


instituting a paid subscription program. On information and belief, the purpose of Kachingle's "Stop the Paywall" campaign is to piggy-back off the Times' goodwill, reputation, and popularity, and to use the reputation and popularity of The Times' blogs for Kachingle's financial gain. This is demonstrated by Kachingle's interest in doing business with The Times and selling its services in conjunction with The Times long before, and independent of, The Times' decision to institute a paid subscription program, as evidenced by Kachingle approaching The Times almost a year before a decision was made by The Times to implement a paid subscription program. This is further shown Kachingle's own admission that it keeps 15 percent of the money paid by consumers. See Exh. D.


27. Kachingle further misleads consumers on its website under the "Q&A" section when it asks whether The Times agreed to this arrangement. In response, Kachingle says no, "But we hope they will like it!" See Exh. D. Kachingle already knew, at the time the website was launched, that The Times did not "like" the business model that Kachingle had proposed and that The Times had rejected Kachingle's business model. Moreover, Kachingle has continued to publish this false representation even after The Times advised Kachingle that Kachingle needed permission from The Times to use The Times' content, and that permission had not, and would not, be granted. Indeed, Kachingle has now admitted that it did not seek permission to use the intellectual property owned by The Times because "to ask permission is to seek denial." See Exh. E.


28. On October 13, 2010, The Times asked Kachingle to cease its "Stop the Paywall" campaign, again informed Kachingle that it intended to implement its paid subscription program (i.e., paywall) regardless of Kachingle's activities, and that Kachingle was infringing upon The

Times' trademarks. The Times further informed Kachingle that it will not accept any money from Kachingle. Kachingle has refused to cease its infringing and misleading activities.



The Times' Intellectual Property

29. Since at least as early as August 29, 2004, The Times has used the  mark in connection with providing online newspapers and magazines in the fields of fashion, trends and style.

30. Due to The Times' long and continuous use of the  mark, The Times has built and now owns enormously valuable goodwill symbolized by this mark and the purchasing public strongly associates this mark with The Times.

31. Based on its continuous use of the  mark in connection with its online services, The Times owns a trademark registration issued by the United States Patent and Trademark Office ("USPTO") for the mark for "providing online newspapers and magazines in the fields of fashion, trends and style," Registration No. 2,959,293

32. This registration serve as conclusive evidence of The Times' ownership of the mark and its exclusive right to use the mark in commerce or in connection with the services identified in the registration under Section 33(b) of the Lanham Act, 15 U.S.C. § 1115(b).

33. Upon information and belief, since December 2007, well prior to the launch of Kachingle's websites, The Times also adopted and used the  mark as an icon in connection with a blog on its website entitled *The Moment*. Due to The Times' continuous use of the  mark in connection with *The Moment*, The Times has built and now owns valuable

goodwill symbolized by this mark and the purchasing public associates this mark with The Times. These marks are collectively referred herein as “The Times Trademarks.”

34. The Times has extensively promoted and marketed The Times Trademarks through its website at www.nytimes.com. The public has routinely been exposed to The Times Trademarks through The Times’ advertising and promotional efforts.

35. The Times has built up and owns tremendous valuable goodwill symbolized by The Times Trademarks.

COUNT I

First Cause of Action for Infringement of Registered Trademarks in Violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1)

36. The Times specifically realleges and incorporates each and every allegation contained in Paragraphs 1 through 35 as if fully set forth herein.

37. Defendant’s use of a confusingly similar imitation of The Times Trademarks is likely to cause confusion, deception, and mistake by creating the false and misleading impression that Defendant’s services are associated or connected with The Times, or have the sponsorship, endorsement, or approval of The Times.

38. Defendant has used a mark confusingly similar to The Times’ federally-registered trademarks in violation of 15 U.S.C. § 1114, and Defendant’s activities have caused and, unless enjoined by this Court, will continue to cause, a likelihood of confusion to and deception of members of the trade and public and, additionally, injury to The Times’ goodwill and reputation as symbolized by the federally-registered trademarks, for which The Times has no adequate remedy at law. The Times has been damaged in an amount that has not yet been determined.

39. Defendant's actions demonstrate an intentional, willful, and malicious intent to trade on the goodwill associated with The Times' federally-registered trademarks to The Times' great and irreparable injury.

COUNT II

Second Cause of Action for Federal Unfair Competition and False Designation of Origin Under the Lanham Act §43(a), 15 U.S.C. § 1125(a)

40. The Times specifically realleges and incorporates each and every allegation contained in Paragraphs 1 through 39 as if fully set forth herein.

41. Defendant's use of a confusingly similar imitation of The Times Trademarks is likely to cause confusion, deception, and mistake by creating the false and misleading impression that Defendant's services are associated or connected with The Times, or have the sponsorship, endorsement, or approval of The Times.

42. Defendant has made false representations, and false designations about the origin of its services, in violation of 15 U.S.C. § 1125(a), and Defendant's activities have caused and, unless enjoined by this Court, will continue to cause a likelihood of confusion and deception of members of the trade and public as well as injury to The Times' goodwill and reputation as symbolized by The Times Trademarks, for which The Times has no adequate remedy at law. The Times has been damaged in an amount that has not yet been determined.

43. Defendant's actions demonstrate an intentional, willful, and malicious intent to trade on the goodwill associated with The Times' trademarks to The Times' great and irreparable injury.

COUNT III

Third Cause of Action for False Advertising Under the Lanham Act §43(a), 15 U.S.C. § 1125(a)

44. The Times specifically realleges and incorporates each and every allegation contained in Paragraphs 1 through 43 as if fully set forth herein.

45. Defendant has made statements that are literally false and has also made misleadingly false representations regarding its relationship with The Times (including, but not limited to, the false representation that The Times will accept payments from Kachingle) and the likelihood that The Times will not implement its paid subscription service. These are inherent and/or material qualities of Defendant's service.

46. Defendant's actions constitute false advertising in violation of 15 U.S.C. § 1125(a)(1).

47. The Times has no adequate remedy at law for the foregoing wrongful conduct. The Times has been, and absent injunctive relief will continue to be, irreparably harmed by Defendant's actions. The Times has been damaged in an amount that has not yet been determined.

COUNT IV

Fourth Cause of Action for Trademark Infringement **Under New York State Common Law**

48. The Times specifically realleges and incorporates each and every allegation contained in Paragraphs 1 through 47 as if fully set forth herein.

49. The Times Trademarks are valid trademarks under New York State common law.

50. The acts of Defendant alleged herein constitute the use in commerce, without the consent of The Times, of a reproduction, counterfeit, copy, or colorable imitation of one or more of The Times Trademarks in connection with the advertisement, promotion, sale, and/or distribution of services identical or near-identical to those offered by The Times, which use is

likely to cause confusion or mistake, or to deceive consumers and therefore infringe The Times' rights in The Times Trademarks, in violation of The Times' common law trademark rights.

51. The Times has no adequate remedy at law for the foregoing wrongful conduct. The Times has been, and absent injunctive relief will continue to be, irreparably harmed by Defendant's actions. The Times has been damaged in an amount that has not yet been determined.

COUNT V

**Fifth Cause of Action for Unfair Competition
in Violation of New York State Common Law**

52. The Times specifically realleges and incorporates each and every allegation contained in Paragraphs 1 through 51 as if fully set forth herein.

53. Defendant's conduct, as alleged above, constitutes unfair competition under New York State common law. Defendant's acts have resulted in the "passing off" of Defendant's services either: (a) as those of The Times; or (b) somehow related or associated with, sponsored by or endorsed by The Times.

54. The Times has no adequate remedy at law for the foregoing wrongful conduct. The Times has been and absent injunctive relief will continue to be, irreparably harmed by Defendant's actions. The Times has been damaged in an amount that has not yet been determined.

COUNT VI

**Sixth Cause of Action for Deceptive Acts and Practices
in Violation of New York General Business Law § 349(h)**

55. The Times specifically realleges and incorporates each and every allegation contained in Paragraphs 1 through 54 as if fully set forth herein.

56. Defendant, without The Times' authorization or consent, and having knowledge of The Times Trademarks, has distributed, advertised, offered for sale and/or sold its services to the consuming public in violation of New York General Business Law § 349(h).

57. Through Defendant's use of simulations and infringing versions of The Times' Trademarks in its advertising, offering for sale, and/or sale of services, Defendant has engaged in consumer-oriented conduct that has adversely affected the public interest of New York and has resulted in injury to consumers in New York.

58. Defendant's deceptive acts or practices, as described in the paragraph above, are materially misleading. Upon information and belief, these acts or practices have deceived or have a tendency to deceive a material segment of the public to whom Defendant has directed its marketing activities, and both the public and The Times have been injured thereby.

59. Defendant's acts have caused and, unless enjoined by this Court, will continue to cause The Times irreparable harm. The Times has no adequate remedy at law and is thus damaged in an amount not yet determined.

60. Defendant has willfully and knowingly violated Section 349 of the New York General Business Law.

COUNT VII

Seventh Cause of Action for False Advertising in Violation of New York General Business Law § 350

61. The Times specifically realleges and incorporates each and every allegation contained in Paragraphs 1 through 60 as if fully set forth herein.

62. Upon information and belief, Defendant, in its advertising and on its services, makes statements that are misleading regarding its relationship with The Times (including, but not limited to, the false representation that The Times will accept payment from Kachingle) and the

likelihood that The Times will not implement its paid subscription program. These are inherent and/or material qualities of Defendant's service in violation of New York General Business Law § 350.

63. Upon information and belief, consumers have relied on Defendant's false advertising.

64. Upon information and belief, Defendant will continue its acts of false advertising, and consumers and The Times will continue to be damaged as a result, unless enjoined by this Court. The Times has been damaged in an amount that has not yet been determined.

COUNT VIII

Eighth Cause of Action for Common Law Unjust Enrichment

65. The Times specifically realleges and incorporates each and every allegation contained in Paragraphs 1 through 64 as if fully set forth herein.

66. Upon information and belief, Defendant has been and will continue to be unjustly enriched as the result of the above-described acts thereby depriving The Times of revenues it rightfully should receive.

67. By the acts described in Paragraphs 1 through 64 above, Defendant has retained revenues to which it is not equitably or legally entitled, and is thereby unjustly enriched at The Times' expense, in violation of the common law of the State of New York.

68. Defendant's acts have caused and will continue to cause irreparable injury to The Times. The Times has no adequate remedy at law. The Times has been damaged in an amount not yet determined.

Prayer for Relief

WHEREFORE, The Times prays:

A. For judgment that:

- i. Defendant has infringed The Times' federally registered trademarks in violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1);
- ii. Defendant has engaged in Federal Unfair Competition and False Designation of Origin in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a);
- iii. Defendant has engaged in false advertising in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a);
- iv. Defendant has engaged in trademark infringement in violation of the common law of the State of New York;
- v. Defendant has engaged in unfair competition in violation of the common law of the State of New York;
- vi. Defendant has engaged in deceptive acts and practices in violation of Section 349 of the New York General Business Law;
- vii. Defendant has engaged in false advertising in violation of Section 350 of the New York General Business Law; and
- vii. Defendant has been unjustly enriched in violation of the common law of the State of New York.

B. That an injunction be issued enjoining and restraining Defendants and their officers, agents, servants, employees, and attorneys, and all those in active concert or participation with them, from:

- i. using The Times Trademarks, or any reproduction, counterfeit, copy, or colorable imitation of The Times Trademarks to identify any services not authorized by The Times;

- ii. making any statement or representation to falsely describe or represent Defendant's services as being those of The Times, or sponsored by or associated with The Times, that there is a relationship between the parties or that The Times will stop its paid subscription program and from offering such services into commerce;
 - iii. making any statement or representation whatsoever, or using any false designation of origin or false description, or performing any act which can or is likely to lead the trade or public, or individual members thereof, to believe that any services distributed, offered, or sold by Defendant are in any manner associated or connected with The Times or are sold, manufactured, licensed, sponsored, approved, or authorized by The Times;
 - iv. effecting assignments or transfers, forming new entities or associations or utilizing any other device for the purpose of circumventing or otherwise avoiding the prohibitions set forth in subparagraphs (i) through (iii); and
 - v. instructing, assisting, aiding or abetting any other person or entity in engaging in or performing any of the activities referred to in subparagraphs (i) through (iv).
- C. For an assessment of the damages suffered by The Times, trebled, including an award of all profits that Defendant has derived while using The Times Trademarks, trebled, as well as costs and attorney's fees to the full extent provided for by Section 35 of the Lanham Act, 15 U.S.C. § 1117; awarding profits, damages, and fees, to the full extent available, pursuant to Sections 349 and 350 of the New York General Business Law; and punitive damages to the full extent available under New York common law.

- D. Awarding The Times interest, including pre-judgment interest, to the full extent available on the foregoing sums.
- E. For costs of suit, and for such other and further relief as the Court shall deem just and proper.

Demand for a Jury Trial

The Times hereby demands a trial of this action by jury.

Dated: October 18, 2010

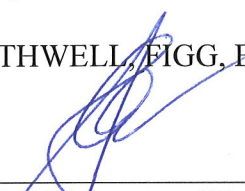
Respectfully submitted,

THE NEW YORK TIMES COMPANY



David E. McCraw (DM7708)
THE NEW YORK TIMES COMPANY
620 Eighth Avenue
New York, NY 10018
(212) 556-4031

ROTHWELL, FIGG, ERNST & MANBECK, PC



Steven Lieberman (SL 8687)
Anne M. Sterba
R. Elizabeth Brenner-Leifer
1425 K St., N.W., Ste. 800
Washington, D.C. 20005
(202) 783-6040

*Attorneys for Plaintiff
The New York Times Company*