth in the complaint. SMS.ac also notes that this lawsuit should never have been filed in the first place. Pursuant to the underlying contract, a copy of which is attached to the complaint, and hereto as Exhibit 4, any "dispute, controversy or claim shall be settled by arbitration in accordance with the Rules of the Arbitration Institute of the London Chamber of Commerce. The place of proceeding shall be in London, United Kingdom" Further, "[t]his Agreement shall be governed by Swedish law." *Id.*; ¶ 1.16.

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15. When SMS.ac was formed in June 2001, and until July , 2003. SMS.ac was
2 located on 3969 Mahaila, Suite 402, San Diego, CA 92122

3 16. On July 1, 2003, SMS.ac moved into its current location at 308 G Street, San
4 Diego, CA 92101. Unfortunately, due to the chaos associated with the move, and the fact that
5 SMS.ac has been aggressively pursuing its business opportunities and attempts to expand, SMS.ac
6 inadvertently failed to notify the Secretary of State after it moved. However, SMS.ac has since
7 updated its information with the Secretary of State.

8 7. If SMS.ac is not afforded the opportunity to present its defense, a judgment for
9 \$130,000 would completely demolish SMS.ac's ability to maintain operations and ensure payroll
10 for its 60 employees. SMS.ac would close its doors and be forced into bankruptcy.

1 I declare under penalty of perjury under the laws of the state of California that the
12 foregoing is true and correct and that this declaration is executed this 14 day of June, 2004, in San
13 Diego, California.

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18 Greg Wilfahrt
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 CHERYL EDWARDS TANNENBERG

Of Counsel:
 KAREN M. LADNER
 DONALD MCGRATH, II

July 13, 2003

VIA CERTIFIED MAIL

Michael Pousti
 Chief Executive Officer
 SMS.ac, Inc.
 7770 Regents Road, 113-405
 San Diego, California 92122

Re. *Our Client: Aspiro AB*

Dear Mr. Pousti:

This firm represents Aspiro AB. Your firm, SMS.ac, Inc., is indebted to Aspiro for services provided as evidenced by the invoices summarized below, copies of which are enclosed. The contract between Aspiro and SMS provides among other things for recovery of interest at the rate of 12% per annum on delinquent accounts. The sums owing are expressed in Euros as follows:

Invoice No.	Due	Currency	Amount	Interest to 7/9/03	Total	Per Diem Interest
2524	09/05/0 2	EUR	26,256.00	2,650.05	28,906.06	8.63
2630	10/05/0 2	EUR	30,735.00	2,798.99	33,533.99	10.10
2728	11/03/0 2	EUR	32,636.00	2,660.95	35,296.95	10.73
2816	12/07/0 2	EUR	17,605.00	1,238.62	18,843.62	5.79
TOTAL					131,910.89	35.25

Michael Pousti
July 13, 2003
Page 2

Expressed in US Dollars at the current rate of exchange, the sum owing by SMS to our client is \$ 131,910.39.

The e-mails forwarded to me by our client contain both admissions that these invoices are due and owing and that SMS.ac is experiencing severe financial difficulty and is unable to pay. These e-mails also clearly demonstrate that Aspiro has attempted to resolve this dispute amicably but to no avail.

Therefore, DEMAND IS MADE that SMS pay the sum of \$ 131,910.39 USD, plus \$ 39.88 USD per diem for each day after July 9, 2003. If payment is not received by Friday, July 25, we will immediately file an action in San Diego County Superior Court to collect this amount. The payment may be by check payable to "Aspiro AB" and should be delivered to this office in order to avoid any action which might be taken as the result of uncertainty as to whether the payment has been made.

You are also advised that Aspiro does not at this time waive the right to arbitrate any dispute relating to the amount owing under the contract, with the arbitration to take place in London as the contract provides. However, Aspiro has instructed us to file the lawsuit immediately for the purpose of obtaining provisional relief as authorized by California Code of Civil Procedure section 1281.8(b). Specifically, Aspiro intends to seek, in advance of any arbitration, a right to attach order permitting the issuance of a writ of attachment which may be immediately levied against the bank accounts and other property of SMS.

Arrangements for payment must be made in order to avoid immediate legal action.

Very truly yours,


Dean T. Kirby, Jr.

cc: John Matra
Greg Wilfahrt
Brandie Williams
Håkan Persson

VILKAS , LTD vs SMS .AC

Declaration of Scheer

Declaration of Meyer

Email of Wilfahrt

1 SULLIVAN, HILL, LEWIN, REZ & ENGEL
 A Professional Law Corporation
 2 Jeffrey D. Lewin, SBN 068202
 Marilyn S. Scheer, SBN 132544
 3 550 West "C" Street, Suite 1500
 San Diego, California 92101
 4 Telephone: (619) 233-4100
 Fax Number: (619) 231-4372

5 Attorneys for Plaintiffs, Vilkas Ltd.
 6 and Crealogix AG

7
 8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 9 FOR THE COUNTY OF SAN DIEGO

11 VILKAS LTD and CREALOGIX AG,
 12 Plaintiffs,

13 v.

14 SMS.AC, INC. and DOES 1-50,
 15 Defendants.

CASE NO. *GIC 828536*

DECLARATION OF MARC MEYER IN
 SUPPORT OF CREALOGIX AG'S
 APPLICATION FOR WRIT OF
 ATTACHMENT AGAINST SMS.AC,
 INC.

Date: *May 28, 2004*
 Time: *11:00 a.m.*
 Dept.: *61*

Judge: Hon. *John S. Meyer*
 Trial Date: *Not Set*
 Complaint Filed: *4/15/04*

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 21 I, Marc Meyer, declare:

22 1. I serve as the Senior Vice-President of Crealogix AG ("Crealogix"). As a foreign
 23 corporation organized under the laws of Switzerland, Crealogix is engaged in international
 24 commerce. The business of Crealogix involves providing delivery services of mobile data to
 25 subscribers of certain mobile network operators throughout the world. My corporate
 26 responsibilities for Crealogix include contract negotiations, troubleshooting, crisis management
 27 and debt collection. I have had primary responsibility for collecting the amounts due from
 28 SMS.ac, Inc. ("SMS") to Crealogix. I have direct and first-hand knowledge of the facts
 contained herein and if called upon to testify, I could and would competently testify thereto.

2. The Defendant SMS.ac, Inc. is a California corporation with its principal place of
 business located in San Diego California. As part of its business, SMS has rights to certain short

1 message service applications and other related mobile products and services. Short message
2 service is the general term for the function of sending and receiving short text messages to and
3 from mobile handsets.

4 3. On or about May 3, 2003, SMS entered into a written contract with Crealogix
5 entitled Mobile Network Transmission Services Agreement (the "Crealogix Agreement") for
6 Crealogix to provide operational activities and technical transmission network set-ups to SMS for
7 delivery to SMS' end-users. A true and correct copy of the Crealogix Agreement is attached
8 hereto as Exhibit 1.

9 4. Crealogix supplied services to SMS in accordance with the terms of the Crealogix
10 Agreement. SMS was invoiced by Crealogix for services totaling 52,358.24 Euros. As of this
11 date, payments of only 3,258.84 Euros have been received by Crealogix, leaving a past due
12 amount of 49,089.40 Euros. Copies of Crealogix Invoice Nos. 140089, 140129, 140170 and
13 140208 are attached hereto as Exhibits 2, 3, 4 and 5 respectively.

14 4. It is my belief that SMS entered into the Crealogix Agreement with the specific
15 intent of sending a large volume of messages over their systems without paying for the rights to
16 do so. SMS designed and implemented an unlawful scheme to contract with various small
17 foreign-based companies, insisting on payment terms of at least 30 days after receipt of the
18 invoice and knowing of the difficulty a foreign company would have in collecting a debt from a
19 California corporation. When the (foreign) providing company insisted on payment, SMS would
20 send a massive amount of short messages over the company's system. When the account was
21 then shut down by the providing company for exceeding the agreed amount of message traffic
22 that could be sent without payment, SMS would move on to another company for similar
23 services.

24 8. On March 8, 2004, Crealogix sent SMS a final demand for payment and notice of
25 termination of the Crealogix Agreement if the sum of 49,089.40 Euros was not transmitted to
26 Crealogix by the close of business on March 15, 2004. A true and correct copy of the final
27 demand sent to SMS by counsel for Crealogix is attached hereto as Exhibit 6. To-date, SMS has
28 not cured its deficiency of 49,089.40 Euros to Crealogix. The sum of 49,089.40 Euros is the
equivalent of approximately \$60,870.57. SMS remains in default to Crealogix and is in breach of
the Crealogix Agreement for nonpayment of the services provided to it.

SMS.AC Inc.
7770 Regents Road
Suite #113-405
San Diego, California 92122

Lugano, 30.06.2003

Invoice 0020

Description	Amount
Min. Traffic Guarantee: 2'000'000 messages à 0.0250	50,000.00
Proximus: 3'909 messages à 0.0620	242.36
Mobistar: 2'606 messages à 0.0620	161.57
Orange/Mobilix: 275 messages à 0.0300	8.25
Sonofon: 469 messages à 0.0300	14.07
Telia DK: 330 messages à 0.0300	9.90
D1: 7'302 messages à 0.0550	401.61
D2: 8'672 messages à 0.0600	520.32
E-Plus: 2'184 messages à 0.0600	131.04
Telecom (I): 2'857 messages à 0.0640	182.85
Vodafone: 3'194 messages à 0.0520	166.09
Wind: 1'978 messages à 0.0600	118.68
KPN: 19'353 messages à 0.0570	1,103.12
O2: 8'237 messages à 0.0600	494.22
T-Mobile: 15'705 messages à 0.0570	895.19
Aritel Vodafone: 1'322 messages à 0.0600	79.32
Telefonica (Spain) :3'084 messages à 0.0600	185.04
TOTAL*	EUR 54,713.63

Term of payment: Within 30 days

*free of VAT according to Art 14(3) Swiss VAT

Bank Account:
Banca dello Stato Bellinzona
Account no. 09700DUU
Swift code BSCTCH22

SMS.AC Inc.
7770 Regents Road
Suite #:13-405
San Diego, California 92122

Lugano, 31.08.2003

Invoice 0027

Description	Amount
Billing Period: 01/08/2003 - 31/08/2003	
Min. Traffic Guarantee: 2'000'000 messages à 0.0250	50,000.00
Mobilkom Austria: 38 messages à 0.06	2.28
Proximus: 979 messages à 0.0620	60.69
Mobistar: 745 messages à 0.0620	46.19
Orange/Mobilix: 55 messages à 0.0300	1.65
Sonofon: 89 messages à 0.0300	2.67
Telia DK: 99 messages à 0.0300	2.97
D1: 3930 messages à 0.0550	216.15
E-Plus: 580 messages à 0.0600	34.80
TIM (I): 1318 messages à 0.0640	84.35
Vodafone: 1152 messages à 0.0520	59.90
Wind: 849 messages à 0.0600	50.94
KPN: 31 messages à 0.0570	1.76
O2: 2324 messages à 0.0600	139.44
T-Mobile (NL): 6454 messages à 0.0570	367.87
Airtel Vodafone: 823 messages à 0.0600	49.38
Telefonica (Spain): 202 messages à 0.0600	12.12
Vodafone (NL): 6050 messages à 0.055	332.75
Optimus: 481 messages à 0.062	29.82
Tele2/comviq: 6031 messages 0.06	361.86
TDC Switzerland: 1184 messages à 0.06	71.04
TOTAL*	EUR 51,928.63

Term of payment: Within 30 days

*free of VAT according to Art. 14(3) Swiss VAT

Bank Account:
Banca dello Stato Bellinzona
Account no. 09700DUU
Swift code BSCTCH22

1 **DECLARATION OF MARILYN S. SCHEER IN SUPPORT OF PLAINTIFFS'**
2 **APPLICATION FOR RIGHT TO ATTACH ORDER**
3

4 I, Marilyn S. Scheer declare:

5 1. I am an attorney duly admitted to practice law before the courts of the State of California.
6 I am employed as an attorney by the law firm of Sullivan, Hill, Lewin, Rez & Engel. I serve as
7 counsel for Vilkas Ltd. ("Vilkas") and Crealogix AG ("Crealogix") in its action against SMS.ac Inc.
8 ("SMS"). I have direct and first-hand knowledge of the facts contained herein and if called upon to
9 testify, I could and would competently testify thereto.

10 2. In preparing to file the lawsuit against SMS, I conducted a litigation search to determine
11 what other actions had been filed against it. I discovered that Aspiro, AB, a Swedish company had
12 filed an action against SMS in San Diego Superior Court for nonpayment based on facts similar to
13 those alleged by Vilkas and Crealogix. Based on the court file, I learned that Aspiro, AB was forced
14 to serve the Secretary of State's office because they could not locate Michael Pousti, SMS' CEO and
15 agent for service of process. A true and correct conformed copy of Aspiro AB's Complaint for
16 Breach of Contract and Common Counts filed against SMS in September 2003 is attached hereto as
17 Exhibit A.

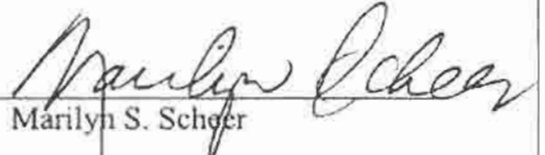
18 3. On May 18, 2004, I was contacted by attorney Douglas Whipple, counsel for Materna, a
19 German company. I had previously learned through my investigation that Materna had claims
20 against SMS based on similar facts of nonpayment for services and that Materna was presently
21 engaged in an arbitration with SMS. Mr. Whipple confirmed my clients' concerns that SMS
22 contracted with various European companies, failed to pay them and then moved onto the next one.
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1 4. There was minor difficulty in serving Michael Pousti with the Summons and Complaint in
2 this action, but since I knew this beforehand, I employed special efforts to have him served.
3 Fortunately, it required only a few attempts.

4 I declare under penalty of perjury under the laws of the State of California that the foregoing
5 is true and correct.

6 Executed this 26th day of May, 2004 at San Diego, California.

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8 Marilyn S. Scheer
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Greg Wilfahrt

From: marc.meyer@crealogix.com
Sent: Monday, September 15, 2003 12:19 AM
To: greg@sms.ac
Cc: Stephane.Martignoni@crealogix.com; louis-paul.wicki@crealogix.com
Subject: RE: Open invoices SMS.ac => legal procedures started

Mr. Wilfahrt

Thank you for getting in touch with us.
I have entered my comments into your mail (below), preceded by "MM".

Sincerely
Marc Meyer

Mr. Martignoni and Mr. Meyer:

SMS.ac

After reading the agreement existing between us, I find your claim of breach to be without merit and nonsensical. The burden of capping SMS use clearly falls to Crealogix.

MM: The cap has been set contractually. Crealogix fulfilled its side of the contract, and SMS.ac breached it. It's that simple.

SMS.ac

It should be obvious to you that entering into a legal confrontation would mean that any resolution to this issue would extend a year or more into the future. Instead of quibbling, does it not make more sense to resolve this respectfully and professionally? Moving forward, it is the intention of SMS.ac to fulfill its obligations to Crealogix. As a start-up, SMS.ac's business environment has been challenging. As we move forward and because our company's revenue receivables are due to us at the end of each month, it is at this time that we are able to tell you exactly how much we are able to pay Crealogix.

MM: We are quite happy to resolve this out of court, if you can make a proposal that is acceptable, and if you stick to the agreement thereafter.

SMS.ac

With this in mind, I have set a recurring meeting for our finance team that will fall on the last Friday of each month. We will look at receivables and expenditures-- and then determine what amount we can send to you. A payment in the amount of \$1,000.00 has already been mailed to Crealogix for the month of August 2003. Stephane, you can expect a communication from me on the first Monday of each month with definite information on what amount SMS.ac is able to pay Crealogix. Our objective is to reach a zero balance as quickly as possible.

MM: A payment of \$1000 is a first step, certainly. Unfortunately we have become suspicious of delaying tactics. You must come forward with a much more aggressive payment plan if you want to convince us that you really mean "to reach a zero balance as quickly as possible". And you should start by paying the full amounts for May

June immediately, and follow closely with the amounts for July and August.

SMS.ac

Gentlemen: We view the email below as a direct attempt to maliciously malign SMS.ac's reputation. I need to communicate the serious consequences for this course of action. Any action on your part, or your agents, to malign the reputation of SMS.ac, Inc. will be dealt with swiftly and severely -- we will not hesitate to use all means afforded by the law to prosecute you. Please let this email represent an official and final warning to you.

MM: We feel free to state the true facts (which we can prove) about SMS.ac and its behaviour towards Crealogix. We are confident, that no judge in Switzerland will object to that, as there is nothing malicious or malignant about that. And it is of course Switzerland, where you would have to prosecute us. You are the only ones who can influence your reputation, and you have to earn your reputation with according business behaviour. So far your behaviour has not been to the benefit of your reputation, but maybe you can change that.