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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MIRA BLANCHARD, ET AL.,  
Plaintiffs,  
v.  
FLUENT, INC., et al.,  
Defendants.

Case No. [17-cv-04497-MMC](#)

**ORDER GRANTING DEFENDANT SAUGHTWARE INC. D/B/A PANDA MAIL'S MOTION TO DISMISS; DENYING PLAINTIFFS' MOTION TO CORRECT NAMES OF DOE DEFENDANTS; GRANTING PLAINTIFFS' MOTION TO SUBSTITUTE; GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR LEAVE TO AMEND**

Before the Court are four motions, each filed August 11, 2017: (1) defendant Saughtware, Inc. d/b/a Panda Mail's ("Panda Mail") "Motion to Dismiss"; (2) plaintiffs' "Motion to Correct Names of Doe Defendants"; (3) plaintiffs' "Motion to Substitute Name of Defendant"; and (4) plaintiffs' "Motion for Leave to Amend Complaint." Each motion has been fully briefed. Having read and considered the papers filed in support of and in opposition to the motions, the Court rules as follows.<sup>1</sup>

**BACKGROUND**

In the operative complaint, the First Amended Complaint ("FAC"), filed in state court on December 20, 2016, plaintiffs Mira Blanchard, Ryan Cooper, Mark Davis, Chandra Greenberg, James Jobe, Debra Kottong, Ogen Lama, Maria Marquez, Vanessa Powers and Gail Taylor allege they collectively received "almost 1,300 unlawful unsolicited commercial emails." (See FAC ¶ 1.)<sup>2</sup> According to plaintiffs, the challenged

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<sup>1</sup>By order filed September 11, 2017, the Court took the matters under submission.

<sup>2</sup>On August 7, 2017, Fluent removed the above-titled action to district court, on the basis of diversity of citizenship.

1 emails contain advertising for "products and services" of defendants Fluent, Inc., Reward  
2 Zone USA, LLC, RewardsFlow, LLC, American Prize Center, LLC, and Mohit Singla  
3 (collectively, "Fluent"). (See FAC ¶¶ 19-23, 40.) Plaintiffs allege that "at least 75 of the  
4 spams at issue" were "sent" to plaintiffs by defendant Panda Mail (see FAC ¶ 25), and  
5 that other emails were "sent" to plaintiffs by defendants AdReaction, Anglo Iditech,  
6 FortAnalysis8, Concept Network, Diego Rufino, Priscila Arekelian, and Andres Mary.  
7 (See FAC ¶¶ 26-32.) Plaintiffs further allege that the emails "had materially false and/or  
8 misrepresented information contained in or accompanying the email headers, contained  
9 Subject Lines that were misleading in relation to the bodies of the emails, and/or  
10 contained third parties' domain names without permission." (See FAC ¶ 95.) Based on  
11 the above allegations, plaintiffs assert a single cause of action, specifically, a claim under  
12 § 17529.5 of the California Business and Professions Code.

### 13 **DISCUSSION**

14 Panda Mail seeks dismissal of the FAC in its entirety as alleged against Panda  
15 Mail; plaintiffs seek leave to amend to correct the names of seven "Doe" defendants, to  
16 change the name of one existing defendant, and to make various amendments to the  
17 factual allegations. The Court considers the motions in turn.

#### 18 **A. Motion to Dismiss**

19 Panda Mail argues that the FAC, as alleged against Panda Mail, is subject to  
20 dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to  
21 set forth facts sufficient to support a finding that Panda Mail violated § 17529.5 and for  
22 failure to plead fraud with the particularity required by Rule 9(b) of the Federal Rules of  
23 Civil Procedure.

##### 24 **1. Failure to Plead Facts to State a Claim**

25 Dismissal under Rule 12(b)(6) "can be based on the lack of a cognizable legal  
26 theory or the absence of sufficient facts alleged under a cognizable legal theory." See  
27 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). "On a motion to  
28 dismiss, the court accepts the facts alleged in the complaint as true." Id.

1 Here, as noted, plaintiffs' FAC contains a single cause of action, specifically, a  
2 claim under § 17529.5. Section 17529.5(a) provides as follows:

3 It is unlawful for any person or entity to advertise in a commercial e-mail  
4 advertisement either sent from California or sent to a California electronic  
mail address under any of the following circumstances:

5 (1) The e-mail advertisement contains or is accompanied by a third-party's  
6 domain name without the permission of the third party.

7 (2) The e-mail advertisement contains or is accompanied by falsified,  
misrepresented, or forged header information. This paragraph does not  
8 apply to truthful information used by a third party who has been lawfully  
authorized by the advertiser to use that information.

9 (3) The e-mail advertisement has a subject line that a person knows would  
10 be likely to mislead a recipient, acting reasonably under the circumstances,  
about a material fact regarding the contents or subject matter of the  
11 message.

12 See Cal. Bus. & Prof. Code § 17529.5(a).

13 Plaintiffs do not allege that Panda Mail advertised in any of the challenged emails;  
14 rather, plaintiffs allege Panda Mail "sent" them some of the emails in which Fluent  
15 advertised. (See FAC ¶¶ 4, 18, 25.) Given the FAC's lack of any allegation that Panda  
16 Mail "advertise[d] in" the challenged emails, see Cal. Bus. & Prof. Code § 17529.5(a), let  
17 alone facts in support thereof, Panda Mail argues that the § 17529.5 claim, as alleged  
18 against it, is subject to dismissal; in particular, Panda Mail argues, the statute only covers  
19 advertisers. In response, plaintiffs argue § 17529.5 is properly interpreted as applicable  
20 not only to an entity that advertises but also to one that sends an email containing or  
21 accompanied by an advertisement.

22 Neither party has cited a case that expressly addresses the issue presented, nor  
23 has the Court located any such authority. Where, as here, "the state's highest court has  
24 not decided an issue [of state law], the task of the federal courts is to predict how the  
25 state high court would resolve it," see Dimidowich v. Bell & Howell, 803 F.2d 1473, 1482  
26 (9th Cir. 1986), and, as discussed below, the Court, applying principles of statutory  
27 interpretation set forth by the California Supreme Court, finds the California Supreme  
28 Court would interpret § 17529.5 in a manner consistent with the interpretation posited by

1 Panda Mail.

2 "When the [California] Legislature uses materially different language in statutory  
3 provisions addressing the same subject or related subjects, the normal inference is that  
4 the Legislature intended a difference in meaning." Kleffman v. Vonage Holdings Corp.,  
5 49 Cal. 4th 334, 342 (2010) (internal quotation and citation omitted). As relevant here,  
6 the California Legislature, in 2003, the year in which it enacted § 17529.5, also enacted,  
7 in the same bill, § 17529.2, which provides in relevant part as follows:

8 Notwithstanding any other provision of law, a person or entity may not do  
9 any of the following:

10 (a) Initiate or advertise in an unsolicited commercial e-mail advertisement  
11 from California or advertise in an unsolicited commercial e-mail  
12 advertisement sent from California.

13 (b) Initiate or advertise in an unsolicited commercial e-mail advertisement to  
14 a California electronic mail address, or advertise in an unsolicited  
15 commercial e-mail advertisement sent to a California electronic mail  
16 address.

17 See Cal. Prof. & Bus. § 17529.2. In conjunction therewith, the Legislature defined  
18 "initiate" to mean "to transmit or cause to be transmitted a commercial e-mail  
19 advertisement or assist in the transmission of a commercial e-mail advertisement by  
20 providing electronic mail addresses where the advertisement may be sent," see Cal. Bus.  
21 & Prof. Code § 17529.1(i), thereby encompassing within the definition of "initiate" the act  
22 of sending commercial email advertisements, see id. As the Legislature chose to prohibit  
23 the acts identified in § 17529.2, when committed either by an advertiser in or sender of a  
24 commercial email, but chose to prohibit the acts identified in § 17529.5 only when  
25 committed by the former, the "normal inference" to be drawn, see Kleffman, 49 Cal. 4th at  
26 342, is that the Legislature did not intend a sender of a commercial email, unless such  
27 sender is also an advertiser, to be liable under § 17529.5.

28 The above interpretation finds additional support in another principle of statutory  
interpretation, specifically, that where the Legislature has "considered, but rejected,  
proposed language" for inclusion in a statute, a court "may not judicially write the deleted  
provisions back into the [statute]." See Sierra Club v. California Coastal Commission, 35

1 Cal. 4th 839, 856 (2005); see also City of Santa Cruz v. Municipal Court, 49 Cal. 3d 74,  
2 88-89 (1989) (holding courts "need not speculate . . . as to the Legislature's intentions,"  
3 where "the Legislature [has] expressly considered and rejected [particular proposed  
4 language]") (emphasis in original). In this instance, the Legislature, in 2004, considered  
5 and passed Senate Bill 1457, which amended § 17529.5. (See Pls.' Req. for Judicial  
6 Notice Ex. A; Def.'s Req. for Judicial Notice Exs. J-M.)<sup>3</sup> The bill, as initially drafted,  
7 proposed amending § 17529.5 to expand its coverage to make it "unlawful for any person  
8 or entity to initiate or advertise in a commercial e-mail advertisement" containing or  
9 accompanied by false or misleading information. (See Def.'s Req. for Judicial Notice Ex.  
10 J.) When the Legislature later passed the bill, however, it deleted the words "to initiate"  
11 and, while amending other provisions of the statute, retained the existing language  
12 making it "unlawful for any person or entity to advertise in a commercial e-mail  
13 advertisement" containing or accompanied by false or misleading information. (See id.  
14 Exs. J, M.) Given the above-discussed legislative history, the Court cannot "judicially  
15 write" the words "to initiate" into § 17529.5. See Sierra Club, 35 Cal. 4th at 856.

16 Relying on their allegation that Panda Mail "conspired to send" Fluent  
17 advertisements to plaintiffs (see FAC, prayer ¶ D), plaintiffs next argue Panda Mail can  
18 be held liable under a theory of conspiracy. Even assuming a sender, under a theory of  
19 conspiracy, can ever be held liable for an advertiser's violation of § 17529.5,<sup>4</sup> however,  
20 plaintiffs fail to allege any facts to support their conclusory assertion that Panda Mail  
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22 <sup>3</sup>The parties' respective requests for judicial notice are hereby GRANTED. See  
23 Territory of Alaska v. American Can Co., 358 U.S. 224, 226 (1959) (holding courts, when  
interpreting statutes, may take judicial notice of "legislative history").

24 <sup>4</sup>"By its nature, tort liability arising from conspiracy presupposes that the  
25 coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to  
26 plaintiff recognized by law and is potentially subject to liability for breach of that duty."  
Applied Equipment Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 511 (1994). As  
27 discussed above, unless Panda Mail advertised in the challenged emails, it cannot be  
28 held liable for a violation of § 17529.5. Consequently, it is unclear how it can held liable  
for a conspiracy to violate § 17529.5. As this issue has not been raised by Panda Mail,  
however, the Court does not further consider it herein.

1 conspired to violate § 17529.5. See Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1050  
2 (9th Cir. 2008) (affirming dismissal of conspiracy claim where plaintiff alleged defendants  
3 were "co-conspirators" without alleging "any evidentiary facts . . . to support such  
4 conclusion"). Moreover, plaintiffs' allegation that Panda Mail was acting as Fluent's  
5 "agent[ ]" when it sent the emails (see FAC ¶¶ 4, 79) precludes Panda Mail's liability on a  
6 conspiracy theory, as "duly acting agents and employees cannot be held liable for  
7 conspiracy with their own principals," see Applied Equipment Corp., 7 Cal. 4th at 512 &  
8 n.4 (holding agents and employees can be held liable only when acting "for their  
9 individual advantage").

10 Accordingly, the FAC, as alleged against Panda Mail, is subject to dismissal for  
11 failure to plead facts sufficient to state a claim.

12 **2. Rule (9)(b)**

13 Panda Mail argues the FAC fails to state a claim for the additional reason that it  
14 does not comply with Rule 9(b)

15 Rule 9(b) provides that, "[i]n alleging fraud . . . , a party must state with particularity  
16 the circumstances constituting fraud." See Fed. R. Civ. P. 9(b). To do so, the plaintiff  
17 must allege "the who, what, when, where, and how of the misconduct charged," see Vess  
18 v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003), and, if the misconduct is  
19 an alleged false statement, such plaintiff must "plead evidentiary facts" that establish the  
20 "statement was untrue or misleading when made," see Fecht v. Price Co., 70 F.3d 1078,  
21 1082 (9th Cir. 1995).

22 Here, the FAC does not identify the content of any of the "at least 75" emails  
23 Panda Mail is alleged to have sent (see FAC ¶ 25), nor does it provide the date(s) on  
24 which those emails were sent, the names of the plaintiff(s) to whom they were sent, or  
25 any evidentiary facts to support a finding that any statement in any email sent by Panda  
26 Mail was untrue or misleading at the time such email was sent.<sup>5</sup> Consequently, the Court

27 \_\_\_\_\_  
28 <sup>5</sup>Although the FAC includes factual allegations sufficient to show some of the  
statements in some of the emails were untrue or misleading when made (see, e.g., FAC

1 agrees with Panda Mail that the FAC does not comply with Rule 9(b).

2 In response to the motion, plaintiffs do not argue to the contrary. Rather, plaintiffs  
3 take the position that Rule 9(b) does not apply to their § 17529.5 claim. In support  
4 thereof, plaintiffs rely on a district court decision that concluded fraud is not a "required  
5 element[ ]" of a claim brought under § 17529.5. See Asis Internet Services v. Optin  
6 Global, Inc., 2006 WL 1820902, at \*3 (N.D. Cal. June 30, 2006) (listing, as "indispensable  
7 elements" of fraud claim, "a false representation, knowledge of its falsity, intent to  
8 defraud, justifiable reliance, and damages"). The district court in Asis went on to note,  
9 however, that courts nonetheless "look[ ] to whether [the] [p]laintiff has alleged either  
10 some fraudulent conduct or a unified course of fraudulent conduct," and, indeed, found  
11 Rule 9(b) applicable to certain of the plaintiff's claims therein. See id. at \*4; see also  
12 Vess, 317 F.3d at 1103-04 (holding where "fraud is not an essential element" of statute,  
13 Rule 9(b) nonetheless applicable where claim is "grounded in fraud") (internal quotation  
14 and citation omitted).

15 Here, plaintiffs allege that "[d]efendants," including Panda Mail, "intended to  
16 deceive recipients of their spam messages through the use of falsified and/or  
17 misrepresented information in From Names, domain name registrations, and Subject  
18 Lines, and use of third parties' domain names without permission" (see FAC ¶ 90), that  
19 "[d]efendants went to great lengths to create falsified and misrepresented information  
20 contained in and accompanying the email headers in order to deceive recipients" (see  
21 FAC ¶ 91), that "[t]he unlawful elements of these spams represent willful acts of falsity  
22 and deception" (see FAC ¶ 95), and that plaintiffs "suffer[ed] damages by receiving the  
23 unlawful spams" (see FAC ¶ 85; see also FAC ¶ 5). In light of such allegations, the Court  
24 finds plaintiffs' § 17529.5 claim against Panda Mail is "grounded in fraud." See Vess, 317  
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26 ¶ 54 (alleging "[s]ome of the spams have From Names that . . . are actively false,  
27 claiming that the spams are from third-party companies (or products) that have nothing to  
28 do with [d]efendants, e.g., 'Sams,' 'Samsung Galaxy S5,' 'Target,' and 'Walmart'")),  
plaintiffs have not alleged that any of those emails were sent by Panda Mail.

1 F.3d at 1103-04; Hypertouch, Inc. v. Azoogole.com, Inc., 2009 WL 734674, at \*1 (N.D.  
2 Cal. March 19, 2009) (holding § 17529.5 claim must be pleaded in conformity with Rule  
3 9(b) where plaintiff alleged defendants sent "fraudulent" emails with "intention of  
4 depriving a person of property" and "to trick" plaintiff, and that emails "harmed" plaintiff),  
5 aff'd, 386 Fed. Appx. 701, 702 (9th Cir. 2010) (noting § 17529.5 "speak[s] in terms of  
6 commercial e-mail advertisements that contain 'falsified,' 'misrepresented,' 'forged,' or  
7 misleading information, . . . terms common to fraud allegations"). In sum, plaintiffs are  
8 required to plead their claim against Panda Mail with the particularity required by Rule  
9 (9)(b), which they have failed to do.

10 Accordingly, the FAC, as alleged against Panda Mail, is subject to dismissal for  
11 the additional reason that it fails to comply with Rule 9(b).

### 12 **3. Leave to Amend**

13 In their opposition, plaintiffs assert that, if afforded an opportunity to do so,  
14 plaintiffs could allege that Panda Mail "is advertising in the spams as well as sending  
15 them." (See Pls.' Opp. at 11:21-22.) The Court will afford plaintiffs leave to amend to  
16 allege facts in support of such assertion; any such allegations, however, must be pleaded  
17 in conformity with Rule 9(b). Additionally, the Court will afford plaintiffs leave to amend to  
18 allege facts sufficient to state a conspiracy claim; again, any such allegations must be  
19 pleaded in conformity with Rule 9(b).

### 20 **B. Motions to Correct, to Substitute and to Amend**

21 As set forth above, plaintiffs have filed three motions, each seeking leave to  
22 amend the FAC for a particular purpose. The Court considers the three motions in turn.

#### 23 **1. Motion to Correct Names of Doe Defendants**

24 The FAC alleges that "Does 1 through 1,000" (see FAC ¶ 33) "registered  
25 [numerous specified] domain names used to send some of the spams at issue in a  
26 manner so as to prevent email recipients from discovering those Doe Defendants' true  
27 identities" (see id.), and that the Does are "legally responsible in some manner for the  
28 matters alleged in [the FAC]" (see FAC ¶ 34).



1 By the instant motion, plaintiffs seek leave to correct the names of seven of the  
2 Does, specifically, to name the following seven entities as defendants: North Island  
3 Marketing Corp., Experions.com LLC, HopeFind.net, Lakeshore Plaza, OfferDome.com,  
4 Ruchestty Partner, and Weight Control Metrics. According to the proposed Second  
5 Amended Complaint ("proposed SAC"),<sup>6</sup> each of those proposed defendants, with the  
6 exception of North Island Marketing Corp., "sent" emails to plaintiffs. (See proposed SAC  
7 ¶¶ 30, 31, 32, 34, 35, 37.) As to North Island Marketing Corp., the proposed SAC alleges  
8 said entity is "related" to existing defendant AdReaction, which is alleged to have "sent"  
9 emails to plaintiffs. (See proposed SAC ¶¶ 27-28.)

10 Although a "court should freely give leave [to amend] when justice so requires,"  
11 see Fed. R. Civ. P. 15(a)(2), a "court does not err in denying leave to amend where the  
12 amendment would be futile," see Missouri ex rel. Koster v. Harris, 847 F.3d 646, 656 (9th  
13 Cir. 2017) (internal quotation and citation omitted). A proposed amendment "is futile  
14 when no set of facts can be proved under the amendment to the pleadings that would  
15 constitute a valid and sufficient claim." See id. (internal quotation and citation omitted).

16 Here, Panda Mail argues the proposed SAC is futile. The Court, for the reasons  
17 stated above with respect to Panda Mail's motion to dismiss, agrees; in particular, the  
18 FAC includes no allegation to support a finding that any of the seven proposed  
19 defendants advertised in one or more of the challenged emails. Although it is  
20 conceivable that plaintiffs, if they were to allege additional facts not in the proposed SAC,  
21 could state a claim against one or more of those seven proposed defendants, the SAC as  
22 currently proposed lacks any such facts.

23 Consequently, the motion to correct will be denied, but without prejudice to  
24 plaintiffs' filing a renewed motion, accompanied by a different proposed amended  
25 complaint. Should plaintiffs elect to do so, plaintiffs must allege facts to support a finding

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<sup>6</sup>The proposed SAC is attached as Ex. B to plaintiffs' Motion for Leave to Amend Complaint.

1 that the proposed defendants violated § 17529.5; additionally, plaintiffs must comply with  
2 Rule 9(b), as, for the reasons stated above, plaintiffs' claim under § 17529.5 sounds in  
3 fraud.

4 Lastly, as both Panda Mail and Fluent point out, the Court has "discretion,"  
5 pursuant to 28 U.S.C. § 1447(e), to deny "an attempt to join a non-diverse party" after an  
6 action has been removed on the basis of diversity. See Newcombe v. Adolf Coors Co.,  
7 157 F.3d 686, 691 (9th Cir. 1998). Here, although plaintiffs allege sufficient facts to  
8 support a finding that proposed defendant North Island Marketing Corp. is diverse in  
9 citizenship (see proposed SAC ¶¶ 8-18, 28), plaintiffs fail to allege sufficient facts from  
10 which the Court can ascertain the citizenship of Experions.com LLC, HopeFind.net,  
11 Lakeshore Plaza, OfferDome.com, Ruchestty Partner, and Weight Control Metrics.<sup>7</sup> If  
12 plaintiffs elect to renew the instant motion, plaintiffs should allege sufficient facts from  
13 which the Court can ascertain the citizenship of all proposed defendants.

14 **2. Motion to Substitute Name of Defendant**

15 Plaintiffs seek leave to substitute "Fluent LLC" as the correct name for "Fluent  
16 Inc." (See proposed SAC ¶ 20; FAC ¶ 19.) Other than arguing such substitution is  
17 "superfluous given that Fluent, LLC has appeared in this matter" (see Fluent's Opp. at  
18 10:4-5), Fluent offers no reason for opposing the proposed substitution.

19 Accordingly, plaintiffs' motion to substitute will be granted.

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23 \_\_\_\_\_  
24 <sup>7</sup>Plaintiffs fail to allege the citizenship of each owner or member of Experions.com  
25 LLC. See Johnson v. Columbia Properties Anchorage, LP, 437 F.3d 894, 899 (9th Cir.  
26 2006) (holding LLC "is a citizen of every state of which its owners/members are citizens").  
27 As to HopeFind.net, Lakeshore Plaza, OfferDome.com, Ruchestty Partner, and Weight  
28 Control Metrics, plaintiffs fail to allege the nature of each such entity. If any such entity is  
an LLC, plaintiffs will need to allege the citizenship of each owner or member, see id.; if  
any such entity is a corporation, plaintiffs will need to allege both the state in which it has  
its "principal place of business" and in which it is "incorporated," see 28 U.S.C.  
§ 1332(c)(1).

1           **3. Motion for Leave to Amend**

2           Plaintiffs seek leave to file an SAC, in which they propose to include a number of  
3 amendments. Specifically, plaintiffs propose to:<sup>8</sup>

4           (1) add a new plaintiff, specifically, Bunny Segal, who is alleged to have received  
5 the same "spams" the existing plaintiffs received (see proposed SAC ¶¶ 4, 17, 58, 115);

6           (2) add three new defendants, specifically, 404 Publishing LLC, Anna Gracie, and  
7 LivingWyze.com, each of whom, plaintiffs claim, "sent" emails to Bunny Segal (see  
8 proposed SAC ¶¶ 26, 29, 33);<sup>9</sup>

9           (3) delete six defendants named in the FAC, specifically, Anglo Iditech, Priscila  
10 Arekelian, Concept Network, FortAnalysis8 Develop, Andres Mary and Diego Rufino, as  
11 well as factual allegations specific to those defendants (see, e.g., proposed SAC,  
12 caption);

13           (4) substitute, for the one currently provided in the FAC, a different "representative  
14 sample" of an unsolicited email (see proposed SAC ¶¶ 1, 2);

15           (5) add factual allegations setting forth the citizenship of some of the existing  
16 defendants (see proposed SAC ¶¶ 20-23);

17           (6) amend the number of emails allegedly sent (see, e.g., proposed SAC ¶¶ 1, 27,  
18 36, 61, 116);

19           (7) add "domain names" allegedly "registered" by existing defendant Mohit Singla  
20 (see proposed SAC ¶ 24);

21           (8) add factual allegations regarding the relationship between existing defendants  
22 collectively referred to as "Fluent" (see proposed SAC ¶ 25);

23           (9) add factual allegations regarding the conduct of the "Does" (see proposed SAC  
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25           <sup>8</sup>The proposed SAC also includes the amendments sought in plaintiffs' motions to  
26 correct and to substitute. The Court lists here the amendments not identified in those two  
27 motions.

28           <sup>9</sup>In the proposed SAC, plaintiffs do not identify the recipient of the emails. In their  
motion, however, plaintiffs assert the three proposed new defendants sent emails to  
proposed plaintiff Bunny Segal. (See Pls.' Mot. for Leave to Amend at 7:10-12, 9:3-4.)

1 ¶¶ 38-41, prayer ¶ O);

2 (10) add factual allegations to support an assertion that Fluent is engaged in a  
3 "scam" (see proposed SAC ¶ 54; see also proposed SAC ¶ 45-53, 55);

4 (11) add factual allegations in support of plaintiffs' existing assertion that plaintiffs  
5 did not "waive" their claims (see proposed SAC ¶ 60);

6 (12) add factual allegations regarding certain of the emails (see proposed SAC  
7 ¶¶ 72-74, 79; 83-84, 86, 90, 93, 95, 97); and

8 (13) amend their prayer for relief to revise the amount of statutory damages  
9 plaintiffs seek (see proposed SAC, prayer).

10 Neither Panda Mail nor Fluent states any opposition to the amendments identified  
11 above as (3) - (13), and the Court finds it appropriate to afford plaintiffs leave to make  
12 those changes. See Fed. R. Civ. P. 15(a)(2).

13 Both Panda Mail and Fluent do, however, oppose the addition of the three new  
14 defendants who sent emails to Bunny Segal, and Fluent opposes the addition of Bunny  
15 Segal as well.

16 To the extent plaintiffs seek leave to add new defendants, the Court, for the  
17 reasons set forth above with respect to plaintiffs' motion to correct, will deny the motion  
18 without prejudice. Also, as discussed above, should plaintiffs seek leave to amend to  
19 add defendants, plaintiffs must, in their proposed amended pleading, allege facts  
20 sufficient to state a claim against each, as well as comply with Rule 9(b) and include  
21 factual allegations from which the citizenship of any new defendant can be determined.<sup>10</sup>

22 Lastly, to the extent plaintiffs seek leave to add Bunny Segal as a plaintiff, the  
23 Court will grant the motion. Fluent's opposition thereto is based on its concern that such

24 \_\_\_\_\_  
25 <sup>10</sup>Plaintiffs fail to identify the citizenship of each owner or member of 404  
26 Publishing LLC. See Johnson, 437 F.3d at 899. Plaintiffs fail to allege the nature of  
27 LivingWyze.com; if said entity is an LLC, plaintiffs will need to allege the citizenship of  
28 each owner or member, see id.; if it is a corporation, plaintiffs will need to allege both the  
state in which it has its "principal place of business" and in which it is "incorporated," see  
28 U.S.C. § 1332(c)(1). Plaintiffs fail to allege the state of which Anna Gracie, an  
individual, is a citizen. See 28 U.S.C. § 1332(a)(1).

1 addition will bring into the case the three new defendants who assertedly sent emails to  
2 her. As discussed above, however, plaintiffs have not been afforded leave to add those  
3 defendants, and, given that Bunny Segal's claim against Fluent "aris[es] out of the same  
4 transaction, occurrence, or series of transactions or occurrences" as those of the existing  
5 plaintiffs and shares with them common "questions of law [and] fact," the proposed  
6 addition of such plaintiff meets the statutory standard for joinder. See Fed. R. Civ. P.  
7 20(a)(1).

8 Accordingly, to the extent plaintiffs seek leave to add defendants, plaintiffs' motion  
9 for leave to amend will be denied, and, in all other respects, plaintiffs' motion will be  
10 granted.


11 **CONCLUSION**

12 For the reasons stated above:

- 13 1. Panda Mail's motion to dismiss is hereby GRANTED, and the FAC, to the  
14 extent alleged against Panda Mail, is hereby DISMISSED with leave to amend.
- 15 2. Plaintiffs' motion to correct the names of Doe defendants is hereby DENIED  
16 without prejudice.
- 17 3. Plaintiffs' motion to substitute "Fluent LLC" for "Fluent Inc." is hereby  
18 GRANTED.
- 19 4. Plaintiffs' motion for leave to amend is hereby DENIED without prejudice to the  
20 extent plaintiffs seek to add defendants, and in all other respects is hereby GRANTED.
- 21 5. Should plaintiffs wish to file an SAC for purposes of amending their claim  
22 against Panda Mail and/or to make the other changes the Court has allowed, plaintiffs  
23 shall file such SAC no later than October 6, 2017.
- 24 6. To the extent plaintiffs wish to add any new defendant(s), plaintiffs shall file a  
25 renewed motion for leave to amend.

26 **IT IS SO ORDERED.**

27 Dated: September 22, 2017

28   
MAXINE M. CHESNEY  
United States District Judge