

APR 13 2009

BROOKLYN OFFICE

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

VIABLE MARKETING CORPORATION,

Plaintiff,

v.

INTERMARK COMMUNICATIONS, INC.  
d/b/a INTERMARK MEDIA, INC. and COPEAC,

Defendant.

Case Number:

09 1500

**COMPLAINT AND  
DEMAND FOR JURY TRIAL**

SEYBERT

WALL, M.J.

For its Complaint, Plaintiff Viable Marketing Corporation, by and through its attorneys,  
The Lustigman Firm, P.C., hereby alleges as follows:

**PARTIES, JURISDICTION AND VENUE**

1. Plaintiff Viable Marketing Corporation ("Viable") is a corporation organized and existing under the laws of the State of Florida with its principle place of business located at 13799 Park Blvd N, Suite #330 in Seminole, Florida.
2. Upon information and belief, Defendant Intermark Communications, Inc. is a corporation organized and existing under the laws of the State of New York. Intermark Communications, Inc.'s primary place of business is 135 Crossways Park Drive, Suite 203, Woodbury, New York, County of Nassau.
3. Upon information and belief, Intermark Media, Inc. and Copeac are assumed names of Intermark Communications, Inc.
4. Intermark Communications, Inc. is subject to personal jurisdiction in this district.
5. The Defendant hereinafter will be referred to as "Copeac", which is the fictitious name it operated under to perpetrate the fraud and other actions described herein.

6. The amount in controversy in this action exceeds Seventy-Five Thousand Dollars (\$75,000.00), exclusive of interest, costs, and attorneys' fees and the parties are citizens of different states.

7. Subject matter jurisdiction exists because this Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332.

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because Copeac resides in this district and also because a substantial part of the events or omissions giving rise to the claim occurred in this district, or a substantial part of property that is the subject of the action is situated in this district.

### **FACTUAL ALLEGATIONS**

9. Viable is in the business of selling web-based business opportunity programs.

10. In order to market its programs most effectively on the Internet, Viable entered into a contract ("the Viable-PartnerWeekly contract") with PartnerWeekly, LLC ("PartnerWeekly"), a Nevada-based Internet marketing agency.

11. The Viable-PartnerWeekly contract gave PartnerWeekly the exclusive Internet marketing rights to certain of Viable's programs, and in return for each valid lead it provided to Viable, it would receive a payment of \$40.00.

12. A valid lead is a consumer who agrees to purchase Viable's program on a trial basis and provides the marketer with legitimate, accurate and valid information to process the transaction, including credit card information with authority to debit the credit card.

13. If a consumer agrees to purchase one of Viable's programs, payment is accepted only by credit card. Viable accepts no cash, check or wire transfer payments.

14. Viable receives the proceeds of credit card payments through a contractual relationship with its processing bank, St. Kitts-Nevis-Anguilla National Bank Limited.

15. The contract between Viable and St. Kitts-Nevis-Anguilla National Bank Limited provides terms and conditions for credit card processing, and establishes a schedule of service fees, penalties and fines for chargebacks. A chargeback occurs when a consumer sees an unauthorized charge on his or her credit card statement, and rather than contact the seller, the consumer disputes the charge directly to the credit card company, which then reverses the transaction by charging it back to the seller, in this case Viable.

16. If chargebacks exceed a certain level, Viable is liable through its merchant account with Visa for significant penalties in addition to chargeback fees.

17. One of PartnerWeekly's selling techniques is to use affiliate marketing. Through affiliate marketing, PartnerWeekly essentially subcontracts its exclusive right to sell certain of Viable's programs through other Internet marketers, known as affiliates.

18. In order to identify and track the proper recipient of its commissions and the source of its leads, Viable and PartnerWeekly assigned a unique code number to each affiliate who is authorized to solicit leads for Viable's programs. Whenever a lead is processed, the affiliate code number is included so that the proper party would receive credit for earning a commission.

19. Copeac is one of PartnerWeekly's affiliate marketers who undertook to introduce Viable's programs to the Internet-using public and generate leads.

20. Copeac promotes itself as a specialist in online lead generation and affiliate marketing.

21. It represents that it has "seasoned expertise" in generating leads for companies wishing to conduct business through the Internet, including large financial institutions, debit

agencies and mortgage lenders. It further represents that it maintains its own Internet-based affiliate network of more than 7000 publishers and content providers.

22. Upon information and belief, Copeac and PartnerWeekly have one or more contracts governing their affiliate relationship.

23. As an affiliate of PartnerWeekly, Copeac agreed to seek leads for Viable, and in return for each valid lead returned to Viable, Copeac would receive a payment of \$33.

24. The commission payments to Copeac were paid through PartnerWeekly, who served as the middleman between Viable and Copeac. PartnerWeekly collected \$40 from Viable and paid \$33 to Copeac for each lead Copeac delivered to Viable.

25. The Viable-PartnerWeekly contract required Viable to pay PartnerWeekly within approximately two weeks of each lead delivered by PartnerWeekly or one of its affiliates.

26. Instead of referring bona fide leads to Viable, Copeac submitted tens of thousands of fraudulent leads that purported to be consumers who wished to purchase Viable's programs on a trial basis.

27. Copeac's leads were fraudulent because they consisted of stolen and unauthorized credit card data designed to cause Viable to make six-figure commission payments for Copeac's own benefit.

28. Upon information and belief, the first fraudulent lead generated by Copeac was received by Viable on or about November 12, 2008.

29. Additional unauthorized leads purporting to be legitimate orders were submitted by Copeac to Viable through on or about January 6, 2009.

30. Unfortunately, defrauded consumers generally do not become aware of fraudulent charges to their credit cards until they receive their statement at the end of their monthly cycle.

Even after receiving their statements, additional weeks might pass by before consumers actually review their statement and discover the unauthorized charges.

31. Viable received its first complaint of a fraudulent lead on or about December 29 or 30, 2008 and immediately began an investigation, which included notifying PartnerWeekly, on December 30, 2008.

32. In January 2009, Viable began receiving statements of its merchant (credit card) account that detailed an enormous amount of chargebacks.

33. In the course of its January 2009 investigation, a Viable employee determined that many of the fraudulent submissions and determined that Copeac was the source of nearly all the fraudulent leads received. Viable subsequently determined that virtually every lead submitted by Copeac became either a chargeback or the subject of a consumer demand for a refund.

34. By the time Viable realized it had been defrauded by Copeac, Viable had already made hundreds of thousands of dollars in commission payments pursuant to the Viable-PartnerWeekly contract.

35. Also by the time Viable realized it had been defrauded, Copeac received more than \$100,000.00 in commission payments from Viable (for which PartnerWeekly served as a conduit).

36. As a result of processing the fraudulent orders generated by Copeac, Viable has been assessed significant charge back fees, fines, and penalties from its processing bank and under its Visa merchant agreement.

37. The amount of Viable's damages continues to increase daily because defrauded consumers continue to demand the charges that Copeac caused them to incur be reversed and

penalties and fees continue to be assessed against Viable by its processing bank and under its merchant agreement.

38. Copeac admitted to PartnerWeekly in writing that it submitted at least 4800 invalid leads for which it obtained payment. Upon information and belief, the number of fraudulent submissions by Copeac exceeds 27,000, at least 10,000 of which proceeded to the stage of credit card processing. Viable maintains a list of the fraudulent submissions received from Copeac, and the list is not set forth herein only because of privacy concerns for the credit card holders and the sheer volume of the list.

39. Copeac also indicated in writing that it has knowledge of additional individuals who participated in the fraudulent submissions to Viable.

40. Shortly after it received notice from PartnerWeekly that Viable had determined that Copeac was the source of the fraudulent leads, Copeac issued a press release announcing that it would no longer accept incentivized Internet traffic, which is a term for the method of referral that Copeac performed for Viable. Copeac explained its decision to cease using incentivized traffic by admitting that the door was opened to fraudulent activities.

41. Viable's current damages estimate as a result of processing the fraudulent leads generated by Copeac is \$1,313,000.00.

**COUNT I**  
**FRAUD**

42. Viable repeats and realleges the allegations contained in paragraphs 1 through 41 as if set forth at length herein.

43. By submitting the purchase orders to Viable containing consumer information, including credit card information, as if they were validly authorized by actual consumers,

Copeac made a material misrepresentation or omission of fact that it knew Viable would reasonably rely upon.

44. Copeac's misrepresentations were made with knowledge of their falsity because Copeac knew it lacked the authorization from the credit card owners to submit their account information and that the consumers were not ordering anything from Viable as represented.

45. Copeac acted with the intent to defraud Viable out of unearned commission payments.

46. Viable reasonably relied on the facial validity of the fraudulent leads in processing the orders.

47. Viable has sustained damages as a result of Copeac's actions.

48. Punitive or exemplary damages are warranted due to the deliberate and egregious nature of Copeac's conduct.

**COUNT II**  
**NEGLIGENT MISREPRESENTATION**

49. Viable repeats and realleges the allegations contained in paragraphs 1 through 41 as if set forth at length herein.

50. At the very least, Copeac was careless in submitting the leads to Viable without reasonably verifying that they were legitimate customer orders.

51. Copeac intended that Viable would rely on the information Copeac submitted.

52. In submitting the leads to PartnerWeekly, Copeac had an awareness that the leads would be viewed by Viable as new customers, and accordingly, Viable would process the orders and pay commissions to PartnerWeekly that would flow directly to Copeac.

53. Viable did in fact rely upon the information sent to it by Copeac and demonstrated this reliance by processing the orders and issuing commission payments.

54. Viable has sustained damages as a result of Copeac's actions.

55. Punitive or exemplary damages are warranted due to the reckless and egregious nature of Copeac's conduct.

**COUNT III**  
**VIOLATION OF GBL §349**

56. Viable repeats and realleges the allegations contained in paragraphs 1 through 41 as if set forth at length herein.

57. By submitting the invalid leads containing unauthorized credit card information as if they were legitimate orders, and thereby causing improper charges to be made to consumers, Copeac engaged in conduct that is deceptive and misleading in a material way.

58. Copeac's conduct with respect to unauthorized credit card use was conduct that was consumer oriented and which injured the public at large.

59. Viable has been injured by reason of Copeac's conduct.

60. By reason of Copeac's deceptive and misleading conduct, Copeac has violated New York General Business Law ("GBL") §349.

**COUNT IV**  
**BREACH OF CONTRACT**

61. Viable repeats and realleges the allegations contained in paragraphs 1 through 41 as if set forth at length herein.

62. Upon information and belief, PartnerWeekly and Copeac are parties to one or more contracts that provide that Copeac will receive commission payments for leads provided to PartnerWeekly's clients.

63. The purpose of the contract(s) between PartnerWeekly and Copeac was to benefit Viable by generating business for Viable, a benefit for which Copeac would earn commissions.



64. Upon information and belief, Viable is an intended beneficiary of the contract(s) between PartnerWeekly and Copeac.

65. Upon information and belief, Copeac breached its contractual obligations to PartnerWeekly.

66. Copeac knew the identity of Viable and that it was earning commissions based on leads it generated for Viable.

67. Copeac understood its efforts to obtain leads would provide a benefit to Viable.

68. Viable has sustained damages as a result of Copeac's breach of its contractual obligations to PartnerWeekly.

**COUNT V**  
**TORTIOUS INTERFERENCE WITH ECONOMIC ADVANTAGE**

69. Viable repeats and realleges the allegations contained in paragraphs 1 through 41 as if set forth at length herein.

70. Viable maintained a business relationship with PartnerWeekly.

71. Viable also maintained a business relationship with its bank, St. Kitts-Nevis-Anguilla National Bank Limited.

72. By the acts alleged herein, Copeac interfered with the business relationship between Viable and PartnerWeekly.

73. By the acts alleged herein, Copeac interfered with the business relationship between Viable and St. Kitts-Nevis-Anguilla National Bank Limited.

74. Copeac acted for a wrongful purpose -- to obtain commission payments from Viable for which Copeac was not otherwise entitled.

75. By submitting the fraudulent leads, Copeac used dishonest, unfair, and/or improper means that interfered with Viable's relationships with PartnerWeekly and St. Kitts-Nevis-Anguilla National Bank Limited.

76. Viable has sustained damages as a result of Copeac's actions.

**COUNT VI**  
**TORTIOUS INTERFERENCE WITH CONTRACT**

77. Viable repeats and realleges the allegations contained in paragraphs 1 through 41 as if set forth at length herein.

78. Viable had a valid contract in existence with PartnerWeekly.

79. Copeac had knowledge of the contract between Viable and PartnerWeekly.

80. By the acts alleged herein, Copeac intentionally caused PartnerWeekly to breach its contractual obligations to Viable.

81. Copeac's acted without justification.

82. Viable has sustained damages as a result of Copeac's actions.

**COUNT VII**  
**COMMON LAW UNFAIR COMPETITION**

83. Viable repeats and realleges the allegations contained in paragraphs 1 through 41 as if set forth at length herein.

84. Copeac's submission of the invalid leads was done in bad faith.

85. Through the acts described herein, Copeac has committed the common law tort of unfair competition and has damaged Viable in an amount to be determined at trial.

**COUNT VIII**  
**MISAPPROPRIATION**

86. Viable repeats and realleges the allegations contained in paragraphs 1 through 41 as if set forth at length herein.

87. Copeac's conduct as described herein, constituted an unlawful misappropriation for its own use and benefit of Viable's funds.

88. Copeac's misappropriation as described herein has directly and proximately damaged Viable in an amount to be proven at trial.

**COUNT IX**  
**UNJUST ENRICHMENT**

89. Viable repeats and realleges the allegations contained in paragraphs 1 through 41 as if set forth at length herein.

90. Copeac wrongfully and unjustly received and retained payment from Viable (with PartnerWeekly serving as a conduit) when it was not entitled to do so.

91. Copeac improperly retained commission payments from Viable for its own benefit without providing anything of value to Viable in return.

92. By reason of the foregoing, Viable is entitled to the value of the benefits it conferred and which have been wrongfully and unjustly retained by Copeac.

**WHEREFORE**, Plaintiff demands judgment as follows against Copeac:


A. Requiring the Copeac to render a full accounting to Viable and to disgorge to Viable any and all revenues received from any source attributable to its activities with respect to Viable or Viable's goods or services.

B. Awarding Viable all damages sustained by reason of Copeac's conduct, including all chargeback fees, bank fines, fees and penalties and consumer refunds.

- C. Awarding Viable punitive and/or exemplary damages in an amount to be determined at trial.
- D. Awarding Viable the costs of this action, pre-judgment interests and reasonable attorney's fees.
- E. Granting such other and further relief as this Court deems just and proper.

Dated: New York, New York  
April 13, 2009

THE LUSTIGMAN FIRM, P.C.

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ATTORNEYS FOR PLAINTIFF

**DEMAND FOR JURY TRIAL**

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff requests a trial by jury on all claims so triable.

DATED: New York, New York  
April 13, 2009

THE LUSTIGMAN FIRM, P.C.

By: Scott Sh