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6
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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 JOHN DOE, also known as
AQUACOOOL_2000,

12 Plaintiff,

13 v.
14

YAHOO! Inc., a Delaware corporation, and
15 DOES 1-9, inclusive,

16 Defendants.
17

Case No.:

COMPLAINT FOR:

- 1) **Invasion of Privacy**
- 2) **Breach of Contract**
- 3) **Negligent Misrepresentation**
- 4) **Unfair Competition and
False Advertising**

18 Aquacool_2000 alleges as follows:

19 1. Plaintiff John Doe, also known as Aquacool_2000, is a resident of the state of
20 Ohio. This action alleges violations of Aquacool_2000's privacy interest, including improper
21 disclosure of information relevant to his identity to a third party by Defendant Yahoo!

22 Aquacool_2000 brings this cause of action as John Doe in order to preclude further damage to his
23 privacy interests.

24 2. Upon information and belief, Defendant Yahoo!, Inc. is a Delaware
25 corporation with its principal place of business within the state of California.

26 3. Aquacool_2000 is unaware of the true names and capacities of defendants
27 sued herein as DOES 1-9 inclusive, and therefore sues such DOE defendants by such fictitious
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1 names. Aquacool_2000 will amend his complaint to allege the true names and capacities as and
2 when they have been ascertained. Upon information and belief, each such fictitiously named
3 defendant is in some way responsible for the events or occurrences referred to herein.

4 4. Upon information and belief, each of the defendants was the agent, servant
5 and/or employee of each of the remaining defendants and was acting within the purpose and scope of
6 said agency, service and/or employment and with the permission/consent of its co-defendants.

7 5. This is a civil action arising under the statutory and common law of the State
8 of California. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1332 in that
9 Plaintiff and defendant are citizens of different states and the amount in controversy exceeds the
10 value of \$75,000, exclusive of interest and costs. This Court has personal jurisdiction over
11 defendants in that they are doing business in the State of California and they are committing the acts
12 alleged in this State. Venue for this action is proper in the Central District pursuant to 28 U.S.C.
13 §1391(a) in that defendants are subject to the personal jurisdiction of this judicial district.

14 **GENERAL ALLEGATIONS OF LAWSUIT**

15 6. Yahoo! is a portal on the World Wide Web that provides a variety of services
16 to individuals and companies. Among the services provided by Yahoo! is a service called the
17 message boards. Using the message-board service, Yahoo! members can submit (or post) comments
18 and opinions about publicly traded companies. Yahoo! invites its members to "discuss the future
19 prospects of the company and share information about it with others" in this forum. Every publicly
20 owned company has a message board devoted to it, set up and fostered by Yahoo!

21 7. Yahoo! prompts its members to "select an identity" before posting comments
22 and, in fact, most comments are posted by individuals using a pseudonym or *nome de plume*. The
23 vast majority of the comments posted on these message boards are colloquial in tone, opinionated,
24 speculative, and frequently caustic and derogatory. The comments tend to resemble informal spoken
25 conversation more than formal written communication, and anyone who frequents the message
26 boards interprets what is posted accordingly. The Yahoo! message boards are a forum where the
27 common man may voice his opinion, however silly or brilliant it may be. Discussion of information

1 about the company and its management is common, but so too is idle speculation about its future
2 stock price, random musings about its prospects, and even "off-topic" trivialities. On the
3 AnswerThink message board, for example, discussion has recently focused on guitars.

4 8. The message boards also give users and the subject a unique opportunity to
5 reply to speech on the message boards that they believe to be wrong or defamatory. A message-
6 board user can promptly post a reply to an objectionable posting and, in many cases, the reply will
7 reach the exact audience that read the initial posting.

8 9. Yahoo! is aware of the nature of the comments posted on the message boards
9 and has taken efforts to advise members that the message boards are "not connected in any way"
10 with the company being discussed. Yahoo! further advises its members that "any messages are
11 solely the opinion and responsibility of the poster."

12 10. These unique features of the message boards suggest that defamation law
13 should be applied carefully to these communications, lest the threat of being held liable for
14 defamation chills users from engaging in the spirited discussions encouraged under state and federal
15 constitutions. In fact, the United States Supreme Court has described the Internet as a "vast
16 democratic fora" and has affirmed another court decision describing the Internet as "the most
17 participatory form of mass speech yet developed and is entitled to the highest protection." Reno v.
18 ACLU, 521 U.S. 844 (1997).

19 11. The United States and California constitutions protect the right to anonymous
20 speech and the right to free speech. The United States Supreme Court, in McIntyre v. Ohio Elections
21 Commission, 514 U.S. 334 (1995), firmly held that the First Amendment protects anonymous
22 speech. The Court gave an impressive listing of important anonymous contributors ranging from
23 Shakespeare to The Federalist Papers. The California constitution has even greater protections for
24 free speech and privacy. See Rancho Publications v. Superior Court, 68 Cal. App. 4th 1538 (1999).
25 While these constitutional rights are not absolute, they may not be disregarded merely on the filing
26 of a lawsuit.

1 12. In order to become a member of Yahoo! and to post comments on the message
2 boards, one is required to disclose certain personal information to Yahoo!, including the user's zip
3 code, gender, occupation, industry, and interests. Yahoo! also collects information about its
4 members that would allow an interested party to trace the source of any particular comment posted
5 on the message boards to the poster's personal computer. In particular, Yahoo! determines and saves
6 the internet protocol (IP) address for every person that posts a message to the message boards every
7 time that a post is made. On information and belief, Yahoo! does not destroy such personally
8 identifying information for many months or years.

9 13. Yahoo! promulgates Terms of Service and a Privacy Policy on its website that
10 purport to govern the relationship between Yahoo! and its members. The Privacy Policy is
11 incorporated by reference into the Terms of Service.

12 14. The first sentence of the Yahoo! Privacy Policy proclaims, "Yahoo! is
13 committed to safeguarding your privacy online."

14 15. Yahoo!'s Privacy Policy further states, in relevant part, "This Privacy Policy
15 will let you know: what personally identifiable information is being collected from you; how your
16 information is used; who is collecting your information; with whom your information may be
17 shared; what choices are available to you regarding collection, use, and distribution of your
18 information," etc.

19 16. More specific language later in the Privacy Policy provides that members will
20 be notified "at the time of data collection or transfer if your data will be shared with a third party and
21 you will always have the option of not permitting the transfer." The Privacy Policy further provides
22 that members' personal information may be disclosed "when we [Yahoo!] believe in good faith that
23 the law requires it . . ."

24 17. The Privacy Policy additionally provides, "Knowing that you use certain
25 services or features may help us to offer you better and more relevant content . . . But as with all
26 personally identifiable information, we do not make this available to any third parties without your
27 permission."

1 18. In its Terms of Service, Yahoo! informs its members that "Notices to you may
2 be made via either email or regular mail," thereby creating a reasonable expectation in its members
3 that Yahoo! will, in fact, provide notice of information important to its members.

4 19. The Privacy Policy further represents that Yahoo! is certified by TRUSTe,
5 which is a third-party group supposedly regulating and reviewing certified-companies' privacy
6 practices. By featuring the TRUSTe certification mark throughout its website, Yahoo! thereby
7 creates the reasonable expectation that Yahoo! maintains strict procedures and requirements with
8 respect to Yahoo!'s disclosure of members' personal information. At a minimum, Yahoo!
9 purposefully gives members the impression that Yahoo! is as protective of members' privacy as the
10 member himself, and that Yahoo! would not disregard members' privacy interests without taking all
11 reasonable steps to safeguard it or giving the opportunity to the member to safeguard it.

12 20. Yahoo has posted the Privacy Policy and TRUSTe certification mark in order
13 to falsely gain members' confidence and to induce individuals to use the Yahoo! service and
14 participate on the message boards. Yahoo! has acted with callous disregard of this public trust and
15 reliance.

16 21. Yahoo! does not inform or in any way notify a member when Yahoo! receives
17 a subpoena for the member's private information.

18 22. Pursuant to the rulings in Columbia Insurance Co. v. Seescandy.com, 185
19 F.R.D. 573 (N.D. Cal. 1999), National Labor Relations Board v. Micklin Daily News, 151 F.3d 472
20 (6th Cir. 1998), and Rancho Publications v. Superior Court, 68 Cal. App. 4th 1538 (1999), Yahoo!
21 is, in fact, under no legal obligation to supply members' personal information in response to
22 premature subpoenas.

23 23. Yahoo! is well aware of the fact that defamation lawsuits have been, and will
24 likely continue to be filed against some members who post comments on the message boards.
25 Indeed, Yahoo! has full-time employees whose primary job responsibility is to respond to subpoenas
26 for members' information. On information and belief, Yahoo! receives hundreds of civil subpoenas
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1 every year for information identifying members who have posted comments critical of publicly held
2 companies on the Yahoo! message boards.

3 24. On information and belief, Yahoo! knows or has reason to know that many of
4 the lawsuits seeking members' personal information are frivolous and would not withstand a motion
5 to dismiss. Yahoo! is aware that executives at publicly owned companies that are featured on the
6 message boards frequently take umbrage at the critical comments posted about "their" companies on
7 the message boards. With sensitive egos and money to burn, such companies often file a lawsuit
8 merely in order to obtain the right to subpoena Yahoo! for members' information so that the
9 company's curiosity and desire to silence the member can be satiated. This phenomenon has been
10 chronicled in numerous media. Nonetheless, the subject of the lawsuit is unable to mount such a
11 defense prior to Yahoo!'s disclosure of personal information -- solely because the defendant is not
12 notified by Yahoo! of the lawsuit or the subpoena.

13 25. On information and belief, Yahoo practices lax standards for responding to
14 subpoenas. Yahoo! does not require subpoenas to be personally served, as required by statute, and
15 does not require out-of-state subpoenas to be authorized by issuance of a court commission, as also
16 required by statute. Rather, Yahoo! will accept facsimile service of any document referring to itself
17 as a subpoena and does not insist on compliance with minimum statutory requirements.

18 26. Yahoo! does not confirm that lawsuits providing subpoena power have been
19 served on defendants or that such lawsuits have complied with various state or federal statutes
20 placing a mandatory hold on subpoenas and other discovery devices until a certain amount of time
21 following the filing of a lawsuit. On information and belief, Yahoo! knows or should reasonably be
22 expected to know that many subpoenas it receives, if not the vast majority of such subpoenas, are
23 issued in violation of such state or federal requirements.

24 27. As one of the largest, if not the largest portal on the Internet, Yahoo! has a
25 large impact on the exercise of the public's rights of free speech and freedom of expression in
26 cyberspace.

1 28. On information and belief, Yahoo! knows that members are surprised and do
2 not expect that Yahoo! will not notify them when Yahoo! receives subpoenas for members'
3 information. On information and belief, Yahoo! has received numerous complaints and inquiries
4 from members, puzzled and outraged, that Yahoo! has provided their information in response to
5 subpoenas, all without notice to them. Many members have been seriously damaged by Yahoo!'s
6 actions. On information and belief, several well-known watchdog organizations active in online-
7 privacy issues have also complained to Yahoo! about its failure to provide notice to members who
8 are the subject of civil subpoenas.

9 29. Nonetheless, on information and belief, Yahoo! has consciously ignored such
10 complaints for the sole purpose of reaping profits for itself and placating the anger of companies that
11 are the subject of message-board criticism. With its advertising revenue and stock valuation in the
12 hands of corporate America, Yahoo! has chosen to capitulate to the pressure exerted by such
13 companies.

14 30. Given the facility with which Yahoo! is able to notify its members (e.g., via
15 email), Yahoo!'s failure to give members notice of such subpoenas is particularly offensive. No law,
16 regulation, or custom prevents Yahoo! from providing such notice prior to responding to a subpoena.
17 While Yahoo! may be legally prohibited from providing notice on certain criminal discovery
18 requests, such prohibitions do not apply to subpoenas that are the subject of this action or subpoenas
19 issued in civil litigation.

20 31. Members who are the subject of frivolous defamation lawsuits and who later
21 learn that Yahoo! has disclosed their information to third parties in response to subpoenas have their
22 free-speech rights and rights to anonymous speech unjustifiably chilled, to the detriment of the
23 public at large by the dampening of the public debate caused thereby.

24 32. On information and belief, Yahoo! is currently under scrutiny by the Federal
25 Trade Commission for its collection and disclosure of member information. Yahoo!'s Geocities unit
26 is already subject to a consent decree by the Federal Trade Commission for prior violations.

1 **SPECIFIC ALLEGATIONS OF LAWSUIT**

2 33. Aquacool_2000 participated in the message boards with the reasonable
3 expectation that Yahoo! would not disclose his identity or personal information to any third party
4 without his consent or, at a minimum, without giving him notice prior to the disclosure of any such
5 information. At no time did Aquacool_2000 knowingly or voluntarily waive his rights to privacy
6 and anonymous speech.

7 34. On or before October 21, 1999, Aquacool_2000 became a Yahoo! message
8 board member and participated in discussion on the message boards by posting comments about the
9 publicly traded company AnswerThink Consulting Group, Inc. Plaintiff, using the pseudonym
10 "aquacool_2000," posted a number of comments that criticized and even ridiculed AnswerThink's
11 management. For example, apparently referring to AnswerThink's management team,
12 Aquacool_2000 stated "One of them is an arrested adolescent whose favorite word is 'turd.' One is
13 so dull that a 5-watt bulb gives him a run for the money. And the third believes that the faster you
14 go in your car, the smarter you get." These sometimes hyperbolic statements of opinion clearly
15 could not be understood by anyone who read them to be assertions of fact. Consequently, the
16 statements cannot, as a matter of law, be considered defamatory.

17 35. On or about February 23, 2000 AnswerThink filed a meritless complaint for
18 defamation against several Doe defendants, including Aquacool_2000, in U.S. District Court for the
19 Southern District of Florida based upon statements that Aquacool_2000 and others posted on the
20 AnswerThink message board operated by Yahoo!.

21 36. On or about March 7, 2000, before AnswerThink made any attempt to serve
22 any of the defendants in that lawsuit, or seek leave of court to issue subpoenas prior to such service,
23 AnswerThink caused a subpoena to be served on Yahoo! seeking the disclosure of personal
24 information, including identity, of Aquacool_2000 and, on information and belief, numerous other
25 message-board members.

26 37. Without taking any steps to notify Aquacool_2000 or obtain his consent,
27 without taking any steps to determine the validity of the subpoena, and without taking any steps to
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1 determine Yahoo!'s legal obligation to supply the requested personal information pursuant to the
2 subpoena, Yahoo! disclosed to attorneys for AnswerThink personal information regarding
3 Aquacool_2000.

4 38. Had Yahoo! taken the minimal step of notifying Aquacool_2000 prior to
5 disclosure of his personal information, Aquacool_2000 would have had an opportunity to move for a
6 protective order and/or a motion to quash the AnswerThink subpoena under the law established by
7 the cases cited above in an effort to protect his privacy and his constitutionally protected right to
8 speak anonymously.

9 39. Following the disclosure of Aquacool_2000's personal information by
10 Yahoo!, AnswerThink filed a second lawsuit against Aquacool_2000 for defamation and other
11 causes of action in United States District Court for the Central District of Florida. Moreover,
12 AnswerThink wrongfully terminated Aquacool_2000 from its employ and wrongfully denied him
13 compensation due him.

14 **FIRST CAUSE OF ACTION**

15 **(Violation of Constitutional Privacy Rights)**

16 40. Aquacool_2000 repeats and incorporates by reference the allegations of the
17 paragraphs above.

18 41. Aquacool_2000, under the First Amendment to the United States Constitution,
19 Article I, Section 1 of the California Constitution and the common law, maintains a legally protected
20 privacy interest in the personal information he provided Yahoo!, as well as a legally protected
21 privacy interest in the information that Yahoo! has collected about him as a result in his participation
22 in its services.

23 42. Aquacool_2000, pursuant to the First Amendment, Article I, Section 1 of the
24 California Constitution, the common law and the terms of Yahoo!'s Terms of Service and Privacy
25 Policy, had a reasonable expectation that the personal information he supplied to Yahoo!, and the
26 personal information that Yahoo! collected from him, would not be disclosed to any third party
27 without his prior consent or, at the very least, without prior notice to him.

1 43. Yahoo!'s unauthorized disclosure of Aquacool_2000's personal information
2 to a hostile third party without warning or notice to Aquacool_2000, and without due regard to
3 Yahoo!'s legal obligation to maintain such information in confidence, constitutes a serious invasion
4 of Aquacool_2000's privacy interests as defined by Art. I, § 1 of the California Constitution.

5 44. Yahoo!'s disclosure of Aquacool_2000's personally identifiable information,
6 without prior notice, to AnswerThink (a company that has filed a frivolous lawsuit against
7 Aquacool_2000 over speech protected by the First Amendment) is offensive and objectionable to a
8 reasonable person of ordinary sensibilities.

9 45. Aquacool_2000 has suffered damages, including but not limited to emotional
10 distress and loss of compensation, that were proximately caused by Yahoo!'s violation of
11 Aquacool_2000's constitutional rights. Aquacool_2000 is also entitled to an award of attorneys' fees
12 pursuant to Code of Civil Procedure § 1021.5.

13 46. Yahoo!'s violation of Aquacool_2000's privacy rights was willful. Yahoo!
14 acted with oppression, fraud and/or malice in disclosing Aquacool_2000's personal information
15 without his consent, and without prior notice, such that Aquacool_2000 is entitled to an award of
16 punitive damages.

17 47. Aquacool_2000 alleges on information and belief that Yahoo!'s practice of
18 disclosing personal information without consent, notice, or legal justification, is widespread and that
19 the privacy interest of many individuals has been violated as a result of Yahoo!'s practices. These
20 practices are likely to continue unless and until they are restrained by an injunction requiring, at a
21 minimum, that Yahoo! notify its members prior to releasing personal information in response to a
22 civil subpoena.

23 **SECOND CAUSE OF ACTION**

24 **(Breach of Written Contract)**

25 48. Aquacool_2000 repeats and incorporates by reference the allegations of
26 paragraphs above.

1 49. On or before October 21, 1999, Aquacool_2000 submitted his registration
2 information to Yahoo! and thereby gained access to Yahoo!'s message-board services.

3 50. On or about March 7, 2000 Yahoo! disclosed Aquacool_2000's personal
4 information to AnswerThink in response to a subpoena issued by AnswerThink.

5 51. The disclosure by Yahoo! of Aquacool_2000's personal information to
6 AnswerThink, without the consent of and prior notice to Aquacool_2000, constitutes a violation of
7 the Terms of Service and the Privacy Policy.

8 52. Yahoo! could not and did not have a reasonable or good-faith belief that
9 disclosure of Aquacool_2000's personal information to AnswerThink was required by law under the
10 instant circumstances. In fact, disclosure of this information was not required by law.

11 53. Moreover, even if Yahoo! acted in good faith, such a basis to disclose
12 personally identifiable information without notice to the member is unenforceable as contrary to
13 public policy. Yahoo!'s disclosure of personal information upon receipt of a subpoena without
14 further investigation and without providing notice to the affected party will result in deprivation of
15 that party's privacy rights, without regard to the careful protections required by due process (e.g.,
16 right to notice and a meaningful opportunity to be heard).

17 54. Yahoo! violated its own Privacy Policy and the covenant of good faith and
18 fair dealing (which is implied in every contract) by disclosing, without notice to Aquacool_2000 and
19 without his consent, Aquacool_2000's personal information to a hostile third party.

20 55. Plaintiff contends that the Terms of Service and Privacy Policy are, in some
21 respects, contracts of adhesion and contain unconscionable and unenforceable waivers of Plaintiff's
22 remedies.

23 56. As a proximate result of Yahoo!'s breaches of the Terms of Service and
24 Privacy Policy, Aquacool_2000 has suffered losses including, without limitation, lost compensation
25 and revenues and other losses according to proof at trial.

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1 **THIRD CAUSE OF ACTION**

2 **(Negligent Misrepresentation)**

3 57. Aquacool_2000 repeats and incorporates by reference the allegations of the
4 paragraphs above.

5 58. Yahoo! has represented and continues to represent to its members, both on its
6 website and in its Privacy Policy, that it will defend and protect its members' privacy interests. For
7 example, Yahoo! has represented and continues to represent that it will notify its members if their
8 personal data will be shared with a third party and that its members will "always have the option of
9 not permitting the transfer" of their personally identifiable information.

10 59. When Yahoo! made these representations, and other similar representations, it
11 had no reasonable ground to believe them to be true, in that Yahoo! routinely discloses the personal
12 information of its members in response to subpoenas seeking the same, without its members'
13 consent, and without notifying its members prior to such disclosure. Moreover, Yahoo! routinely
14 makes these disclosures without taking any steps whatsoever to determine whether the subpoenas it
15 responds to are, in fact, valid, or if Yahoo! has any legal obligation to disclose the information that is
16 requested by the subpoenas.

17 60. Yahoo! further made these representations, and other similar representations,
18 with the intention of inducing Aquacool_2000 to act in reliance on such representations in the
19 manner herein alleged, or with the expectation that Aquacool_2000 would so act.

20 61. Aquacool_2000 reasonably relied on the foregoing representations made by
21 Yahoo! and submitted his personal information to Yahoo! and allowed Yahoo! to collect further
22 personal information related to his interests and habits, for the purpose of registering as a message-
23 board member.

24 62. As a result of his reliance on Yahoo!'s misrepresentations, Aquacool_2000
25 has suffered personal injury and other losses in an amount subject to proof at trial.

1 **FOURTH CAUSE OF ACTION**

2 **(Unfair Competition and False Advertising)**

3 63. Aquacool_2000 repeats and incorporates by reference the allegations set forth
4 in the paragraphs above.

5 64. California Business and Professions Code § 17200 prohibits acts of unfair
6 competition, which include "any unlawful, unfair or fraudulent business act or practice." Business
7 and Professions Code § 17500 prohibits false advertising. A violation of § 17500 also constitutes a
8 violation of § 17200.

9 65. As alleged above, Yahoo!, in connection with the services it provides, has
10 caused to be published false and misleading statements that Yahoo! knew, or in the exercise of
11 reasonable care, should have known to be false or misleading, all in violation of Business and
12 Professions Code §§ 17200 and 17500.

13 66. Pursuant to these provisions of the Business and Professions Code,
14 Aquacool_2000 is entitled to an order or judgment enjoining Yahoo! from engaging in further
15 unlawful, unfair or fraudulent acts or practices and for orders of disgorgement and restitution.
16 Aquacool_2000 is further entitled to an award of his attorneys' fees and costs as permitted by those
17 provisions and Code of Civil Procedure § 1021.5.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Aquacool_2000 prays for relief and judgment as follows:

20 (a) An award of compensatory damages for all personal and economic harms
21 suffered by Aquacool_2000 as a result of Yahoo!'s actions;

22 (b) Exemplary and punitive damages as permitted by law;

23 (c) Attorneys' fees and costs of the suit incurred herein;

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(d) A permanent injunction prohibiting the release of private information without specific and prior notice to Yahoo!'s members; and

(e) Such other and further relief as the court may deem proper and just.

Dated: May __, 2000

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