

OFFICE OF THE ATTORNEY GENERAL
OF THE STATE OF NEW YORK

In the Matter of the

Assurance No. 09-187

Investigation of Andrew Cuomo,
Attorney General of the State of New York, of

PlasmaNet, Inc. d/b/a
WWW.FREELOTTO.COM
and FreeLotto

ASSURANCE OF DISCONTINUANCE
PURSANT TO EXECUTIVE LAW § 63(15)

Pursuant to the provisions of Article 22-A of the New York General Business Law, and section 63(12) of the Executive Law, the Office of Andrew M. Cuomo, Attorney General of the State of New York ("OAG"), has made an inquiry into certain business practices of PlasmaNet, Inc. d/b/a FREELOTTO.COM and FreeLotto. Based upon that inquiry, the OAG has concluded as follows:

Background

1. PlasmaNet, Inc. d/b/a FREELOTTO.COM and FreeLotto ("PlasmaNet"), is a Delaware corporation doing business and based in the State of New York at 420 Lexington Avenue, Suite 2435, New York, N.Y. 10170.
2. Since 1999, PlasmaNet has been the registrant of and has controlled the domain name FREELOTTO.COM. The website associated with the domain name FREELOTTO.COM ("FreeLotto") is an interactive website that has also been operational since 1999. Through FreeLotto, consumers are offered the chance to win cash and other prizes by playing online lottery-style sweepstakes games in exchange for viewing and receiving advertisements.

3. Every day, PlasmaNet employees hold drawings at the PlasmaNet office in New York City. PlasmaNet then announces the winning numbers in emails it sends to FreeLotto players and separately notifies by email those players who won prizes valued between \$1 and \$10,000,000. Since 1999, over 57 million consumers have registered with FreeLotto, over 5,000,000 of whom have actually won prizes of \$1 to \$10,000,000. Currently, there are approximately 12 million active FreeLotto players worldwide.

4. To play online FreeLotto games, consumers must first register with FreeLotto by providing a first and last name, postal address and valid email address. Consumers consent to view advertising that is served by PlasmaNet on behalf of third-parties, and consent to receive advertising from PlasmaNet, by agreeing to the website's "Terms of Use," which are presented to the consumer during the registration process. Consumers cannot play games on FreeLotto unless and until they agree to receive emails from PlasmaNet.

5. After registering with FreeLotto the consumer is presented with six lottery-style sweepstakes games (collectively, the "FreeLotto Games"). In order to play one or more of the FreeLotto Games, the consumer is required to view and to respond to third-party advertisements that PlasmaNet sends to the consumer on behalf of third-party advertisers. Once the consumer clicks on the advertisement, or answers a question posed by the advertisement, or otherwise responds to the advertisement, the consumer is not required to take any further action with respect thereto.

6. There is no required fee for playing the FreeLotto Games on FreeLotto. Once registered, the consumer may return to the FreeLotto website every day to play one or more of the six FreeLotto Games provided the consumer clicks on or otherwise responds to third-party advertisements during the course of play.

7. Consumers may, however, opt to subscribe to a paid service, called the “FreeLotto Automatic Subscription Ticket” or “F.A.S.T.,” which automatically plays the FreeLotto Games for the consumer who uses the service, playing his or her pre-set number preferences. Monthly subscriptions to the F.A.S.T. service cost \$9.99 for those consumers who subscribed prior to May 2006 and \$14.99 for those consumers who subscribed thereafter.

8. PlasmaNet earns revenue from FreeLotto in two ways: (i) money paid to PlasmaNet by third-party advertisers in the form of “click through fees” each time a consumer clicks on or otherwise responds to a third-party advertisement during the course of playing the FreeLotto Games; and (ii) monthly F.A.S.T subscriptions.

PlasmaNet’s Banner Advertisements

9. In order to attract consumers to register with the FreeLotto website, PlasmaNet relied exclusively on banner, pop-up, and other online advertisements, referred to generally herein as “banner ads.” By clicking on a FreeLotto banner ad, a consumer is ultimately directed to the FreeLotto website to register therewith. The overwhelming majority of FreeLotto’s over 57 million total registrations are attributable to the banner ads designed and placed by PlasmaNet.

10. Since at least February 2007, over sixty percent (60%) of PlasmaNet’s FreeLotto banner ads unequivocally state that the consumer viewing the banner ad has, in fact, already won a prize (the “YOU WON! Ads”).

11. Consumers who clicked on the YOU WON! Ads had not already “won” a prize. Rather, the YOU WON! Ad offered the viewing consumer a \$50 gift certificate to SKYAUCTION.COM¹, a \$10 check, or a check for \$2,087.56, so long as the consumer

¹ SKYAUCTION.COM is a website where people may bid on and purchase restaurant gift cards, airline tickets, hotel accommodations, cruises, and other vacation packages.

registered with FreeLotto and agreed to receive advertising from PlasmaNet. PlasmaNet's YOU WON! Ads do not disclose the registration requirements to the viewing consumers.

12. The YOU WON! Ads have attracted consumers to register with the FreeLotto website. From the inception of the YOU WON! Ad campaign in February 2007, through November 2008, the YOU WON! Ads, which accounted for roughly sixty percent (60%) of PlasmaNet's total banner ads, generated the majority of FreeLotto's registrations during that time period: ninety-three percent (93%) or 17,205,155 of 18,725,490.

PlasmaNet's Email Messages to FreeLotto Players

13. Consumers who register with FreeLotto agree to receive email messages from PlasmaNet. In order to maintain interest in FreeLotto, PlasmaNet devised an email campaign that notified FreeLotto players of "pending" prizes of between \$300 and \$10,000,000 (the "Pending Emails"). These "pending" prizes were attributed to the name of the FreeLotto player who received the email and directed the email recipient to webpages to "claim" his or her prizes. The webpages to which the email recipients were directed instructed those players to select a method of payment of winnings (check or electronic transfer of funds) and to verify and validate personal information.

14. Some FreeLotto players who received Pending Emails interpreted them as a notice of prize winnings and, therefore, set about to "claim" their prizes by (i) clicking on various hyperlinks within the email message at PlasmaNet's instruction; (ii) directing PlasmaNet to pay them their prizes by check or electronic transfer of funds; and (iii) verifying their personal information. Unbeknownst to some Pending Email recipients, they were not claiming prizes but were in the process of purchasing the F.A.S.T. service. The initial Pending Email sent by PlasmaNet was not a notice of prize winnings but rather, purported to be an advertisement for the

F.A.S.T. service even though it, for example, did not describe what the F.A.S.T. service was or identify its cost.

15. PlasmaNet utilized several devices that led some FreeLotto players who received these Pending Email messages to interpret them wrongly as a notice of prize winnings. For example, the subject lines of these emails misleadingly identified the email recipient as a winner and, in general, conveyed a false or misleading sense of urgency:

- *****Open Immediately***** Enclosed Winning Information is for [email recipient's name] Only
- [Email recipient's name], Seeking \$1 Million Dollar Winner in [email recipient's City, subscriber's State]
- [Email recipient's name]: Your Immediate Attention Requested – Respond by [date]
[Email recipient's name]: Critical Notice: Please Confirm

16. Sender information on the Pending Emails also misled some FreeLotto players. For example, messages appeared to be from “the Awards Committee” and “Congratulations- Respond by [date].” PlasmaNet does not have an “Awards Committee” and, having not won a prize, the email recipient had no real reason to be congratulated.

17. The text of the Pending Email messages was also deceptive and misleading in that it led some recipients to believe, erroneously, that they were being notified of actual prize winnings. The email message identified FreeLotto players with “paid” and “pending” prizes and always identified the email recipient as a player with a “pending” prize of between \$300 and \$10,000,000. The Pending Email message ultimately directed the recipient to click on hyperlinks that stated, for example, “CLICK TO CLAIM,” “Click Here to Claim” or “Click here to validate and complete your prize payment directive.” Some Pending Email recipients believed that by clicking on the “CLICK TO CLAIM” type hyperlinks, they were in the process of claiming the large prizes associated with their name.

18. After clicking on the “CLICK TO CLAIM” type hyperlinks, the “claim” process continued with PlasmaNet directing email recipients to two separate webpages, an “unverified” “Form 7082a....Prize Payment Directive” and a “verified” “Form 7082b....Prize Payment Directive.” On these webpages, the email recipient was directed to (i) verify personal information; (ii) indicate whether the recipient preferred to have his or her “picks” played automatically each day or preferred to visit FREELOTTO.COM himself or herself every day; (iii) select the manner in which he or she wanted to be paid prizes, i.e., by check or electronic funds transfer; (iv) select numbers for the next FreeLotto Games drawings and, ultimately; (v) verify his or her credit card information.

19. Some Pending Email recipients believed that the initial Pending Email message was a notice of prize winnings and that by clicking on the “CLICK TO CLAIM” type hyperlinks and completing the instructions on the subsequent webpages, they had successfully claimed the large prizes associated with their names in the initial Pending Email messages and would be paid shortly.

20. These Pending Email recipients, however, had not won anything. The initial Pending Email message was intended to be an advertisement for the F.A.S.T. service and by clicking on the “CLICK TO CLAIM” type hyperlinks and submitting information on the subsequent webpages to PlasmaNet, the email recipient was actually purchasing the F.A.S.T. service for \$9.99 per month or \$14.99 per month (depending when the recipient initially subscribed) with automatic renewals.

21. The text of the initial Pending Email messages and the content of the subsequent webpages, coupled with the lack of clear, conspicuous or adequate disclosures as to their commercial nature, deceived and misled some consumers into purchasing the F.A.S.T. service.

22. The Pending Email campaign described herein at paragraphs 13 to 21 ran from March 2006 through at least October 2007 and was highly successful. Between January 2003 and October 2007 (over four years), a total of 617,131 FreeLotto players registered for the F.A.S.T. service from an email sent by PlasmaNet. Of those F.A.S.T. registrants, 503,208 did so from the Pending Email campaign. The average number of monthly F.A.S.T. subscriptions from emails went from approximately 3,000 subscriptions per month between January 2003 and February 2006 to approximately 25,000 per month from March 2006 through October 2007.

STATUTORY VIOLATIONS

23. OAG concludes that by engaging in the practices described in Paragraphs 1 through 22 above during the period beginning March 2006 through the date of this Assurance of Discontinuance, PlasmaNet has violated New York General Business Law sections 349 and 350 and New York Executive Law section 63(12).

WHEREAS, PlasmaNet neither admits nor denies the OAG's conclusions above;

WHEREAS, OAG is willing to accept the terms of this Assurance pursuant to New York Executive Law section 63(15) and to discontinue its investigation; and

WHEREAS, the parties each believe that the obligations imposed by this Assurance of Discontinuance are prudent and appropriate;

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the parties that:

AGREEMENT

24. This Assurance of Discontinuance (hereinafter "Assurance") shall apply to PlasmaNet, Inc. d/b/a WWW.FREELOTTO.COM and FreeLotto ("PlasmaNet") as well as its respective principals, directors, officers, representatives, agents, assigns and successors and to any other business entities whose acts, practices, or policies it or they direct, formulate, or

control. This Assurance shall also apply to PlasmaNet's shareholders and employees who are acting in their capacities as shareholders and employees of PlasmaNet.

25. For purposes of this Assurance, "clearly and conspicuously" means that the statement, representation, or term being disclosed is of such size, color, contrast, and/or audibility and is so presented as to be reasonably unavoidable and understood by the person to whom it is being disclosed. If such statement is necessary as a modification to, or explanation or clarification of, other information with which it is presented, it must be presented in close proximity to the information it modifies and in a manner so as to be readily noticed and understood. For these purposes, a hyperlink to the modification, explanation or clarification, set forth on a subsequent website, webpage or screen, may be sufficient so long as the hyperlink provides sufficient notice of the subject of the hyperlinked subsequent website, webpage or screen. With respect to banner ads, "clearly and conspicuously" shall include notice in the banner ad that "participation is required" or comparable language and the terms of that participation may then be set forth on a subsequent website, webpage, or screen accessible by a hyperlink.

26. For purposes of this Assurance, "F.A.S.T." shall mean any paid service whereby PlasmaNet automatically enters a customer in PlasmaNet's regular and recurring lottery-style sweepstakes drawings.

27. PlasmaNet shall not, in the advertising, marketing, or promotion of F.A.S.T., the FreeLotto website, or any other website or online service, utilize false, deceptive, misleading, or illegal advertising, marketing or promotional materials or schemes.

28. PlasmaNet has a policy of providing refunds to F.A.S.T. subscribers who request them. PlasmaNet shall provide a refund of up to three months' subscription cost to F.A.S.T.

subscribers who seek refunds for payments made for F.A.S.T. between March 1, 2006 and October 31, 2007 and who submit their refund requests in the next six months. F.A.S.T. subscribers may submit refund requests to PlasmaNet by writing to: FreeLotto, P.O. Box 4562, Grand Central Station, New York, N.Y. 10163, Attn: F.A.S.T. Refund Request.

29. In any and all advertising, marketing, or promotions of the FreeLotto website, or any other website or online service, that conveys to a viewing consumer that the viewing consumer has already or in fact won a prize, game or lottery-style sweepstakes, PlasmaNet shall clearly and conspicuously disclose to the viewing consumer in the advertisement, promotion or marketing scheme or material that the viewing consumer must register with PlasmaNet and agree to receive email advertising from PlasmaNet or other third-parties in order to collect or claim any prizes or winnings.

30. PlasmaNet shall clearly and conspicuously disclose in any and all advertisements, campaigns, and marketing and promotional materials, or any parts of such advertisements, campaigns and marketing and promotional material, that concern, regard, reference or refer to F.A.S.T.: (i) what the F.A.S.T. service is; (ii) the cost of the F.A.S.T. service and, if applicable, the terms of its automatic renewal; (iii) that the consumer is not, under any circumstances, required to use or purchase the F.A.S.T. service; and (iv) that the consumer's chances or odds of winning or obtaining prizes or other items of value are not increased or bettered by the use or purchase of the F.A.S.T. service.

31. OAG and PlasmaNet acknowledge that since at least 2002, PlasmaNet has taken steps to prevent residents of the State of New York from registering with FreeLotto and playing the FreeLotto Games. PlasmaNet acknowledges that if at a future date it permits residents of New York State to register with FreeLotto, it is obligated to comply with the terms of GBL

section 369-e (4) and Title 19, section 132.4 of the Compilation of the Rules and Regulations of the State of New York (“NYCRR”) and any other statutes or rules that do now or shall in the future apply. PlasmaNet agrees that, unless and until it permits residents of the State of New York to register with FreeLotto or to play the FreeLotto Games, it shall employ, or shall continue to employ, reasonable measures that, with reasonable efficacy, prevent New York residents from (i) registering with FreeLotto or (ii) playing the FreeLotto Games. Such measures include, but are not limited to, prohibiting a consumer from registering with FreeLotto if he or she submits to PlasmaNet during the registration process a zip code attributed to the State of New York, and prohibiting a consumer from submitting to PlasmaNet credit card information that the consumer identifies to FreeLotto as associated with a zip code within the State of New York.

32. In consideration for the making of this Assurance, and within ten business days thereafter, PlasmaNet shall pay by wire transfer, certified or bank check payable to the State of New York, the amount of \$1,500,000.00 in penalties, costs and fees. Payment shall be made to:

Attorney General of the State of New York
120 Broadway
New York, New York 10271
Attention: Internet Bureau

33. The payment and all correspondence related to this Assurance must reference Assurance # 09-187.

34. Within thirty (30) days of the execution of this Assurance, PlasmaNet shall identify to OAG a person who shall be responsible for directing compliance with the terms of this Assurance (“Compliance Officer”). Within forty-five (45) days thereafter, the Compliance Officer shall submit to OAG an affidavit from the Compliance Officer confirming that PlasmaNet has appropriate practices and procedures in place and that it has taken the steps

identified herein to ensure compliance with each and every term of this Assurance, and that PlasmaNet is in compliance with the Assurance.

35. For a period of three (3) years following the date of execution of this Assurance, in the event that the Company changes its principal place of business, the Company shall inform OAG in writing within fifteen (15) days after any such change.

36. For a period of three (3) years following the date of execution of this Assurance, in the event that PlasmaNet incorporates a new corporation or business entity, does business under a new name, or operates or controls any website associated with any new domain name (collectively, "Change in Business") that is used to engage or is intended to engage in offering consumers the opportunity to play lottery-style sweepstakes games or other similar promotions online, PlasmaNet shall inform OAG in writing at least thirty (30) days before any such Change in Business.

37. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by PlasmaNet in agreeing to this Assurance.

38. To the extent not already provided under this Assurance, the Company shall, upon request by OAG, provide all documentation and information reasonably necessary for OAG to verify compliance with this Assurance.

39. If a court of competent jurisdiction determines that PlasmaNet has breached this Assurance, PlasmaNet shall pay to OAG the cost, if any, of such determination and of enforcing this Assurance, including without limitation legal fees, expenses, and court costs.

40. OAG finds the relief and agreements contained in this Assurance appropriate and in the public interest. OAG is willing to accept this Assurance pursuant to Executive Law

section 63(15), in lieu of commencing a statutory proceeding. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

41. Nothing contained in this Assurance shall be construed to alter or enhance any existing legal rights of any consumer or to deprive any person or entity of any existing private right under the law.

42. Nothing in this Assurance shall in any way affect, restrict, or otherwise govern any rights of recourse PlasmaNet may have or seek to assert against any third party.

43. Nothing contained herein shall be construed as relieving PlasmaNet of the obligation to comply with all state and federal laws, regulations, or rules, nor shall any of the provisions of this Assurance be deemed permission to engage in any act or practice prohibited by such law, regulation or rule.

44. The acceptance of this Assurance by the OAG shall not be deemed approval by the OAG of any of PlasmaNet business practices, and PlasmaNet shall make no representation to the contrary.

45. This Assurance is contingent on and relies on the truthfulness and accuracy of all representations made by PlasmaNet and its counsel. To the extent that those representations are later found to be materially incomplete or inaccurate, this Assurance is voidable by OAG in its sole discretion.

46. Any violation of the terms of this Assurance shall constitute prima facie evidence of violation of the applicable law in any civil action or proceeding thereafter commenced against PlasmaNet by the Attorney General.

47. Except in an action by the Attorney General to enforce the obligations of PlasmaNet in this Assurance or in the event of termination of this Assurance by the Attorney

General, neither this Assurance nor any acts performed or documents executed in furtherance of this Assurance: (a) may be deemed or used as an admission of, or evidence of, the validity of any alleged wrongdoing, liability, or lack of wrongdoing or liability or (b) may be deemed or used as an admission of or evidence of any such alleged fault or omission of PlasmaNet in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal. This Assurance shall not confer any rights upon person and/or entities who are not party to this Assurance.

48. PlasmaNet represents and warrants, through the signatures below, that the terms and conditions of this Assurance are duly approved, and execution of this Assurance is duly authorized. PlasmaNet shall not take any action or make any statement denying, directly or indirectly, the propriety of this Assurance or expressing the view that this Assurance is without factual basis. Nothing in this paragraph affects PlasmaNet's (i) testimonial obligations or (ii) right to take legal or factual positions in defense of litigation or other legal proceedings. This Assurance is not intended for use by any third party in any other proceeding and is not intended, and should not be construed, as an admission of liability by PlasmaNet.

49. PlasmaNet shall fully cooperate with any Attorney General investigation into the business practices of PlasmaNet as PlasmaNet is defined in paragraph 24 herein.

50. This Assurance shall be binding on and inure to the benefit of the parties to this Assurance and their respective successors and assigns, provided that no party, other than OAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of OAG.

51. This Assurance may not be amended except by an instrument in writing signed on behalf of all the parties to this Assurance.

52. This Assurance may be executed in counterparts, each of which shall be considered the same as if a single document shall have been executed, but shall become effective when such counterparts have been signed by each of the parties hereto.

53. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

54. All notices, reports, requests, and other communications to any party pursuant to this Assurance shall be in writing and shall be directed as follows:

If to PlasmaNet:

PlasmaNet, Inc.
420 Lexington Avenue, Suite 2435
New York, N.Y. 10170
Telephone: (212) 931-6760
Facsimile: (212) 931-6762

With a copy to:
Gerald B. Lefcourt, Esq.
Gerald B. Lefcourt, P.C.
148 East 78th Street
New York, N.Y. 10075-0406
Telephone: (212) 737-0400
Facsimile: (212) 988-6192

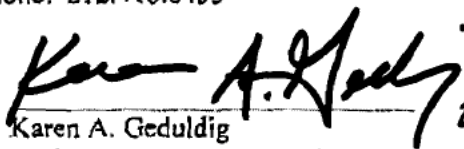
If to OAG, to:

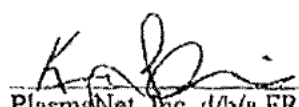
Office of the Attorney General of the State of New York
Internet Bureau
120 Broadway, 3rd Floor
New York, N.Y. 10271
Attn: Karen A. Geduldig, Assistant Attorney General
Telephone: (212) 416-6307
Facsimile: (212) 416-8369

IN WITNESS WHEREOF, this Assurance is executed by the parties hereto on January 11, 2010

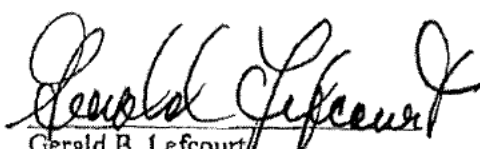
2010

ANDREW M. CUOMO
Attorney General of the State of New York
120 Broadway
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Telephone: 212.416.8433

By:  2-22-10
Karen A. Geduldig
Assistant Attorney General
Internet Bureau

By: 
PlasmaNet, Inc. d/b/a FREELOTTO.COM
and FreeLotto

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148 East 78th Street
New York, N.Y. 10075
Telephone: 212.737.0400

By: 
Gerald B. Lefcourt
Attorneys for PlasmaNet, Inc. d/b/a
FREELOTTO.COM and FreeLotto

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

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THE PEOPLE OF THE STATE OF :
NEW YORK, by ANDREW CUOMO, :
Attorney General of the State of New York, :
 :
 : **Index No.:** _____/09
 : **Plaintiffs,**
 : **COMPLAINT**
 :
-against- :
 :
 : **IAS Part:** _____
PLASMANET, INC. d/b/a FREELOTTO.COM, : **Assigned Justice** _____
and KEVIN ARONIN, individually :
 :
 :
 :
 : **Defendants.** :
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The People of the State of New York (“Plaintiffs”), by and through Andrew M. Cuomo, Attorney General of the State of New York (“Attorney General”), allege on information and belief that:

INTRODUCTION

1. The Attorney General brings this action pursuant to Executive Law section 63(12), New York General Business Law (“GBL”) sections 349, 350 and **369-e, Article 14-H of the General Municipal Law, Title 20, Chapter 2, Subchapter 19 of the New York City Administrative Code, 15 U.S.C. section 7706(f)(1)(A), (B) and (3)15. U.S.C. section 7704(a)(2) (the “CAN-SPAM Act”), and Penal Law sections 225.05 and 225.10** to enjoin defendants PlasmaNet, Inc. d/b/a FREELOTTO.COM and Kevin Aronin in his personal capacity (collectively “defendants”) from continuing to engage in deceptive, fraudulent and illegal business practices in the operation of the interactive website associated with the domain name FREELOTTO.COM and in the false, deceptive, misleading and illegal advertising of FREELOTTO.COM and of services associated with FREELOTTO.COM. The Attorney General

also seeks (i) **restitution and damages to be paid to all consumers victimized by defendants’ deceptive, fraudulent and illegal business practices**; (ii) disgorgement of profits earned from defendants’ repeated and persistent fraudulent, deceptive and illegal business practices pursuant to Executive Law section 63(12); (iii) civil penalties pursuant to GBL Article 22-A and **15 U.S.C. section 7706(f)(1)(B) and (3)**; (iv) costs, as authorized by Civil Procedure Law and Rule (“CPLR”) section 8303(a)(6), to be paid to the State of New York; and (v) all other relief that the Court deems just and proper.

PARTIES AND JURISDICTION

2. Plaintiffs, the People of the State of New York, are represented by their chief legal officer, Andrew M. Cuomo, Attorney General of the State of New York having offices at 120 Broadway, New York, New York 10271.

3. Defendant PlasmaNet, Inc. d/b/a FREELOTTO.COM (“PlasmaNet”) is a company doing business and based in the State of New York at 420 Lexington Avenue, Suite 2435, New York, New York 10170. PlasmaNet has been the registrant of and has controlled the domain name FREELOTTO.COM since 1999. The interactive website associated with the domain name FREELOTTO.COM has been operational since 1999 offering consumers the chance to win cash and other prizes by playing online lottery games.

4. Defendant Kevin Aronin (“Aronin”) created PlasmaNet and began operating FREELOTTO.COM in 1999. Defendant Aronin is PlasmaNet’s founder, Chief Executive Officer and President. He is responsible for all of PlasmaNet’s advertising, for all of the content on PlasmaNet’s websites including FREELOTTO.COM, and for all of PlasmaNet’s acts and practices including, but not limited to those described herein.

JURISDICTION

5. This Court has jurisdiction pursuant to Executive Law section 63(12), which empowers the Attorney General to commence an action for injunctive relief, restitution, disgorgement, and damages when any person or business entity has engaged in or has otherwise demonstrated repeated or persistent fraudulent or illegal acts in the carrying on, conducting, or transaction of business.

6. This Court also has jurisdiction pursuant to GBL sections 349 and 350, which empower the Attorney General to seek injunctive relief, restitution, and civil penalties of up to \$500 per violation that occurred prior to July 3, 2007 and civil penalties of up to \$5,000 per violation that occurred after July 3, 2007.

7. **Jurisdiction also exists pursuant to GBL section 369-e, a statute which carries criminal liability and which empowers the Attorney General to commence an action for injunctive relief as well as an action through which he may exercise all of the powers and duties which the district attorney would otherwise be authorized or to exercise or perform.**

8. **CAN-SPAM AUTHORIZES STATES TO BRING ACTIONS DIRECTLY BUT THE STATUTE STATES THAT STATES “may” BRING SUCH AN ACTION IN FEDERAL DISTRICT COURT. TO CLAIM PROPER JURISDICTION HERE, WE CAN EITHER BRING THE CAN-SPAM CLAIM PURSUANT TO 63(12), BRING IT IN STATE COURT ON THE ALLEGATION THAT THE “may” IS PERMISSIVE (research required), OR TAKE IT OUT ALL TOGETHER.**

9. The Attorney General has served defendants with a pre-litigation notice pursuant to GBL sections 349(c) and 350-c. See Affirmation of _____, dated _____, 2009 (hereinafter “_____ Aff.”) at ¶ ___ & Exh. ___.

VENUE

10. Because the Attorney General has offices located in the County of New York and because illegal acts alleged herein have occurred in the County of New York, venue is proper in the County of New York.

FACTS

11. Since 1999 defendants have owned and operated the interactive website associated with the domain name FREELOTTO.COM (or “FreeLotto”) where, in exchange for viewing and receiving advertisements, consumers have the chance to win cash and other prizes by playing online lottery games. Accordingly, every day PlasmaNet employees hold lottery drawings at the PlasmaNet office in New York City. PlasmaNet then announces the winning numbers in emails it sends to FreeLotto users and notifies by email those users who have won prizes valued between \$1 and \$10,000,000.00.

12. In order to drive consumers to the FreeLotto website PlasmaNet has relied almost exclusively on banner, pop-up, and other online advertisements, referred to generally herein as “banner ads.” Banner ads are online advertisements, typically a graphic image, positioned in a specific place on a webpage. PlasmaNet purchases space on websites and advertising networks owned and operated by third-parties where it places banner ads it has designed to promote the FreeLotto website. Since 1999 tens of millions of consumers have registered with, or “joined,” the FreeLotto website, nearly all of whom did so by way of the banner ads designed and placed by PlasmaNet.

13. In order to play FreeLotto’s online lottery style games and be eligible to win a prize, consumers must first register on the FreeLotto website and agree to view and receive advertising from PlasmaNet (d/b/a FreeLotto). Consumers register by providing a first and last

name, postal address and valid email address. They agree to view and receive advertising from FreeLotto by agreeing to FreeLotto's "Terms of Use." Consumers are presented with these "Terms of Use" during the registration process. The consumer submits her personal information and agrees to FreeLotto's Terms of Use by clicking on the "Click2Win®" button at the bottom of the registration webpage. Consumers cannot play lottery games on FREELOTTO.COM unless and until they agree to receive emails from PlasmaNet (d/b/a FreeLotto).

14. After registering the consumer is presented with six (6) lottery games: "FreeLotto \$1,000,000.00 Daily Jackpot a/k/a Classic FreeLotto," "Win a Car," "Pay Off Your Mortgage," "FastCASH \$10,000," "\$100,000 Giveaway," and "10 Million Dollars a/k/a SuperBucks" (collectively, the "Lottery Games"). In order to submit numbers for the next drawing for each game the consumer must first select the numbers they want to play and second view and respond to several third-party advertisements. The consumer responds to third-party advertisements by either clicking on a banner ad that promotes a third-party product or service or answering a question posed by a third-party advertiser.

15. PlasmaNet earns "click through" fees of between at least \$.01 and \$1.00 from these third-party advertisers each time a consumer clicks on a third-party banner ad or responds to a question posed by a third-party advertiser during the course of play. Defendants have earned over 85 million dollars in gross advertising revenue from consumers taking these actions.

16. Defendants offer players, but do not require them to play, a seventh game called "Tell A Friend – Win \$5,000.00." In order to play this game and have the chance to win its \$5,000 prize, a FreeLotto player must register with FREELOTTO.COM (*see supra* ¶ 13) and submit up to ten (10) unique email addresses to PlasmaNet. The email addresses must belong to someone besides the submitting player and the submitting player must themselves certify that the

person whose email address is being submitted has consented to receiving email solicitations from PlasmaNet and/or its third-party advertisers.

17. Defendants aggressively advertise the FreeLotto website as a “free to play” gambling website meaning that the players are not required to pay defendants money in order to play the Lottery Games. In order to play without paying defendants money, players must agree to receive commercial email advertising from PlasmaNet and must also visit FREELOTTO.COM themselves and click-on or otherwise respond to several third-party advertisements during the course of playing the six (6) Lottery Games.

18. Starting in 2001, defendants began offering a service to players whereby PlasmaNet submits the players’ numbers for them. This service, called the “FreeLotto Automatic Subscription Ticket” or “F.A.S.T.,” enables users to play the Lottery Games everyday without having to remember to visit the FreeLotto website and without having to click on third-party advertisements. Historically, F.A.S.T. cost consumers \$9.99 per month and was automatically renewed each month. Since May 2006, F.A.S.T. has cost \$14.99 consumers per month; a subscription which still automatically renews. Defendants have earned over \$56 million dollars in gross revenue from F.A.S.T. subscriptions.

19. Defendants advertise the F.A.S.T. service on the FreeLotto website and by sending email advertisements to consumers who have registered with the FreeLotto website. Defendants send one or two F.A.S.T. email advertisements a day to FreeLotto registrants until the registrant either subscribes to the F.A.S.T. service or cancels her FreeLotto registration in total. The overwhelming majority of F.A.S.T. subscriptions are attributable to defendants’ email advertisements as opposed to their website advertisements.

20. PlasmaNet also offers a special service called the FreeLotto Automatic Subscription Ticket (FAST) Prize Doubler (the “F.A.S.T. Prize Doubler”) to those FreeLotto players who already pay for the F.A.S.T. service. Through the F.A.S.T. Prize Doubler, F.A.S.T. subscribers can double the prizes they have the chance of winning.

21. As set forth in more detail *infra* defendants are violating New York law through their operation and marketing of the FreeLotto website and through their advertising of the F.A.S.T. service. First, defendants are operating an illegal lottery in violation of New York State criminal laws. Perhaps even worse, defendants’ deceive and mislead consumers into registering with the illegal FREELOTTO.COM lottery and purchasing the F.A.S.T. service, all of which earns defendants significant revenues.

Defendants Are Operating an Illegal Lottery

22. Penal Law section 225.05 makes it illegal to “knowingly advance or profit from unlawful gambling activity.”

23. Penal Law section 225.10(2) makes it illegal to “[r]eceiv[e], in connection with a lottery . . . (a) money or written records from a person other than a player whose chances or plays are represented by such money or records, or (b) more than five hundred dollars in any one day of money played in such scheme or enterprise.”

24. According to Penal Law section 225.00(11), a lottery is “an unlawful gambling scheme” where players agree to pay “something of value” for opportunity to win a prize, which is given to a player based upon chance. Penal Law section 225.00(6) defines “something of value” as “any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money

or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.”

25. Article 14-H of the General Municipal Law (“GML”) authorizes municipalities to permit and regulate the promotion and operation of bingo and lotto by “authorized organizations.” *See* General Municipal Law § 477. In response, New York City, the municipality in which defendants operate, has enacted the “Bingo Licensing Law.” *See* NYC Admin. Code section 20-338 et seq. An “authorized organization” means and includes “any bona fide religious or charitable organization or bona fide educational, fraternal, civic or service organization or bona fide organization of veterans . . ., volunteer firefighters, or volunteer ambulance workers, which by its charter, certificate of incorporation, constitution, or act of the legislature, shall have among its dominant purposes one or more of the lawful purposes as defined in this article, provided that each shall operate without profit to its members, and provided that each such organization has engaged in serving one or more of the lawful purposes as defined in this article for a period of one year immediately prior to applying for a license under this article.” GML § 476(4). *See also* NYC Admin. Code § 20-339(c).

26. “Lawful purposes” are defined as “one or more of the following causes, deeds or activities: (a) Those which shall benefit needy or deserving persons indefinite in number by enhancing their opportunity for religious or educational advancement, by relieving them from disease, suffering or distress, or by contributing to their physical well-being, by assisting them in establishing themselves in life as worthy and useful citizens, or by increasing their comprehension of and devotion to the principles upon which this nation was founded and enhancing their loyalty to their governments; (b) Those which shall initiate, perform or foster worthy public works or shall enable or further the erection or maintenance of public structures;

(c) Those which shall initiate, perform or foster the provisions of services to veterans by encouraging the gathering of such veterans and shall enable or further the erection or maintenance of facilities for use by such veterans which shall be used primarily for charitable or patriotic purposes, or those purposes which shall be authorized by a bona fide organization of veterans, provided however that such proceeds are disbursed in accordance with the rules and regulations of the racing and wagering board. (d) Those which shall otherwise lessen the burdens borne by government or which are voluntarily undertaken by an authorized organization to augment or supplement services which government would normally render to the people.” GML § 476(6). *See also* NYC Admin. Code § 20-339(c).

27. “No [entities that are] lawfully conducting, or participating in the conduct of bingo . . . under any license lawfully issued pursuant to this article, shall be liable to prosecution or conviction for violation of any provision of article two hundred twenty-five of the penal law[.]” GML § 499. *See also* NYC Admin. Code § 20-341 (authorizing authorized organizations to conduct the game of bingo within the territorial limits of the city provided that the authorized organization obtains the requisite license and complies with relevant laws).

28. Defendants are not “authorized organizations” as defined in Article 14-H of the GML and section 20-339(c) of the New York City Bingo Licensing Law. Nor are they licensed pursuant to those laws. They are not, therefore, exempt from prosecution under article 225 of the Penal Law.

The F.A.S.T. Prize Doubler is an illegal lottery.

29. PlasmaNet’s F.A.S.T. Prize Doubler is an illegal lottery. As stated *supra* at paragraph ___, defendants offer players who already pay for the F.A.S.T. service the opportunity, through the F.A.S.T. Prize Doubler, to win larger prizes than non-paying FreeLotto players. The

purchase of F.A.S.T. for \$14.99 per month is a prerequisite for taking advantage of the F.A.S.T. Prize Doubler and non-paying FreeLotto players have no means or ability to take advantage of the F.A.S.T. Prize Doubler. By paying \$14.99 per month for the F.A.S.T. service, F.A.S.T. subscribers are providing something of value to PlasmaNet in exchange for the chance to win the larger prizes offered through the F.A.S.T. Prize Doubler. The F.A.S.T. Prize Doubler is, therefore, an illegal lottery.

30. Defendant Aronin designed FREELOTTO.COM including the F.A.S.T. Prize Doubler. Both he and PlasmaNet earn considerable profits from the F.A.S.T. subscriptions, which are a requirement for using the F.A.S.T. Prize Doubler. By promoting, advancing and operating the F.A.S.T. Prize Doubler, defendants are “knowingly advance[ing] or profit[ing] from unlawful gambling activity[,]” in violation of Penal Law section 225.05.

31. There are hundreds of thousands of F.A.S.T. subscribers who play FreeLotto every day. These hundreds of thousands of F.A.S.T. subscribers pay defendants \$14.99 per month or roughly \$.48 per day. If, on a given day, at least 1,042 F.A.S.T. subscribers played on FREELOTTO.COM, paying defendants \$.48, defendants would earn \$500.

32. On any given day there are tens of thousands of F.A.S.T. subscribers playing on FREELOTTO.COM resulting in well over \$500 of money played in any one day. Therefore, by promoting and operating the F.A.S.T. Prize Doubler, with its requirement that a subscriber also pay for the F.A.S.T. service, defendants have “[r]eceived, in connection with a lottery . . . more than five hundred dollars in any one day of money played in such scheme or enterprise” in violation of Penal Law section 225.10(2)(b). **ISSUES: (1) Do we need to allege, upon information and belief that more than 1,042 F.A.S.T. users also use F.A.S.T. Prize Doubler and, therefore, that Doubler generates more than \$500 in money played in any one day? (2)**

Is this considered money “played?” No clear case law on this point since this is a new iteration of a lottery.]

33. Defendants are not “authorized organizations,” as that term is defined in Article 14-H GML and the New York City Bingo Licensing Law, and are not, therefore, licensed to operate lotto games within the territorial limits of New York City. Accordingly, by operating the F.A.S.T. Prize Doubler in New York City, New York, defendants are operating a lotto game in violation of Article 14-H of the GML and the New York City Bingo Licensing Law, a class B misdemeanor.

The “Tell-A-Friend” Lottery Game is an illegal lottery.

34. PlasmaNet’s “Tell-A-Friend – Win \$5,000.00” game is also an illegal lottery. As stated *supra* at paragraph __, in order to have the chance to win this \$5,000 prize a FreeLotto player must submit up to ten (10) unique email addresses to PlasmaNet. The email addresses must belong to someone besides the submitting player and the submitting player must certify that the person whose email address is being submitted has consented to receiving email solicitations from PlasmaNet and/or its third-party advertisers.

35. Email addresses belonging to consumers who agree to view electronic commercial advertising are commonly referred to in commerce as an “opt-in addresses” and are commonly bought and sold commodities with a ready market, i.e., are “something of value” as that term is defined in section 225 of the Penal Law. In fact, upon information and belief, defendants themselves either have rented, do rent, or otherwise make available to third-parties the opt-in addresses it collects via FREELOTTO.COM for profit. By providing the opt-in email addresses to PlasmaNet during the course of playing the “\$5,000 ‘Tell-A-Friend’” Lottery Game, FreeLotto players are providing something of value to PlasmaNet exchange for the chance to win

the \$5,000 “Tell-A-Friend” prize. The “Tell-A-Friend” Lottery Game is, therefore, an illegal lottery.

36. Defendant Aronin designed FREELOTTO.COM including the \$5,000 “Tell-A-Friend” Lottery Game. Defendants use this Lottery Game to collect valuable information in the form of opt-in email addresses from players; email addresses that PlasmaNet has, upon information and belief, either used itself or rented or otherwise made available to third-parties for profit. By promoting, advancing and operating the \$5,000 “Tell-A-Friend” Lottery Game, defendants are “knowingly advance[ing] or profit[ing] from unlawful gambling activity” in violation of Penal Law section 225.05.

37. **[In order for this to be a 225.10(2)(b) violation (a Class E Felony) we’d have to allege that the opt-in email addresses constitute \$500 of “money played” in any one day. We could take the position that the opt-in email addresses are “money” for the purposes of the statute but I don’t think we get there, partially because the statute defines “something of value” broadly as money plus other things, and 225.10 refers only to “money.”]**

38. Defendants are not “authorized organizations,” as that term is defined in Article 14-H GML and the New York City Bingo Licensing Law, and are not, therefore, licensed to operate lotto games within the territorial limits of New York City. Accordingly, by operating the \$5,000 “Tell-A-Friend” Lottery Game in New York City, New York, defendants are operating a lotto game in violation of Article 14-H of the GML and the New York City Bingo Licensing Law, a class B misdemeanor.

The Operation of FREELOTTO.COM is, in total, an illegal lottery

39. Defendants’ entire operation of the FREELOTTO.COM website constitutes an illegal lottery. Again, under Penal Law article 225, a lottery consists of three elements: (i) the

distribution of prizes, (ii) based upon chance, (iii) in exchange for consideration or “something of value.” See Penal Law § 225.00(6), (11). All three of these elements exist here. Through the website FREELOTTO.COM, defendants offer to distribute prizes to players determined by chance. In order to have this chance to win these prizes, FreeLotto players must provide consideration or “something of value” by: (i) providing personal information, including valid and functioning email addresses, to defendants; (ii) agreeing to receive email advertising from PlasmaNet; and, either (iii) viewing and responding to third-party advertising or (iv) paying \$14.99 per month for F.A.S.T. **Each of these items or services constitutes “something of value,” as that term is defined in section 225.00 of the Penal Law. [This is the relatively untested theory that these things constitute “consideration” for the purposes of an illegal lottery]** Defendants’ operation of FREELOTTO.COM is, therefore, an illegal lottery.

40. Defendant Aronin designed FREELOTTO.COM and defendants earn enormous profits from its operation in the form of tens of millions of dollars of click-through fees and tens of millions of dollars in F.A.S.T. subscriptions. By promoting, advancing and operating FREELOTTO.COM, defendants are “knowingly advance[ing] or profit[ing] from unlawful gambling activity” in violation of Penal Law section 225.05.

41. Tens of millions of players have registered with FREELOTTO.COM and declined the F.A.S.T. service, opting instead to visit the website themselves every day and to respond to, or “click on,” third-party advertising during the course of play. As set forth *supra* at ¶ 15, each time these players “click” on a third party advertisement during the course of play defendants earn a fee of between at least \$.01 and \$1.00. If, on any given day, 50,000 FREELOTTO.COM players click on just one (1) third-party advertisement during the course of play, earning defendants just \$.01, defendants would earn \$500.

42. On any given day there are tens of millions of FREELOTTO.COM players clicking on one, if not more, third-party advertisement and earning defendants \$.01 if not more. Therefore, by promoting and operating the FREELOTTO.COM website through which millions of players play the Lottery Games in exchange for clicking on one, if not more, third-party advertisement worth at least \$.01, defendants have “[r]eceived, in connection with a lottery . . . more than five hundred dollars in any one day of money played in such scheme or enterprise” in violation of Penal Law section 225.10(2)(b). **[ISSUE: Is this considered money “played” for the purposes of the 225.10? No clear case law on this point since this is a new iteration of a lottery.]**

43. Similarly, there are hundreds of thousands of players who utilize the F.A.S.T. service to play FreeLotto everyday paying defendants \$14.99 per month or roughly \$.48 per day. If, on a given day, 1,042 F.A.S.T. subscribers played on FREELOTTO.COM paying defendants \$.48, defendants would earn \$500. On any given day there are tens if not hundreds of thousands of F.A.S.T. subscribers playing on FREELOTTO.COM resulting in well over \$500 of money played in any one day. Therefore, by promoting and operating the FREELOTTO.COM website through which tens if not hundreds of thousands of players play the Lottery Games in exchange for paying \$.48 a day for the F.A.S.T. service, defendants have “[r]eceived, in connection with a lottery . . . more than five hundred dollars in any one day of money played in such scheme or enterprise” in violation of Penal Law section 225.10(2)(b). **[ISSUE: Is this considered money “played” for the purposes of 225.10? No clear case law on this point since this is a new iteration of a lottery.]**

44. Defendants are not “authorized organizations,” as that term is defined in Article 14-H of the GML and the New York City Bingo Licensing Law, and are not, therefore, licensed

to operate lotto games within the territorial limits of New York City. Accordingly, by operating FREELOTTO.COM in New York City, New York, defendants are operating a lotto game in violation of Article 14-H of the GML and the New York City Bingo Licensing Law, a class B misdemeanor.

**Defendants Deceptively and Fraudulently
Induce and Mislead Consumers Into Registering With FreeLotto**

45. The only way defendants actively solicit consumers to register with FREELOTTO.COM is via banner ads (*see supra* ¶12) that they design and place on webpages and advertising networks. Since at least February 2007, a majority of these banner ads unequivocally state that the consumer viewing the ad has, in fact, already won a prize. They state, for example [**these are not the actual banner ads, we'll have to copy and paste them in here. I don't think it is improper to paste them in and I think it tells the story better than I can**]:

**You are the 999,999th visitor:
Congratulations you WON!**

Claim Number: 110495 **Click To Claim**

WARNING: YOU REALLY WON!

You Won! You Won! You Won!
[Click2Claim](#)



**SUR-PRIZE
FREE MONEY**

WINNER!

You have 01:00 Seconds Left Click2Claim

(the “YOU WON!’ Ads”).

46. While defendants’ YOU WON! Ads unequivocally state that the viewing consumer has already won a prize or is already a winner, in reality these consumers have not already “won” anything. In order to “claim” her winnings, the viewing consumer must register with FREELOTTO.COM by (i) providing personal information to PlasmaNet, (ii) agreeing to receive commercial advertising from PlasmaNet and other third-parties, (iii) playing the FreeLotto Lottery Games and click on third-party advertisements **[I’m not sure the player HAS to play the Games but we can allege it upon information and belief since the registrant is automatically brought to the Lottery Games after registering with FreeLotto]**; and (iv) in some cases, supplying PlasmaNet with identifying documentation. Throughout the requisite registration process the viewing consumer is led to believe that they are in the process of “claiming” the prize identified in the banner ad. It is not clear or conspicuous to the consumer

that is she is registering with FREELOTTO.COM and agreeing to receive commercial email advertising from defendants.

47. Plasmanet's YOU WON! Ads are at best an advertisement for FREELOTTO.COM. At worst, they are designed to trick consumers into (i) signing up with FREELOTTO.COM, (ii) submitting valuable information to defendants, and (iii) authorizing defendants to flood their valid email accounts with email advertisements. The persons viewing the YOU WON! Ads are not already winners and have no reason to believe that they are signing up with FREELOTTO.COM rather than solely claiming a prize. These ads are, therefore, false, deceptive and misleading in violation of New York State law.

**Defendants Deceptively and Fraudulently
Induce and Mislead Consumers Into Purchasing the F.A.S.T. Service**

48. Defendants offer FreeLotto players the F.A.S.T. service where, for \$14.99 a month, PlasmaNet will submit a player's numbers for them so that the player does not need to remember to visit the FreeLotto website everyday or click on third-party advertisements during the course of play. Defendants describe the F.A.S.T. service in the "Official Rules of FreeLotto" however those Rules do not indicate that F.A.S.T. costs money.

49. Defendants advertise the F.A.S.T. service by (i) sending email advertisements to FreeLotto players at the email addresses the players submitted during the registration process and (ii) on the FreeLotto website. The more successful mechanism by far has been the email advertisements. The overwhelming majority of F.A.S.T. subscriptions derive from an email advertisement sent by defendants.

50. Starting in March 2006 and lasting through at least October 2007, defendants commenced an email campaign for their F.A.S.T. service that was created and designed by defendant Aronin (referred to throughout as the "March 2006 email campaign"). The campaign

was a success increasing the average number of monthly F.A.S.T. subscriptions from just under 3,000 subscriptions a month to just under 25,000 per month.

51. In general, the email advertisements in the March 2006 campaign identify FreeLotto players with “paid” and “pending” prizes. The email recipient is identified as a player with a “PENDING” prize of between \$300 and \$10,000,000.00. The email recipient is then directed to hyperlinks that state, for example, “CLICK TO CLAIM,” “Click Here to Claim,” “Click here to validate and complete your prize payment directive,” or “CLICK TO VERIFY.” These email advertisements, which purportedly advertise the F.A.S.T. service, do not describe the F.A.S.T. service or state its cost. These email advertisements are, therefore, designed *not* to look or feel like an advertisement for the F.A.S.T. service, but rather, to look and feel like a notice of actual prize winnings.

52. The subject lines and header information of these purported email advertisements also perpetuate the mis-impression that the email serves *not* as an advertisement for F.A.S.T. but as a notice of actual prize winnings. For example, the subject lines convey a false and unnecessary sense of urgency and falsely identify the email recipient as a winner stating things such as: “***Open Immediately*** Enclosed Winning Information is for [Email Recipient] Only,” “[Email Recipient], Seeking \$1 Million Dollar Winner in [Email Recipient’s City, State], “[Email Recipient]: Your Immediate Attention Requested - Respond by [date],” and “[Email Recipient]: Critical Notice: Please Confirm.” The email recipient has not won a prize, the information is not, for the recipient “only,” and there is no real sense of urgency. The email recipient is not required to use the F.A.S.T. service so there is no reason why she must immediately read these email advertisements or respond by any specific date.

53. The header information of these emails is similarly deceptive and misleading.¹ For example, some the messages claim to be from “The Awards Committee,” “Congratulations-Respond By [date],” and WINNERS@FreeLotto.com. Contrary to this header information, PlasmaNet does not have an “Awards Committee,” the email recipient is not a “winner,” and she has no reason to be “[c]ongratulat[ed].”

54. By “clicking” on the hyperlinks “CLICK TO CLAIM,” “Click Here to Claim,” “Click here to validate and complete your prize payment directive,” or “CLICK TO VERIFY” the email recipient is brought to a webpage separate and apart from the initial email advertisement to “VALIDATE” personal information, to select the manner in which she wants to be paid her prizes, and to select numbers for the next game. There is no indication that the previous email was an advertisement for F.A.S.T. service, that the email recipient is not in the process of claiming the prizes identified in that email, or that she is in the process of purchasing the F.A.S.T. service. To be sure, the F.A.S.T. service is still not described nor its cost revealed.

55. After clicking to “VALIDATE” this information the email recipient is brought to yet another webpage separate and apart from the initial email advertisement and the previous webpage. On this next webpage the email recipient is asked to “VALIDATE” her credit card information. There is no clear or conspicuous disclosure that the initial email was an advertisement for F.A.S.T. service, that the email recipient is not in the process of claiming the prizes identified in that email, or that she is in the process of purchasing the F.A.S.T. service.

56. Defendants, and defendant Aronin specifically, designed the initial email advertisements, and the separate webpages to which email recipients are directed, to lead the email recipients to falsely believe that they had actually won huge cash prizes between \$300 and

¹ “Header information” is the section of an email message that contains the sender and recipient’s email addresses as well as the routing information and a subject line.

\$10,000,000.00 and was in the process of claiming it. The email advertisements direct the recipients to click on various hyperlinks and buttons, such as “CLICK TO CLAIM” perpetuating the false sense that the recipients had won prizes and were in the process of claiming them. The separate webpages that follow enforce that false impression. At no point is there adequate, clear or conspicuous – if any – disclosure that informs the email recipient that; one the email she received is an advertisement for the F.A.S.T. service, two, the email recipient did not win a prize; three by clicking on the “CLICK TO CLAIM” and other similar hyperlinks in the email itself, the email recipient is *not* claiming a prize; or four, the email recipient is in the process of purchasing the F.A.S.T. service.

57. Defendants had notice that consumers were misled, deceived and confused by the emails in the March 2006 email campaign. For example, in November 2006 defendants received a letter from the Better Business Bureau of Metropolitan New York, Inc. (“NYC BBB”) in which the NYC BBB informed defendants that consumers were apparently misled by defendants’ email advertisements. Defendant Aronin responded personally to the NYC BBB’s notice and requested samples of complaints that consumers had submitted to the NYC BBB on this point. Defendants, however, did not modify the email campaign in any way until October 2007, after defendants became aware of the Attorney General’s investigation into their business practices.

58. Similarly, upon information and belief, defendants have directly received voluminous correspondence from consumers expressing their belief that the email advertisements, which purport to advertise the F.A.S.T. service, were notices of actual prize winnings. This correspondence further demonstrates defendants’ notice and knowledge of the misleading, deceptive, and fraudulent nature of the emails in the March 2006 email campaign.

**Defendants Repeated and Persistently Violate the
Filing and Bonding Requirements of General Business Law Section 369-e**

59. GBL section 369-e governs the “[u]se of games of chance in selling commodities.” It requires proprietors who “propos[e] to engage in any game, contest or other promotion or advertising scheme . . . which offers the opportunity to receive gifts, prizes or gratuities, as determined by chance, without any consideration therefore, where the total announced value of the prizes offered is in excess of five thousand dollars[,]” to, among other things, make certain filings with the Secretary of State, to maintain a trust account or to furnish a bond in an amount equal to the total value of all prizes offered, and to refrain from using “false, deceptive or misleading” advertising in connection with the said game of chance. *See, e.g.*, GBL § 369-e(1), (4), (5) & (6).

60. More specifically, GBL section 369-e(1) requires such proprietors to file a statement with the Secretary of State at least thirty (30) days prior to the commencement of any such contest, game or promotion that sets forth at least: (i) the minimum number of participating objects to be made available; (ii) the minimum number of prize-winning objects that will be included in such promotion or advertising scheme or plan; and (iii) the proportionate rules and regulations pertaining to such promotion or advertising scheme or plan, including the period of time and the geographic area to be covered by the contest. Each such statement is to be accompanied by a \$100 filing fee. Failure to file such a statement is a class B misdemeanor.

61. GBL section 369-e(4) requires such proprietors to establish and maintain a special trust account in a branch of a national or state chartered banking institution with a balance sufficient to pay or purchase the total value of prizes offered. In lieu of establishing such a trust, the proprietor may furnish a bond, with sufficient sureties, in amount equal to the total value of prizes offered; such bond is to be in favor of the people of the state of New York. A copy of a certificate of deposit indicating the balance of said trust account or a copy of the surety bond is to

be filed with the Secretary of State simultaneously with the statements required by GBL section 369-e(1).

62. GBL section 369-e(5) requires such proprietors to file with the Secretary of State a listing of the name and address of each winner of every prize over twenty-five (25) dollars, the description of the prize won by each such person, and the date on which such prize was delivered to each such person. Under this section, proprietors of these promotions and advertising schemes are also required to maintain complete records of the advertising scheme for a period of six (6) months after the promotion. Failure to file these statements or maintain these records is a class B misdemeanor.

63. GBL section 369-e(6) prohibits proprietors of these promotions and advertising schemes from printing, publishing or circulating literature or advertising material in connection with the promotion or advertising scheme which is false, deceptive or misleading. Use of false, deceptive or misleading advertising is a class B misdemeanor.

64. As alleged herein, defendants are operating an illegal lottery in violation of the Penal Law in that they offer people the chance to win prizes, distributed by chance, in exchange for consideration or “something of value.” To the extent that the operation of FREELOTTO.COM, in whole or in part, is found to offer this opportunity “without any consideration therefore,” *see* GBL section 369-e(1), then defendants, who operate out of New York State, would be obligated to comply with the filing and other requirements of GBL section 369-e.

65. Defendants apparently modified the rules of FREELOTTO.COM in or near 2002 stating that FREELOTTO.COM is “void” in New York. Upon information and belief, as a result of claiming that FREELOTTO.COM is “void” in New York, defendants ceased to comply with

the filing, bonding and other requirements GBL section 369-e. Regardless of whether or not the game is characterized as “void” in New York, New York residents can and do continue to play FREELOTTO.COM and defendants continued to be based in, and to operate within, the State of New York. Nevertheless, defendants have not complied with the filing or bonding requirements of GBL sections 369-e(1), (4) and (5) since at least 2002. Moreover, since at least March 2006 defendants have printed, published, or circulated false, deceptive or misleading literature or advertising material in connection with their games, contests or other promotions or advertising schemes, which offer consumers the opportunity to receive gifts, prizes or gratuities, as determined by chance, without any consideration therefore, where the total announced value of the prizes offered is in excess of five thousand dollars. Defendants have, therefore, repeatedly and persistently violated GBL sections 369-e(1), (4), (5) and (6).

Defendant Kevin Aronin is Personally Liable for Violations of New York Law

66. At all times, defendant Aronin had actual knowledge of and participated in PlasmaNet’s fraudulent, deceptive and illegal business practices as described herein. Defendant Aronin created PlasmaNet and FREELOTTO.COM, designed the March 2006 campaign and PlasmaNet’s banner ads and, at the very least, reviewed and approved of the content of the FREELOTTO.COM website and all advertising related to the website. Defendant Aronin also received correspondence from the NYC BBB and directly from consumers giving him actual knowledge and notice that consumers were misled by the advertising described herein. Defendant Aronin is responsible for all of PlasmaNet’s acts and practices and all of the content of PlasmaNet’s websites and advertising. He is, therefore, personally liable for the business’ acts and practices under Executive Law section 63(12) and Article 22-A of the General Business Law.

**FIRST CAUSE OF ACTION
AGAINST PLASMANET, INC. d/b/a FREELOTTO.COM
AND KEVIN ARONIN, INDIVIDUALLY
(DECEPTIVE ACTS AND PRACTICES
IN VIOLATION OF GENERAL BUSINESS LAW SECTION 349)**

67. GBL section 349 renders unlawful any “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in [New York].”

68. By engaging in the acts and practices described above, defendants PlasmaNet, Inc. d/b/a FREELOTTO.COM and **Kevin Aronin in his personal capacity [researching to see if personal liability is under 63(12) alone or both 63(12) and GBL Article 22-A]** have repeatedly and persistently engaged in deceptive business practices in violation of GBL section 349.

69. Defendants’ violation of GBL section 349 constitutes repeated and persistent illegal conduct in violation of Executive Law section 63(12).

**SECOND CAUSE OF ACTION
AGAINST PLASMANET, INC. d/b/a FREELOTTO.COM
AND KEVIN ARONIN, INDIVIDUALLY
(FALSE ADVERTISING
IN VIOLATION OF GENERAL BUSINESS LAW SECTION 350)**

70. GBL section 350 renders unlawful “false advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state.”

71. By engaging in the acts and practices described above, defendants PlasmaNet, Inc. d/b/a FREELOTTO.COM and **Kevin Aronin in his personal capacity [researching to see if personal liability is under 63(12) alone or both 63(12) and GBL Article 22-A]** have repeatedly and persistently engaged in false advertising in violation of GBL section 350.

72. Defendants’ violations of GBL section 350 constitute repeated and persistent illegal conduct in violation of Executive Law section 63(12).

**THIRD CAUSE OF ACTION
AGAINST PLASMANET, INC. d/b/a FREELOTTO.COM
AND KEVIN ARONIN, INDIVIDUALLY
(ILLEGAL OPERATION OF A LOTTERY IN
VIOLATION OF PENAL LAW SECTION 225.05)**

73. Penal Law section 225.05 makes it illegal to “knowingly advance or profit from unlawful gambling activity.”

74. By engaging in the acts and practices described above, defendants PlasmaNet, Inc. d/b/a FREELOTTO.COM and Kevin Aronin in his personal capacity are operating an illegal lottery in violation of New York Penal Law section 225.05, a class A misdemeanor.

75. Defendants’ violations of New York Penal Law section 225.05 constitute repeated and persistent illegal conduct in violation of Executive Law section 63(12).

**[WE HAVE TO DISCUSS WHETHER TO BRING THE PENAL LAW CLAIM AT ALL,
AGAINST PARTS OR ALL OF THE LOTTERY, OR TO BRING 225.05 WITH OR
WITHOUT 225.10]**

**FOURTH CAUSE OF ACTION
AGAINST PLASMANET, INC. d/b/a FREELOTTO.COM
AND KEVIN ARONIN, INDIVIDUALLY
(ILLEGAL OPERATION OF A LOTTERY IN
VIOLATION OF PENAL LAW SECTION 225.10(2)(b))**

76. New York Penal Law section 225.10(2) makes it illegal to “[r]eceiv[e], in connection with a lottery . . . (b) more than five hundred dollars in any one day of money played in such scheme or enterprise.”

77. By engaging in the acts and practices described above, defendants PlasmaNet, Inc. d/b/a FREELOTTO.COM and Kevin Aronin in his personal capacity are operating an illegal lottery in violation of New York Penal Law section 225.10(2)(b), a class E felony.

78. Defendants' violations of New York Penal Law section 225.10(2)(b) constitute repeated and persistent illegal conduct in violation of Executive Law section 63(12).

[WE HAVE TO DISCUSS WHETHER TO BRING THE PENAL LAW CLAIM AT ALL, AGAINST PARTS OR ALL OF THE LOTTERY, OR TO BRING 225.05 WITH OR WITHOUT 225.10]

**FIFTH CAUSE OF ACTION
AGAINST PLASMANET, INC. d/b/a FREELOTTO.COM
AND KEVIN ARONIN, INDIVIDUALLY
(ILLEGAL OPERATION OF A BINGO OR LOTTO GAME IN
VIOLATION OF GENERAL MUNICIPAL LAW SECTION 479 AND
NEW YORK CITY ADMINISTRATIVE CODE SECTION 20-342)**

79. New York City Administrative Code section 20-342 prohibits the conduct of certain bingo games and section 20-342 permits the conduct of certain bingo games.

80. General Municipal Law section 479 prohibits the conduct of bingo games in violation of any provision of any local law or ordinance.

81. By engaging in the acts and practices described above, defendants PlasmaNet, Inc. d/b/a FREELOTTO.COM and Kevin Aronin in his personal capacity are violating New York City Administrative Code section 20-342 and General Municipal Law section 479, a class B misdemeanor.

82. Defendants' violations of New York City Administrative Code section 20-342 and General Municipal Law section 479 constitute repeated and persistent illegal conduct in violation of Executive Law section 63(12).

[I NEED TO DIG DOWN A LITTLE AND SEE HOW THE ENFORCEMENT MECHANISM WORKS FOR THESE STATUTES]

**SIXTH CAUSE OF ACTION
AGAINST PLASMANET, INC. d/b/a FREELOTTO.COM
AND KEVIN ARONIN, INDIVIDUALLY**

**(ILLEGAL OPERATION OF A LOTTERY IN
VIOLATION OF GENERAL BUSINESS LAW SECTION 369-e(1))**

83. New York General Business Law section 369-e(1) requires every person, firm or corporation proposing to engage in any game, contest or other promotion or advertising scheme or plan in connection with the promotion, advertising or sale of consumer products or services which offers the opportunity to receive gifts, prizes or gratuities, as determined by chance, without any consideration therefor, where the total announced value of the prizes offered is in excess of five thousand dollars shall file with the secretary of state, at least thirty days prior to the commencement of such game, contest or promotion upon a form that he shall provide, a statement setting forth: (i) the minimum number of participating objects to be made available; (ii) the minimum number of prize-winning objects that will be included in such promotion or advertising scheme or plan; the proportionate opportunity of winning prizes; (iii) the minimum value of prizes to be made available; and (iv) the rules and regulations pertaining to such promotion or advertising scheme or plan, which shall include the period of time and the geographic area to be covered by the contest and such other information as the secretary of state may, from time to time, require. The filing of these statements shall be accompanied by a fee of one hundred dollars (\$100).

84. Since 2002, defendants have not complied with the filing requirements of GBL section 369-e(1), failures which constitute class B misdemeanors.

85. Defendants' violations of GBL section 369-e(1) constitute repeated and persistent illegal conduct in violation of Executive Law section 63(12).

[WE HAVE TO DISCUSS WHETHER TO BRING THE 369-e CLAIMS AND I GATHER IF WE DO WE WRAP IT IN 63(12). I IMAGINE WE'D HAVE TO GO THE GRAND JURY ROUTE SINCE THERE IS A CRIMINAL PENALTY AND WE OBVIOUSLY

HAVEN'T DONE THAT. SAME APPLIES FOR ALL OF THE 369-e CLAIMS EXCEPT FOR 369-e(4) (BONDING) WHICH IS NOT IDENTIFIED AS A MISDEMEANOR]

**SEVENTH CAUSE OF ACTION
AGAINST PLASMANET, INC. d/b/a FREELOTTO.COM
AND KEVIN ARONIN, INDIVIDUALLY
(ILLEGAL OPERATION OF A LOTTERY IN
VIOLATION OF GENERAL BUSINESS LAW SECTION 369-e(4))**

86. GBL section 369-e(4) requires every person, firm or corporation engaging in any promotion or advertising game or contest of the type set forth in GBL section 369-e(1) to establish and maintain a special trust account in a branch of a national or state chartered banking institution with a balance sufficient to pay or purchase the total value of prizes offered. In lieu of establishing such trust account, said operator may furnish a bond, with sufficient sureties, in an amount equal to the total value of all prizes offered; such bond shall be in favor of the people of the state of New York. A copy of a certificate of deposit indicating the balance of said trust account or a copy of the surety bond shall be filed with the office of the secretary of state simultaneously with the filing of the statement required by subdivision one hereof. The monies so held in escrow or said surety bond shall at all times equal the total amount of prizes so offered.

87. Since 2002, defendants have not complied with the requirements of GBL section 369-e(4).

88. Defendants' violations of GBL section 369-e(4) constitute repeated and persistent illegal conduct in violation of Executive Law section 63(12).

**EIGHTH CAUSE OF ACTION
AGAINST PLASMANET, INC. d/b/a FREELOTTO.COM
AND KEVIN ARONIN, INDIVIDUALLY
(ILLEGAL OPERATION OF A LOTTERY IN
VIOLATION OF GENERAL BUSINESS LAW SECTION 369-e(5))**

89. GBL section 369-e(5) requires every person, firm or corporation engaging in any promotion or advertising scheme or plan of the type set forth in GBL section 369-e(1) to, within ninety days following the completion of said promotion or advertising scheme or plan, file with the secretary of state a listing of the name and address of each winner of every prize having a value of more than twenty-five dollars, the description of the prize won by each such person, and the date when such prize was delivered to each such person, and shall maintain complete records of such promotion or advertising scheme or plan for a period of six months thereafter.

90. Since 2002, defendants have not complied with the filing requirements of GBL section 369-e(5), failures which constitute class B misdemeanors.

91. Defendants' violations of GBL section 369-e(5) constitute repeated and persistent illegal conduct in violation of Executive Law section 63(12).

**NINTH CAUSE OF ACTION
AGAINST PLASMANET, INC. d/b/a FREELOTTO.COM
AND KEVIN ARONIN, INDIVIDUALLY
(ILLEGAL OPERATION OF A LOTTERY IN
VIOLATION OF GENERAL BUSINESS LAW SECTION 369-e(6))**

92. GBL section 369-e(6) prohibits the use of false, deceptive, or misleading advertising in connection with any promotion or advertising scheme or plan of the type set forth in GBL section 369-e(1).

93. Since at least March 2006, defendants have used of false, deceptive, or misleading advertising in connection with any promotion or advertising scheme or plan of the type set forth in GBL section 369-e(1), acts which constitute class B misdemeanors.

94. Defendants' violations of GBL section 369-e(6) constitute repeated and persistent illegal conduct in violation of Executive Law section 63(12).

**TENTH CAUSE OF ACTION
AGAINST PLASMANET, INC. d/b/a FREELOTTO.COM**

**AND KEVIN ARONIN, INDIVIDUALLY
(UNLAWFUL USE OF DECEPTIVE SUBJECT LINES
IN VIOLATION OF 15 U.S.C. SECTION 7704(a)(2))**

95. The Controlling the Assault of Non-Solicited Pornography and Marketing Act, or The CAN-SPAM Act, 15 U.S.C. section 7704(a)(2) makes it unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message if such person has actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that a subject heading of the message would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

96. By engaging in the acts and practices described above, defendants PlasmaNet, Inc. d/b/a FREELOTTO.COM and Kevin Aronin in his personal capacity [does personal liability carry under 15 U.S.C. § 7704(a)(2)] have repeatedly and persistently engaged in a pattern and practice of knowingly transmitting commercial electronic mail messages with subject headings that likely mislead recipients, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

97. Defendants' violations of 15 U.S.C. section 7704(a)(2) constitute repeated and persistent illegal conduct in violation of Executive Law section 63(12). **[If we bring this claim, do we want to bring it under 63(12) to make sure we stay in State court and can we do that? We have direct authority to bring the case under federal law so would wrapping it in 63(12) be forum shopping and removable?]**

**ELEVENTH CAUSE OF ACTION
AGAINST PLASMANET, INC. d/b/a FREELOTTO.COM
AND KEVIN ARONIN, INDIVIDUALLY
(FRAUDULENT CONDUCT IN
VIOLATION OF EXECUTIVE LAW SECTION 63(12))**

98. Executive Law section 63(12) prohibits “repeated fraudulent or illegal acts [and] persistent fraud or illegality in the carrying on, conducting or transaction of business” in the State of New York.

99. By repeatedly and persistently engaging in the acts and practices described above, defendants PlasmaNet, Inc. d/b/a FREELOTTO.COM and Kevin Aronin in his personal capacity have violated Executive Law section 63(12).

DEMAND FOR RELIEF

WHEREFORE, the Attorney General requests that this Court grant relief pursuant to Executive Law section 63(12), General Business Law sections 349, 350 and **369-e**, **Article 14-H of the General Municipal Law, Title 20, Chapter 2, Subchapter 19 of the New York City Administrative Code, 15 U.S.C. section 7706(f)(1)(A), (B) and (3)** **15. U.S.C. section 7704(a)(2) (the “CAN-SPAM Act”)**, and **Penal Law sections 225.05 and 225.10** against defendants by issuing an Order and Judgment as follows:

- i. permanently enjoining defendants from further engaging in any of the fraudulent, deceptive, and/or illegal acts and practices alleged herein;
- ii. granting full restitution to all victimized consumers;
- iii. directing that a money judgment for civil penalties pursuant to GBL sections 350-d be entered against each and all defendants in favor of the State of New York, based upon the sum of \$500 per each violation that occurred prior to July 3, 2007 and based upon the sum of \$5,000 for each violation that occurred after July 3, 2007 or such other amount as the Court deems appropriate;
- iv. directing that a money judgment for civil penalties pursuant to 15 U.S.C. section 7706(f)(1)(B) and 7706(f)(3) be entered against each and all defendants in favor

of the State of New York, based upon the sum of \$250 per each violation with a maximum amount of \$2,000,000 or such other amount as the Court deems appropriate;

- v. directing disgorgement of profits each and all defendants earned by way of their repeated and persistent fraudulent, deceptive and illegal business acts and practices;
- vi. directing that a money judgment be entered against each and all defendants in the sum of damages;
- vii. directing that a money judgment be entered against defendants in favor of the Attorney General in the sum of \$2,000, pursuant to CPLR section 8303(a)(6) and for costs; and
- vi. granting the Attorney General such other and further relief as this Court finds just and proper.

Date: _____, 2009
New York, New York

**ANDREW M. CUOMO
ATTORNEY GENERAL
OF THE STATE OF NEW YORK**

By: _____
Karen A. Geduldig

Attorney for Plaintiffs
120 Broadway, 3rd Floor
New York, New York 10271
(212) 416-8433

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

-----X
**THE PEOPLE OF THE STATE OF
NEW YORK, by ANDREW CUOMO,
Attorney General of the State of New York,**

Petitioners,

-against-

**PLASMANET, INC. d/b/a FREELOTTO.COM,
FREELOTTOEZWIN.COM,
WORLDCASHLOTTO.COM,
WINCASHNOW.COM and
CLICK2WIN.COM and KEVIN ARONIN
individually,**

Respondents.

**AFFIRMATION OF
KAREN A. GEDULDIG**

Index No.: _____

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KAREN A. GEDULDIG, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following under penalty of perjury:

1. I am an Assistant Attorney General in the office of ANDREW M. CUOMO, Attorney General of the State of New York, assigned to the Internet Bureau. I am familiar with the facts and circumstances of this proceeding.

2. The facts set forth in this affirmation are based upon information contained in the files of the Internet Bureau.

3. I submit this affirmation in support of the Attorney General's application for an order and judgment which, *inter alia*, compels Plasmanet, Inc. d/b/a FreeLotto.com, FreeLottoEZWin.com, WorldCashLotto.com, WinCashNow.com, and Click2Win.com and Kevin Aronin, individually (collectively "Plasmanet") to produce documents in response to a subpoena *duces tecum* served on or near February 6, 2009 (the "February 2009 subpoena").

BACKGROUND

4. Plasmanet is a Delaware corporation with its principle place of business at 420 Lexington Avenue, Suite 2435, New York, New York 10170. Exhibit 1 (Printout from New York State Department of State, Division of Corporations). Since 1999, Plasmanet has owned and operated the domain name FREELOTTO.COM, a website which offers consumers the opportunity to win cash and other prizes in online lottery games in exchange for viewing advertising. See Exhibit 2 at pp. 7-8 (excerpt of transcript of a hearing dated October 7, 2009, taken pursuant to Executive Law section 63(12), hereinafter referred to as “Aronin Oct. 7 Tr.”); Exhibit 3 (letter from Gerald Lefcourt to Karen Geduldig, dated October 25, 2007 at pp. 1-2).

5. More specifically, consumers who play lottery games on the FreeLotto.com website must agree to (i) respond to advertising on the FreeLotto.com website; and (ii) receive email advertising at their valid, functioning email address. Exhibit 2 at pp. 7-9. In addition, FreeLotto.com users can play the lottery games without viewing *email* advertising if they subscribe to a service offered by Plasmanet that costs \$14.99 per month.¹ Exhibit _ at p. 80 (Oct. 23 Hearing Tr.). This service is called the “FreeLotto Automatic Subscription Ticket” or “F.A.S.T.” Exhibit 2 at p. 9. Plasmanet has represented, in response to a subpoena *duces tecum* issued on July 16, 2007 (see Exhibit _ (July 16, 2007 subpoena *duces tecum*) that, since 2001, F.A.S.T. subscriptions have accounted for more than \$56 million in revenue. See Exhibit 4 (memorandum), a figure that was confirmed under oath by Mr. Aronin. Exhibit 2 at pp. 11-13.

6. The Attorney General has reviewed hundreds of complaints about Plasmanet’s business and advertising practices. The Attorney General commenced an investigation which has revealed that consumers who register with FreeLotto.com do receive emails from Plasmanet,

¹ Users who subscribe to this service must still respond to advertising on the FreeLotto.com website.

which allegedly advertise Plasmanet's F.A.S.T. service. *See, e.g.*, Exhibit _ at ¶ _ (Affidavit of Rachel Mills, dated June 30, 2009); Exhibit 6 (October 23 Hrg. Tr.) (testimony under oath confirming that these particular email advertisements were sent by Plasmanet). AG21

7. The Attorney General's investigation also indicates that these email advertisements do not appear to be advertisements for F.A.S.T. but rather, they appear to notify the recipient that they have won a lottery game and direct the recipients to click on various hyperlinks to claim their prizes. According to the Attorney General's investigation, while the recipient is led to believe that they are claiming a prize they are actually subscribing to Plasmanet's for-pay F.A.S.T. service. **[Do I need to substantiate these statements with, for example, an affidavit from Rachel, to avoid being a witness?]**

8. During the course of the investigation the Attorney General has also determined that Plasmanet uses deceptive and fraudulent banner advertisements or "banner ads"² to drive consumers to register with the FreeLotto.com website. The only way Plasmanet actively solicits consumers to register with FreeLotto.com is via banner ads that it designs and places on webpages and advertising networks. *See* Exhibit _ at p. 2 (Letter from Gerald Lefcourt to Karen Geduldig, dated October 25, 2007).

9. Since February 2007 the majority of these ads unequivocally state that the consumer viewing the ad has, in fact, already won a prize (the "YOU WON! Ads"). *See* Exhibit _ at p. 13 (Response No. 31) (representing that the promotion began in February 2007); Exhibit _ (copies of some banner ads produced by Plasmanet in response to a subpoena *duces tecum* issued on July 16, 2007).

10. In reality, these consumers have not already won anything. In order to collect

² Banner ads are online advertisements, typically a graphic image, positioned in a specific place on a webpage.

anything from Plasmanet the viewing consumer must first: (i) register with FreeLotto and provide personal information to Plasmanet, (ii) agree to receive commercial email advertising from Plasmanet and other third-parties, (iii) respond to third-party advertising on the FreeLotto.com website, and, in some instances, (iv) supply Plasmanet with identifying documentation. Exhibit _ at p. 13 (Response No. 31). Plasmanet has represented, in response to a subpoena *duces tecum* issued on July 16, 2007 (*see* Exhibit __), that has earned over \$85 million in advertising revenue between 1999 and July 2007, (*see* Exhibit _); a number which was confirmed under oath by Mr. Aronin. *See* Exhibit 2 at pp. 11-13.

THE ATTORNEY GENERAL'S INVESTIGATION

11. Throughout the investigation the Attorney General has been extremely flexible with regards to requests for information and documents. For example, in or near April 2008 the Attorney General advised Plasmanet of his intent to subpoena the testimony of Plasmanet's President and Chief Executive Officer, Kevin Aronin, and its Chief Marketing Officer, Anne Stephens pursuant to his authority under Executive Law section 63(12). Plasmanet requested that, in lieu of this testimony, the Attorney General issue informal requests for information and documents and seek this testimony only if the documents and information produced were insufficient. *See* Exhibit __ (Letter from Karen Geduldig to Gerald Lefcourt, dated April 22, 2008). The Attorney General agreed and made requests for information and documents by letter dated April 22, 2008. *See* Exhibit __.

12. The Attorney General found Plasmanet's responses to be insufficient and he issued subpoenas *ad testificandum* to Mr. Aronin and Ms. Stephens. *See* Exhibits __ and __. He ultimately agreed to only take testimony from Mr. Aronin over the course of two days in October

2008. During those two days of testimony, the Attorney General made several requests on the record for documents and information, including full tax returns, which Mr. Aronin agreed to provide under oath. Exhibit 2 at pp. 17-18 (Mr. Aronin represents that “[i]f you need further information, we are always happy to provide anything else you need”). These requests were set forth in a letter dated October 29, 2008 and included requests for financial statements, tax records, and documents that would substantiate the company’s advertising revenue from 1999 to the present, *see* Exhibit __ (October 29, 2008 letter); the very documents that had been requested in the Attorney General’s informal letter requests, dated April 22, 2008 and which Plasmanet agreed to produce. Exhibit _ (April 22, 2008); Exhibit 2 at pp. 16-18.

13. Such flexibility notwithstanding and despite the company’s agreement to provide the very records at issue, Plasmanet continues to withhold tax and financial documents. Instead, Plasmanet continues to provide what the Attorney General finds to be insufficient, incomplete or contradictory information about the profitability of its advertising practices. For example:

- Plasmanet has represented that from June 1999 to July 2007, it earned \$85,548,453 in gross advertising revenue; *see* Exhibits _ (July 2007 subpoena) and _ (memo), a figure confirmed, under oath, by Plasmanet’s President and Chief Executive Officer, Kevin Aronin. *See* Exhibit 2 at pp. 11-13 (excerpt of transcript).
- Later, Plasmanet represented that from 2002 through 2007 it earned \$5,900,871 in gross advertising revenue. *See* Exhibit __ (October 29, 2008 letter requesting documents) and Exhibit 15 (documents produced in response to October 29, 2008 letter). The Attorney General found incredible that Plasmanet, in its infancy, earned over 90% – nearly \$80 million – of its gross advertising revenue, particularly since Plasmanet’s Chief Executive Officer testified, under oath, that Plasmanet’s per-click earnings from advertising are “more significant now-a-days than when I started the business back in ’99.” Exhibit 2 at p. 9-10.
- In an attempt to explain away this abnormal discrepancy in advertising revenue, Plasmanet baldly asserted that it was attributed to the “virtual collapse of the internet advertising market.” *See* Exhibit __

(February 24, 2009 letter). When asked for more detail as to the effect this “virtual collapse” had on Plasmanet’s earnings, Plasmanet again baldly stated that the difference in profits was due to the “profound fall off in internet advertising revenue.” *See* Exhibit __ (May 6, 2009 letter).

- Still later, Plasmanet attempted to correct its earlier representation that it earned \$5.9 million in *gross* advertising revenue between 2002 and 2007. It stated that it failed to incorporate revenue vaguely referred to as “other net advertising revenue components” and that the company actually earned roughly \$9.1 million in *net* advertising revenue during that time. *See* Exhibit 17 (May 6, 2009 letter).

14. At present, Plasmanet has made two vastly different representations about its advertising income for the past five years and has made contradictory characterizations about its advertising revenue since 1999. In order to properly assess the claims of this State without resort to more delay and uncertainty, the Attorney General served the February 2009 subpoena on Plasmanet to obtain the financial documents that underlie the company’s representations and testimony. *See* Exhibit 18 (February 6, 2009 subpoena). Service of that subpoena was accepted on behalf of Plasmanet by its counsel and Plasmanet responded in part and objected in part. *See* Exhibit __ (February 24, 2009 letter); Exhibit __ (objections).

15. To date, Plasmanet refuses to produce documents in response to document requests numbered one (1) through four (4).

16. The Attorney General has herein established that the documents sought in the February 2009 subpoena are reasonably related to the subject under investigation and to the public purpose to be achieved and are extremely necessary to the same. He, therefore, seeks an order compelling Plasmanet’s compliance with the February 2009 subpoena pursuant to New York Civil Practice Law and Rule section 2308(b).

17. No previous application for the relief sought herein has been made to this Court or

any other court.

Dated: New York, New York
June 26, 2009

Karen A. Geduldig

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

-----X		
THE PEOPLE OF THE STATE OF	:	
NEW YORK, by ANDREW CUOMO,	:	
Attorney General of the State of New York,	:	
	:	
Petitioners,	:	
	:	AFFIRMATION OF
-against-	:	<u>KAREN A. GEDULDIG</u>
	:	
PLASMANET, INC. and KEVIN ARONIN,	:	
individually,	:	Index No.: _____
	:	
Respondents.	:	
-----X		

KAREN A. GEDULDIG, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following under penalty of perjury:

1. I am an Assistant Attorney General in the office of ANDREW M. CUOMO, Attorney General of the State of New York, assigned to the Internet Bureau. I am familiar with the facts and circumstances of this proceeding.

2. The facts set forth in this affirmation are based upon information contained in the files of the Internet Bureau.

3. I submit this affirmation in support of the Attorney General’s application for an order and judgment which, inter alia, (a) enjoins respondents Plasmanet, Inc. and Kevin Aronin (collectively the “respondents”) from engaging in fraudulent, deceptive, and/or illegal acts and business practices; (b) requires respondents to pay restitution to aggrieved consumers; (c) requires respondents to disgorge all profits from such practices; and (d) requires respondents to pay penalties and costs to the State of New York.

Parties

4. Petitioners are the People of the State of New York, by their attorney Andrew M. Cuomo, Attorney General of the State of New York.

5. Plasmanet, Inc. is a Delaware corporation with its principal place of business at 420 Lexington Avenue, Suite 2435, New York, New York 10170. Exh. 1 (Certificate of Incorporation). Plasmanet owns and operates five gambling websites. Three of the websites, Freelotto.com, FreelottoEZWin.com and WorldCashLotto.com offer consumers the opportunity to participate in online lotteries. Click2Win.com and WinCashNow.com offer consumers the opportunity to participate in online casino-style tournaments by obtaining “tokens” to play with. The activity on each of the websites is governed by New York law **[check]**. Exh. __ at ¶ 8 (FreeLotto.com Rules), _ at ¶ 8 (FreeLottoEZWin.com Rules); _ at ¶ 8 (WorldCashLott.com Rules); _ at ¶ 8 (WinCashNow.com Rules); _ at ¶ 8 (Click2Win.com Rules).

6. Respondent Kevin Aronin (“Aronin”) created Plasmanet Inc. in 1999. Aronin is Plasmanet’s Chief Executive Officer and President. He is the company’s controlling shareholder, owning ____ percent of the company and is its only director. **[manager? Is there a board of directors?]** Aronin is responsible for all of the content on each of the five websites identified in paragraph 5. **[ask him this]**

7. **[I don’t think it will be necessary to identify other owners]**

Statutory Framework

8. Executive Law §§ 63(12) and 63(15) empower the Attorney General to seek injunctive and equitable relief when any person or business entity has engaged in, or otherwise demonstrated, repeated fraudulent or illegal acts in the transaction of business in the State of New York.

9. General Business Law (“GBL”) §§ 349 and 350 empower the Attorney General to seek injunctive relief when any person or entity has engaged in deceptive acts or practices in the conduct of any business or in false advertising.

10. GBL § 350-d empowers the Attorney General to seek, *inter alia*, civil penalties in the amount of \$500.00 for each violation of GBL § 350, the False Advertising Statute, and/or of GBL § 349, the Deceptive Practices Statute. Under Civil Procedure Law and Rule (“CPLR”) § 8303(a)(6), the Court may also award petitioners a sum not to exceed \$2,000. Finally, once the broad equitable powers are invoked under Executive Law § 63(12), the Court may order disgorgement of profits earned by way of respondents’ deceptive practices.

11. **7704(a)(2) CAN-SPAM prohibits use of deceptive subject lines and deceptive “header” information meaning who the email is from “From” – I don’t think that’s true, which is fine b/c we can assert that is a deceptive practice under 349/350?**

FACTUAL ALLEGATIONS

Background

1. Since 1999 respondents have operated five websites on which they offer consumers opportunities to gamble online. Three of the websites offer consumers opportunities to play online lotteries. Accordingly, every day, Plasmanet employees hold lottery drawings at the Plasmanet office in New York City. Plasmanet then announces the winning numbers and notifies by email those consumers who have won prizes of between \$1 and \$10,000,000. The three websites through which respondents offer online lotteries are FreeLotto.com (“FreeLotto”), FreeLottoEZWin.com (“FreeLottoEZWin”) and WorldCashLotto.com (“WorldCashLotto”)

collectively referred to as the “Lottery Websites,” or the “Websites.”¹

2. FreeLotto went live in June 1999. Since that time 33,078,025 consumers have registered with the website. Of those consumers, 4,936 – or .015% – have won substantial prizes between \$300 and \$10,000,000.² More specifically, 4,493 consumers have won a \$300 cash prize; 278 consumers have won a \$10,000 cash prize; 83 consumers have won a prize worth \$50,000;³ 34 consumers have won a prize worth \$100,000;⁴ 30 consumers have a \$100,000 cash prize; 14 consumers have won a \$1,000,000 cash prize; and 4 consumers have won a \$10,000,000 cash prize.

3. WorldCashLotto went live in February 2002 and since then 21,754 **[confirm – page 2 10/25/07]** consumers have registered with the website. Of those consumers, 123 have won a prize **[of?]**.

4. FreeLottoEZWin went live in September 2002 and since then 125,870 **[confirm – page 2 10/25/07]** consumers have registered with the website. Of those consumers, 147 have won a prize **[of?]**

5. Consumers can play on a Lottery Website for free, however, Plasmanet offers to

¹ Respondents other two websites offer consumers the opportunity to gamble online by betting with “tokens” that the consumer obtains from respondents. On Click2Win.com consumers play in online tournaments of casino-style games such as poker using “tokens” purchased or obtained for free from Plasmanet. WinCashNow.com allows consumers to similarly use “tokens” to bet on whether or not the numbers they select will be drawn in a lottery drawing. Because respondents do not offer subscription services, as defined supra at paragraphs ___ - ___, on these two websites, these websites are not subject to the instant action.

² Consumers also win more modest prizes of between \$1 and \$5.

³ Plasmanet offers a “Win a Car” lottery game. The grand prize is a car worth up to \$50,000. **[check rules]**

⁴ Plasmanet offers a “Pay Off Your Mortgage” lottery game. The grand prize is \$100,000 towards the winner’s mortgage. **[check rules]**

play a consumer's numbers for them every day for a fee. On FreeLotto, that service is called the "FreeLotto Automatic Subscription Ticket," or "F.A.S.T." and it costs consumers either \$9.99 or \$14.99 a month.⁵ On FreeLottoEZWin and WorldCashLotto it is simply called a "service" that costs the consumer \$1 per game.

6. In order to play the online lotteries and be eligible to win a prize, consumers must first register on a given Lottery Website by providing a first and last name, postal address and valid email address. **Before a consumer plays a game [for the first time or every time] on a Lottery Website [or is this just with Freelotto?]** the consumer must select a "sponsor to visit" by clicking on a banner advertisement or by answering a question all of which are served by third-party advertisers.

7. Plasmanet earns a fee from these third-party advertisers each time a registrant clicks on a particular third-party's advertisement or answers a question posed by a third-party advertiser. Since 1999, Plasmanet has earned \$85,548,453 from this third-party advertising. **[confirm that this is where that \$ came from]**

A. Plasmanet Deceptively Induces Consumers to Register with its Lottery Websites

8. The only way Plasmanet solicits individuals to register with its Lottery Websites is via banner advertisements. A banner advertisement, or banner ad, is an advertisement in the form of a graphic image that typically runs across a web page or that is positioned in a margin or other space on a web page that is typically reserved for advertisements. Banner ads entice website visitors to click on the graphic to obtain further information about a product, service or, in this case, a game.

⁵ Note about discrepancy of price and **ask Aronin why it is a different cost.** Did it go up as

9. Plasmanet has produced to the Attorney General copies of the universe of banner ads it serves to solicit consumers to register with a Plasmanet Lottery Website. Copies of these banner ads are annexed hereto at Exhibit ____.

10. The majority of Plasmanet's banner ads [**nearly 60%, 116 out of 190**] assert that the consumer viewing the ad has – in fact – already won a prize, thereby enticing the consumer to click on the banner ad:

[screen shot of samples of Plasmanet banner ads]

11. In reality, these consumers have not won anything. These banner ads are a lie specifically designed [**ask at depo point of banner ad**] to encourage consumers to visit and then register with a Lottery Website. **What happens when they click on banner ad? What screens are they brought to?**

12. Plasmanet's banner ads are, therefore, intended to dupe individuals into registering with Plasmanet under the mistaken belief that they are claiming a prize rather than registering to play a lottery. [**this might be overstated depending on what screen brought to subsequently**]

13. Plasmanet's banner ad campaign has been overwhelmingly successful; 33,225,649 people have registered with Plasmanet's Lottery Websites since 1999: 33,078,025 with FreeLotto, 125,870 with FreeLottoEZWin, and 21,754 with WorldCashLotto. [**Make sure FAST players = total registrants for non-Freelotto sites**] [**make sure banner ads go to all sites**]

of a specific date?

14. **Each time[?]** these 33,225,649 consumers **played a lottery game/registered** on a Lottery Website they were required to select a “sponsor to visit.” The “sponsor” the consumer selected then paid Plasmanet a fee. Since 1999, Plasmanet has earned \$85,548,453 in gross revenue from these third-party advertiser fees. **[FreeLotto only? Each game or just first?]**

15. In short, Plasmanet tricks a consumer into visiting, and then registering with, a Lottery Website by representing to that consumer that they have actually won a prize when they have not. Although the consumers did not win a prize, Plasmanet did: for each consumer who was tricked into registering with a Lottery Website Plasmanet earned a fee from third-party advertisers, to wit, \$85,548,453.

16. It is reasonable to apply the percentage of Plasmanet’s deceptive banner ads, *i.e.*, the 60% that falsely claimed that the viewing party had, in fact, won a prize, to the third-party advertising revenue Plasmanet earned. Using this correlation, the Attorney General estimates that 60% of Plasmanet’s third-party advertiser revenue, or \$51,329,071, is attributed to its deceptive banner ads.

B. Plasmanet Deceptively Induces Consumers to Pay for its Subscription Services

17. Although Plasmanet does not require registrants to pay to play its lottery games, it does offer a service by which it will play the lottery games for its members for a monthly fee (the “subscription service”). The FreeLotto subscription service is called the FreeLotto Automatic Subscription Ticket, or “F.A.S.T.,” and costs \$9.99 or \$14.99 per month,⁶ whereas the FreeLottoEZWin and WorldCashLotto subscription services cost \$1 per game. The service fees are charged to a credit card the consumer provides to Plasmanet.

⁶ **[Note about how seemingly random price difference]**

18. To date, a total of 1,152,582 consumers have subscribed to a Plasmanet subscription service: 910,573 consumers have subscribed to FreeLotto's F.A.S.T., 21,754 have subscribed to WorldCashLotto's \$1 service, and 125,870 have subscribed to FreeLottoEZWin's \$1 service.

19. Plasmanet began offering F.A.S.T. on FreeLotto in April 2001, the \$1 subscription service on WorldCashLotto in February 2002 and the \$1 subscription service on FreeLottoEZWin in September 2002. Since April 2001, Plasmanet has earned \$56,169,216 from its subscription services. **[all three?]**

20. The only way Plasmanet advertises its subscription services is by sending emails to those consumers who have already registered with a Lottery Website and who have, therefore, provided their email addresses to Plasmanet **[advertise all services this way or just Freelotto?]**. These emails are deceptive for a number of reasons set forth in greater detail infra at paragraphs __ to __ and in the accompanying Affidavit of Investigator Rachel Mills, dated December __, 2007 ("Mills Affidavit" or "Mills Aff.") attached hereto at Exhibit __.

21. In short, the emails that purport to advertise Plasmanet's subscription services actually look and feel as if the consumer is being notified of having won a huge cash prize. The emails then direct the recipients to click on various hyperlinks and buttons, such as "CLICK2CLAIM," which perpetuate the false sense that the recipient has won a prize and is in the process of claiming that prize. The final web page the email recipient is brought to after clicking on the various hyperlinks is one that requests the email recipient's credit card information. Nowhere on this web page does Plasmanet disclose that the original email was an advertisement for a subscription service and that the recipient's credit card information will be

used to pay for a subscription service.

22. Following is a more detailed description of the various deceptive techniques Plasmanet employs in its emails to trick its customers into signing-up for a subscription service.

(1) **Deceptive Sender Information and Subject Lines**

Almost immediately after registering with a Lottery Website, a consumer begins receiving emails from Plasmanet. The information in the “sender” field of these emails indicates that recipient has won a prize. The “senders” of respondents’ emails are, for example: “the Awards Committee,” “Congratulations-Respond By [date]” and “WINNERS@FREELOTTO.COM.”⁷ This sender information leads the email recipients to believe that they have won a Plasmanet lottery game. After all, the email comes from Plasmanet’s Awards Committee, characterizes the consumer as a winner and/or congratulates the recipient. The consumer, however, has not won anything.

⁷ These examples of sender information and subject lines of Plasmanet emails are from emails received by undercover FreeLotto accounts created by Internet Bureau Investigator Rachel Mills. See Exh. ___ (Mills Affidavit).

23. The subject lines of these emails further perpetuate the mis-impression created by the sender information, i.e., that the email recipient has won a prize. The subject lines of the emails assert a sense of urgency which, lends to the mis-impression that the recipient has won a prize. Examples of such subject lines are: “***Open Immediately*** Enclosed Winning Information is for Tammy Jones Only,” “Tammy, Seeking \$1 Million Dollar Winner in BAYONNE, New Jersey,”⁸ “Jones, Tammy: Your Immediate Attention Requested - Respond by 6/11/07,” “Jones, Tammy: Urgent-Urgent-Urgent,” “Jones, Tammy: Critical Notice: Please Confirm,” “Jones, Tammy -Important Documents Enclosed,” and “Tammy Jones of BAYONNE, We Urge You to Open This Immediately.” These subject lines do not disclose that the email is merely an advertisement and that, in fact, there is no urgent need for the recipient to do anything.

(2) **Emails that Characterize the Recipient as a Winner**

24. The mis-impression made in the sender and subject lines of Plasmanet’s emails is further exploited by the substance of the emails. Plasmanet has many email templates aimed at soliciting consumers to sign-up for a Plasmanet subscription service. Internet Bureau Investigator Rachel Mills created two undercover accounts with FreeLotto and, as set forth below at paragraphs __ to __ and in the Mills Affidavit, most of the emails sent to her undercover accounts by Plasmanet fostered the erroneous belief that she had won a prize.⁹

i. *Check Release Status Notification Template*

25. This email is an “official listing” of people whose prize winnings have been

⁸ When Investigator Mills created the Tammy Jones account on FreeLotto, she submitted Bayonne, New Jersey as Tammy Jones’ residence. See Mills Aff., at ____.

⁹ Plasmanet produced hundreds of email templates that it purportedly sends to its customers to advertise its subscription services. With the exception of a few of these templates, Investigator Mills did not encounter any of the emails that Plasmanet produced. See Mills Aff. ____.

“PAID” by Plasmanet or that are “PENDING.” The consumer is directed to review the official listing to see if they are “qualified to receive a check, upon proper submission in accordance with sponsor rules.” The consumer then scans the list of PAID and PENDING winnings and finds their name listed next to an amount of money between \$300 and \$10,000,000. The recipient is identified as having a payment status of “PENDING” and her name appears among the names of people who have been “PAID.” At the bottom of the official list is a hyperlink that instructs the consumer to “CLICK TO CLAIM.”

[SCREENSHOTS]

26. After clicking on the “CLICK TO CLAIM” hyperlink, the consumer is brought to a second web page, with titles such as “Pin Validation Request & Prize Payment Directive.” Often times, it claims to be an official looking “Form 7082A.”

27. This second web page requests that the consumer verify her personal identification number and prize payment information, including her name, address, phone number and the mode by which she would prefer to receive her prize winnings (check or electronic funds transfer).

28. The recipient is also asked to select additional numbers for future lottery games

and to identify whether she prefers to visit the Lottery Website herself every day or if she would prefer the Lottery Website to pick her numbers automatically for her. Below the space reserved for selecting numbers for future lottery games there is a hyperlink that instructs the consumer to “CLICK TO VALIDATE.”

[SCREENSHOTS]

29. After clicking on the CLICK TO VALIDATE hyperlink, the consumer is brought to a third web page, which requests that the consumer verify his or her credit card information. This third web page bears a title similar to the pre-ceding web pages, i.e., “Pin Validation Request & Prize Payment Directive” or “Check Release Status Notification.” At the bottom of the web page the consumer is instructed to “CLICK TO VALIDATE” her credit card information. Plasmanet does not disclose to the consumer that her credit card will – in fact – be used to pay for a subscription service.

30. It is also important to note that the email recipient is brought to this third web

page and asked for her credit card information even if she checks the box next to “I prefer to visit Freelotto.com everyday” thereby indicating that she would not be interested in Plasmanet’s subscription service.

[SCREENSHOTS]

ii. *The “Declaration of Decision” Email*

31. This email is titled a “DECLARATION OF DECISION” and it “guarantees” money prizes for winners in the “Award Series IV.” It contains a list of people who are in the “Award Series IV,” including the person’s first initial and last name, “Amount” won, and status of payment. The email recipient is listed among the Award Series IV winners, some of which have a status of “Won & Paid” and others whom have a status of “Awaiting publicity release.” Listed next to the email recipient’s name is an “amount” of prize winning between \$300 and \$10,000,000 a status of “Pending.” At the bottom of the Awards Series IV list is a hyperlink that instructs the email recipient to “CLICK2CLAIM.”

[SCREENSHOTS]

32. After clicking on the “CLICK2CLAIM” hyperlink, the consumer is brought to a second web page that is identical to that which was described supra at paragraph __. In short, this web page requests that the consumer verify her personal identification number and prize payment information, including her name, address, phone number and the mode by which she would prefer to receive her prize winnings (check or electronic funds transfer). She is also directed to select numbers for future lottery games and to identify whether she prefers to visit the Lottery Website herself every day or if she would prefer the Lottery Website to pick her numbers automatically for her. Below the space reserved for selecting numbers for future lottery games there is a hyperlink that instructs the consumer to “CLICK TO VALIDATE.”

[SCREENSHOT]

33. After clicking on the CLICK TO VALIDATE hyperlink, the consumer is brought to a third web page that is identical to that which was described supra at paragraph ___. It requests that the consumer verify his or her credit card information. There is no disclosure adequate to overcome the impression that the credit card information submitted is part of the prize claim process.

34. It is also important to note that the email recipient is brought to this third web page and asked for her credit card information even if she checks the box next to “I prefer to visit Freelotto.com everyday” thereby indicating that she would not be interested in Plasmanet’s subscription service.

[SCREENSHOTS]

iii. *Emails from the Division of Unclaimed Funds*

35. These emails purport to be from or about the “Division of Unclaimed Funds, created by PNI [Plasmanet, Inc.] to locate individuals with eligible funds available to them.” The email claims that the monies listed “may be yours to claim. Review the official listing to the right to determine if you are eligible.” Like the emails described supra, the recipient’s name is listed next to an amount of money between \$300 and \$10,000,000 with a payment status of “PENDING” and her name appears among the names of people who have been “PAID.” At the bottom of the official list is a hyperlink that instructs the consumer to “CLICK TO CLAIM.”

[SCREENSHOT]

36. This email is particularly deceptive because while Plasmanet claims to have created the Division of Unclaimed Funds, the Federal government as well as all fifty states have

bureaus, divisions or agencies regarding unclaimed funds and property lending credibility to Plasmanet's so-called "Division of Unclaimed Funds." As discussed infra at paragraph __, given the similarity between Plasmanet's "Division of Unclaimed Funds," and those operated by state and federal governments, consumers have been misled into believing that New York State's Division of Unclaimed Funds was actually holding millions of dollars of winnings on their behalf.

- iv. The "Instant Bonus" Email
- v. The "Prize Claim" Email
- vi. "Form 7082A" Emails
- ii. *The "VIP Thank-You Certificate" Email*

C. Plasmanet's Emails Do Not Disclose Their Commercial Nature

37. As stated infra at paragraphs __, __, __ and __, there are no disclosures in the emails, nor on the web pages to which the email recipient is subsequently brought to, that indicate the commercial nature of the email or that override the impression that the email recipient has won a huge cash prize and that the submission of her credit card information is part of the prize claim process.

38. In response to a consumer complaint received by the OAG and provided to respondents, respondents identified one sentence at the bottom of one of their emails (as opposed to the subsequent web pages an email recipient is brought to) that they assert adequately discloses the advertising nature of their email and subsequent web pages that the consumer is led to. This sentence states:

"A number of pending winners listed above may be qualified to receive a check in the amount specified by verifying their PIN # on the following F.A.S.T. form, in conjunction submitting the winning entry in accordance

with FreeLotto rules, terms and conditions.”

39. In this particular email, which is annexed hereto as Exhibit ___, the sentence is buried in a paragraph below the list identifying the email recipient as a winner with a “PENDING” payment status. Other times, this sentence is well below the “CLICKTOCLAIM” hyperlink. See Exh. ___.

40. This statement utterly fails to disclose the commercial nature of the email or to dissuade the email recipient from believing she has won a huge cash prize and is merely in the process of claiming it. First and quite reasonably, email recipients have interpreted the term “pending winner” as meaning that they have already submitted the requisite “winning entry.” See infra at ____.

41. This statement also fails to disclose the price of using the required “F.A.S.T. form,” or that the “F.A.S.T.” service even has a cost. Because this statement does not indicate that the “F.A.S.T.” service is a paid service, this statement cannot seriously be considered a disclosure of the commercial nature of the email.

42. To make matters worse, this sentence conflicts with FreeLotto’s Terms and Conditions with respect to claiming a prize. In this sentence, respondents assert that the email recipient qualifies to receive a check by, in part, using a F.A.S.T. form to verify a PIN number. However, as respondents repeatedly point out, FreeLotto is “free to play,” and a player is never required to use a F.A.S.T. form to qualify for a prize. In fact, in the Terms and Conditions for respondents’ Lottery Websites, respondents dictate a very specific procedure for claiming a prize, none of which refer to use of the F.A.S.T. form or a subscription service. Moreover, in this sentence, respondents describe the F.A.S.T. form as necessary to “verify your PIN #,”

whereas in their Terms & Conditions they describe the F.A.S.T. form as one on which a player dictates to FreeLotto the numbers the player wants FreeLotto to play on his or her behalf.

43. In short, this statement does not disclose that the email is an advertisement for a subscription service. Rather, it leads the email recipient to believe that they have won a prize and directs them to a payment form under the mistaken belief that the recipient is claiming a prize. It leads the consumer to believe that the email recipient must use the F.A.S.T. service to claim this so called prize. (Letter from Plasmanet dated March 12, 2007 to Honorable John Lim, complaint number 619792 about how clear this statement is)

44. Plasmanet points to another statement as evidence of the adequately disclosed advertising nature of its emails. This one is on the web page on which a consumer submits her credit card information; the second web page the consumer is brought to after being identified as a winner of millions of dollars and directed to “CLAIM” her prize. This sentence states:

There is no better way to make sure that you never miss your chance to win over \$11,000,000.00 every day! Auto-Play, subject to only \$14.99 per month. (less than 9 cents per game!)

45. Of course, this statement alone does not dispel the notion that the email recipient is in the process of claiming her million dollar prize and, therefore, this statement does not adequately relay to the email recipient that they are actually in the process of paying for “Auto-Play” rather than claiming a huge cash prize.

46. Not incidentally, the term “Auto-Play” is not described anywhere on Plasmanet’s website or in the Terms and Conditions for any of its Lottery Websites. In all places except for this particular web page, Plasmanet refers to its subscription service as “F.A.S.T.” or the “FreeLotto Automatic Subscription Ticket,” not “Auto-Play.” Therefore, even if a enterprising

player sought to determine what exactly “Auto-Play” was, they would have no reason to conclude that the subscription service respondents’ offered was the “Auto-Play” service mentioned on this web page.

C. The Attorney General Has Received and Otherwise Obtained Consumer Complaints Regarding FreeLotto’s Deceptive Advertising Campaigns

47. Consumers who received emails from respondents after registering with a Lottery Website interpreted the emails as a notice of winning and not as an advertisement for a subscription service. For example, Karen Mims-Rice (Exh. ___) received an email from FreeLotto with the subject line “Mimsrice, Karen: Check #5621 Enclosed - Congratulations.” The email contained a picture of a check, made out to Karen Mimsrice in the amount of \$4,687.63. Beneath the picture of the check was a hyperlink that instructed Ms. Mims-Rice to “CLICK HERE TO CLAIM.” Ms. Mims-Rice submitted a complaint to the OAG seeking the \$4,000 plus dollars stated in the email. She states that the email “clearly states that I Won” and that the email “is clearly not an advertisement.”

48. Koichiro Imabayashi received an email from [“Winners@FreeLotto.com.”](mailto:Winners@FreeLotto.com) This email contained a list of people whose prize winnings have been “PAID” by Plasmanet or that are “PENDING.” Mr. Imabayashi’s name was on this list three times next to prize amounts of \$10,000 and \$1,000,000 and is identified as having a “PENDING” status. Based on this email, Mr. Imabayashi writes that “I have won one million dollars of jackpot. I have received a confirmation Email fo my winning one million dollars from Kevin J. Aronin, the CEO of Plasmanet.”

49. William Sireci of New York, New York received an email from FreeLotto Prize

Headquarters with a picture of check from the Division of Unclaimed Funds in the amount of \$1,000,000 made payable to William Sireci.

50. Even worse, Freelotto fails to cancel the Auto-Pay service for those consumers who request it, instead continuing to charge consumers' credit cards on a monthly basis for a service the consumer clearly does not want. **[christine Hiracheta, Ottawa, KS complaint]** Freelotto claims that its "promotion" is void in New York, however, according to emails Freelotto sent to this Office's undercover email accounts, see infra at ¶¶ _____, New Yorkers have been won Freelotto games and been paid prizes. In fact, the Attorney General and the **New York Police Department** have received complaints about Freelotto from New York based consumers.

51. Freelotto also purports to restrict New Yorkers from registering on the Freelotto.com website, however this restriction is completely superficial. On two occasions an Investigator with the Attorney General's Office attempted to register on Freelotto.com using a New York postal address. Although she was prohibited from registering with Freelotto using a New York postal address, she was not forbidden from registering – seconds later – using a false New Jersey postal address. In short, Freelotto makes no attempt to verify the postal addresses submitted by consumers during the registration process. Nor does it block the IP addresses of would-be registrants who tried to input a New York postal address during the registration process.

52. .

Dated: New York, New York
March 21, 2006

Karen A. Geduldig

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

-----X
**THE PEOPLE OF THE STATE OF
NEW YORK, by ANDREW CUOMO,
Attorney General of the State of New York,**

Petitioners,

-against-

**PLASMANET, INC. d/b/a FREELOTTO.COM,
FREELOTTOEZWIN.COM,
WORLDASHLOTTO.COM,
WINCASHNOW.COM and
CLICK2WIN.COM and KEVIN ARONIN
individually,**

**For an order pursuant to
CPLR § 2308(b)
compelling compliance with a
certain subpoena, dated
February 6, 2009, issued by
the Attorney General**

Index No.: _____

Respondents.
-----X

**MEMORANDUM TO ENFORCE SUBPOENA DUCES TECUM
AGAINST PLASMANET, INC., d/b/a FREELOTTO.COM, FREELOTTOEZWIN.COM,
WORLDASHLOTTO.COM, WINCASHNOW.COM and CLICK2WIN.COM and
KEVIN ARONIN, INDIVIDUALLY**

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**MEMORANDUM TO ENFORCE SUBPOENA DUCES
TECUM AGAINST PLASMANET, INC. *et al.***

The State of New York, by Attorney General Andrew Cuomo, submits this memorandum of law in support of its motion to enforce a subpoena *duces tecum* served on Plasmanet, Inc. d/b/a FreeLotto.com, FreeLottoEZWin.com, WorldCashLotto.com, WinCashNow.com, and Click2Win.com (collectively referred to as “Plasmanet”) on or near February 6, 2009.

Plasmanet owns and operates the website associated with the domain name WWW.FREELOTTO.COM. By registering with FreeLotto.com consumers have the opportunity play online lottery games and win cash and other prizes in exchange for viewing advertising on the website and in their email in-boxes. The Attorney General has received over 100 complaints about Plasmanet’s advertising and business practices and has had the opportunity to review hundreds more similar complaints received by the Better Business Bureau for the Greater Metropolitan Area and from the New York State Police Department. Due in part to this large volume of complaints the Attorney General commenced an investigation into, among other things, Plasmanet’s fraudulent, deceptive and illegal business and advertising practices in violation of New York General Business Law sections 349 and 350, the penal law, and Executive Law section 63(12).

In the course of this investigation, the Attorney General issued a subpoena *duces tecum* on Plasmanet on or near February 6, 2009 with a deadline of February 17, 2009 (the “February 2009 subpoena”). The February 2009 subpoena has seven (7) requests for documents; the first four (4) of which seek tax records, financial statements, and documents that underlie representations made by Plasmanet during the course of the Attorney General’s investigation concerning its revenue.

The Attorney General seeks the information called for by the first four (4) document requests in order to define the scope of Plasmanet's fraudulent, deceptive and illegal business practices and the injury borne by the public and to verify which of the differing representations made by Plasmanet during the course of the investigation are correct. Although Plasmanet had agreed to produce this information, to date, it has refused to produce documents responsive to the first four (4) document requests in the February 2009 subpoena. The Attorney General is thus compelled to make the instant motion.

STATEMENT OF FACTS

Plasmanet is a Delaware corporation with its principle place of business at 420 Lexington Avenue, Suite 2435, New York, New York 10170. *See* Affirmation of Karen A. Geduldig, dated June 30, 2009 (hereinafter "Geduldig Aff."), ¶ 4. Since 1999, Plasmanet has owned and operated the domain name FREELOTTO.COM, a website which offers consumers the opportunity to win cash and other prizes in online lottery games in exchange for viewing advertising. Geduldig Aff., ¶ 4. More specifically, consumers who play lottery games on the FreeLotto.com website must agree to (i) respond to advertising on the FreeLotto.com website; and (ii) receive email advertising at their valid, functioning email address. Geduldig Aff., ¶ 5. In addition, FreeLotto.com users can play the lottery games without viewing *email* advertising if they subscribe to a service offered by Plasmanet that costs \$14.99 per month.¹ Geduldig Aff., ¶ 5. This service is called the "FreeLotto Automatic Subscription Ticket" or "F.A.S.T." Geduldig Aff., ¶ 5. Since 2001, F.A.S.T. subscriptions have accounted for more than \$56 million in revenue. Geduldig Aff., ¶ 5.

The Attorney General has received over one hundred complaints about Plasmanet's business and advertising practices and has reviewed nearly two hundred more from the Better

¹ Users who subscribe to this service must still respond to advertising on the FreeLotto.com website.

Business Bureau of Metropolitan New York and the New York State Police Department combined. Geduldig Aff., ¶ 6. The Attorney General commenced an investigation which revealed that consumers who register with FreeLotto.com do receive emails from Plasmanet, which allegedly advertise Plasmanet's F.A.S.T. service. Geduldig Aff., ¶ 6. According to the Attorney General's investigation these email advertisements do not appear to be advertisements for F.A.S.T. but rather they appear to notify the recipient that they have won a lottery game and direct the recipients to click on various hyperlinks to claim their prizes. The Attorney General found that while the recipient is led to believe that they are in the process of claiming a prize they are actually subscribing to Plasmanet's for-pay F.A.S.T. service. Geduldig Aff., ¶ 7. Among other things, the Attorney General is investigating whether the \$56 million Plasmanet earned from F.A.S.T. subscriptions was generated by way of deceptive email advertisements to the public's detriment.

The Attorney General's investigation has also indicated that Plasmanet uses deceptive and fraudulent banner advertisements or "banner ads"² to drive consumers to register with the FreeLotto.com website. The only way Plasmanet actively solicits consumers to register with FreeLotto.com is via banner ads that it designs and places on webpages and advertising networks. Since February 2007 the majority of these ads unequivocally state that the consumer viewing the ad has, in fact, already won a prize (the "YOU WON! Ads"):

[screen shot of samples of Plasmanet banner ads]

See Geduldig Aff., ¶¶ 8-9.

The investigation has revealed that these consumers have not already won anything. In order to collect anything from Plasmanet the viewing consumer must first: (i) register with

² Banner ads are online advertisements, typically a graphic image, positioned in a specific place on a webpage.

FreeLotto and provide personal information to Plasmanet, (ii) agree to receive commercial email advertising from Plasmanet and other third-parties at the consumer's functioning email address, (iii) respond to third-party advertising on the FreeLotto.com website, and, in some cases, (iv) supply Plasmanet with identifying documentation. Geduldig Aff., ¶ 10. Plasmanet has represented it that has earned over \$85 million in advertising revenue between 1999 and July 2007; a number which was confirmed under oath by Plasmanet's President and Chief Executive Officer. Geduldig Aff., ¶ 10. Among other things, the Attorney General is investigating whether the \$85 million Plasmanet earned from users clicking on banner ads was generated by way of deceptive banner advertisements.

During his investigation the Attorney General has been extremely flexible with regards to requests for information and documents. For example, in or near April 2008 the Attorney General advised Plasmanet of his intent to subpoena the testimony of Plasmanet's President and Chief Executive Officer, Kevin Aronin, and its Chief Marketing Officer, Anne Stephens pursuant to his authority under Executive Law section 63(12). Geduldig Aff., ¶ 11. Plasmanet requested that, in lieu of this testimony, the Attorney General issue informal requests for information and documents and seek this testimony only if the documents and information produced were insufficient. Geduldig Aff., ¶ 11. The Attorney General agreed and made requests for information and documents by letter dated April 22, 2008. Geduldig Aff., ¶ 11. Plasmanet's responses were insufficient and the Attorney General issued subpoenas ad testificandum to Mr. Aronin and Ms. Stephens. Geduldig Aff., ¶ 11. He ultimately agreed to only take testimony from Mr. Aronin over the course of two days in October 2008. Geduldig Aff., ¶ 11. During those two days of testimony, the Attorney General made several requests on the record for documents and information, including full tax returns, which Mr. Aronin agreed to

provide under oath. Geduldig Aff., ¶ 11. These requests were set forth in a letter dated October 29, 2008 and included requests for financial statements, tax records, and documents that would substantiate the company's advertising revenue from 1999 to the present; the very documents that had been requested in the Attorney General's April 22, 2008 informal letter request and which Plasmanet had agreed to produce during Mr. Aronin's testimony. Geduldig Aff., ¶ 11.

Such flexibility notwithstanding and despite the company's agreement to provide the very records at issue, Plasmanet continues to withhold tax and financial documents. Instead, Plasmanet continues to offer what the Attorney General finds to be insufficient, incomplete or contradictory information about the profitability of its advertising practices. For example:

- Plasmanet has represented that from June 1999 to July 2007, it earned \$85,548,453 in gross advertising revenue, a figure confirmed, under oath, by Mr. Aronin. *See* Geduldig Aff., ¶ 14.
- Later, Plasmanet represented that from 2002 through 2007 it earned \$5,900,871 in gross advertising revenue. The Attorney General found incredible that Plasmanet, in its infancy, earned over 90% – nearly \$80 million – of its gross advertising revenue, particularly since Mr. Aronin testified, under oath, that Plasmanet's per-click earnings from advertising are “more significant now-a-days than when I started the business back in '99.” *See* Geduldig Aff., ¶ 14.
- In an attempt to explain away this abnormal discrepancy in advertising revenue, Plasmanet baldly asserted that it was attributed to the “virtual collapse of the internet advertising market.” When asked for more detail as to the effect this “virtual collapse” had on Plasmanet's earnings, Plasmanet again baldly stated that the difference in profits was due to the “profound fall off in internet advertising revenue.” *See* Geduldig Aff., ¶ 14.
- Still later, Plasmanet attempted to correct its earlier representation that it earned \$5.9 million in *gross* advertising revenue between 2002 and 2007. It stated that it failed to incorporate revenue vaguely referred to as “other net advertising revenue components” and that the company actually earned roughly \$9.1 million in *net* advertising revenue during that time. *See* Geduldig Aff., ¶ 14.

At present, Plasmanet has made two vastly different representations about its advertising

income for the past five years and has made contradictory characterizations about its advertising earnings since 1999. In order to properly assess the issues relevant to the Attorney General's investigation into allegedly illegal conduct and, accordingly, to assess the claims of this State without resort to further delay and continued uncertainty, the Attorney General served the February 2009 subpoena on Plasmanet to obtain the financial documents that underlie the company's representations and testimony. *See Geduldig Aff.*, ¶ 15. Service of that subpoena was accepted on behalf of Plasmanet by its counsel and Plasmanet responded in part and objected in part. *See Geduldig Aff.*, ¶ 15. To date, Plasmanet has refused to produce documents in response to the first four (4) requests for documents in the February 2009 subpoena. This motion follows.

ARGUMENT

THE FEBRUARY 2009 SUBPOENA IS VALID AND THE COURT SHOULD COMPEL PLASMANET'S COMPLIANCE WITH IT

The Attorney General is the chief consumer advocate in the State of New York. He is granted broad authority to conduct investigations into allegedly illegal acts in the conduct of business in New York. *See, e.g., La Belle Creole Intl., S. A. v. New York*, 10 N.Y.2d 192, 197, 176 N.E.2d 705, 707-08, 219 N.Y.S.2d 1, 5 (1961). As part of this broad authority to investigate allegedly fraudulent and illegal acts, the Attorney General is authorized to serve subpoenas and take testimony. *See N.Y. Executive Law § 63(12)*. *See also Weiner v. Abrams*, 119 Misc. 2d 970, 974, 464 N.Y.S.2d 919, 921-22 (Sup. Ct. Kings Co. 1983) (holding that the Attorney General has authority under Executive Law section 63(12) to issue investigatory subpoenas).

When enforcing his investigatory authority the Attorney General enjoys a presumption that "he is acting in good faith and must show only the materials sought [by subpoena] bear a reasonable relation to the subject under investigation and to the public purpose to be achieved."

La Belle Creole Intl., S. A., 10 N.Y.2d at 196, 176 N.E.2d at 707, 219 N.Y.S.2d at 4-5. *See also Abrams v. Thruway Food Market & Shopping Center, Inc.*, 147 A.D.2d 143, 146, 541 N.Y.S.2d 856, 858 (2d Dep't 1989) (same); *Weiner*, 119 Misc. 2d at 974-75, 464 N.Y.S.2d at 922 (same). "Unless the subpoena calls for 'documents which are utterly irrelevant to any proper inquiry' . . . or its 'futility . . . to uncover anything legitimate is inevitable or obvious', the courts will be slow to strike it down." *LaBelle Creole Intl., S.A.*, 10 N.Y.2d at 196-97, 176 N.E.2d at 707, 219 N.Y.S.2d at 4-5 (quotations omitted).

Based in part on the hundreds of consumer complaints the Attorney General has reviewed and on its own undercover investigations, the Attorney General is investigating Plasmanet to determine whether or not it and its principal have engaged in repeated and persistent unlawful and deceptive business practices, false advertising and other illegality in violation of New York General Business Law sections 349 and 350, the New York penal law and New York Executive Law section 63(12). As a result of his investigation the Attorney General believes that well over \$100 million of revenue is attributed to Plasmanet's false and misleading advertising and illegal business practices. Plasmanet's revenues will define the scope of Plasmanet's fraudulent and illegal activity and correlates to the public's injury. As such, Plasmanet's revenues are reasonably related to the Attorney General's investigation and to the public purpose sought to be achieved.

Moreover, over the course of the investigation Plasmanet has made different assertions of its profits over the past five years and has made different characterizations as to its advertising revenue since 1999. The Attorney General is assessing the State's claims in good faith. In doing so, he cannot justifiably rely on the representations of a source that is remotely questionable. The tax and financial documents will provide the Attorney General with the neutral means

needed to assess and possibly compromise the public's claims in good faith, further supporting enforcement of the February 2009 subpoena.

Plasmanet, however, maintains that document requests one (1) through (4) are “unwarranted and unlawful” and it refuses to produce the requested documents. Geduldig Aff. At Exhibit ___. Plasmanet cites to some cases to allegedly support its position that the Attorney General must articulate some higher standard when he subpoenas financial documents pursuant to his investigatory authority. Geduldig Aff. At Exhibit ___. Not one of these cases addresses the Attorney General's investigatory authority under Executive Law section 63(12) and certainly none of them support Plasmanet's position that the Attorney General's statutory investigatory authority is somehow curtailed when it comes to his seeking financial documents. *See* Geduldig Aff. At Exhibit _ (letter from Plasmanet's attorney listing cases); *Nanbar Realty Corp. v. Pater Realty Co.*, 242 A.D.2d 208, 210, 661 N.Y.S.2d 216 (1st Dep't 1997) (analyzing discovery requests made by private parties in a private litigation); *Matthews Indus. Piping Co. v. Mobil Oil Corp.*, 114 A.D.2d 772, 495 N.Y.S.2d 35 (1st Dep't 1985) (same); *Britton v. Knott Hotel Corp.*, 111 A.D.2d 62, 62, 489 N.Y.S.2d 186, 187 (1st Dep't 1985) (same); *Giuliano v. Hunts Point Coop. Mkt., Inc.*, 56 A.D.2d 909, 909, 392 N.Y.S.2d 850 (2^d Dep't 1977) (same); *see also Slate v. State*, 267 A.D.2d 839, 699 N.Y.S.2d 824 (3^d Dep't 1999) (analyzing discovery requests made during an affirmative litigation).

This is not a civil action among private parties. This is an investigation undertaken by the chief legal officer of the State of New York to determine whether or not Plasmanet and its principal have defrauded consumers and otherwise engaged in ongoing fraudulent and deceptive business practices, false advertising, and other illegality within the State. To restrict the Attorney General's investigatory authority as Plasmanet proposes would defy settled law and

would paralyze the Attorney General's authority to investigate illegality and other wrongdoing. *See, e.g., LaBelle Creole Intl., S.A.*, 10 N.Y.2d at 196-97, 176 N.E.2d at 707, 219 N.Y.S.2d at 4-5 (“Investigation will be paralyzed if arguments as to materiality or relevance, however appropriate at the hearing, are to be transferred upon a doubtful showing to the stage of a preliminary contest as to the obligation of the writ.”) (quotations omitted).

The case law is clear that the Attorney General need not articulate a higher standard to justify a non-judicial, investigatory subpoena for tax and financial documents. The Attorney General has, nevertheless, satisfied this standard as he has “ma[d]e a strong showing of necessity and desirability.” *See Geduldig Aff.* at Exhibit __, p. 2. As set forth above, Plasmanet earns revenue from F.A.S.T. subscriptions and from consumers clicking on banner ads on the FreeLotto.com website. *See supra* at pp. __, *Geduldig Aff.*, ¶¶ __ - __. The Attorney General understands that both of those revenue streams derive from repeated and persistent fraudulent, deceptive and illegal business practices. Therefore, Plasmanet's earnings directly correlate to the injury borne by the public and also serve to define the scope of Plasmanet's fraudulent and illegal activities making Plasmanet's financial records a necessary part of the Attorney General's investigation.

The Attorney General attempted to obtain this financial information from other sources without resort to tax and other financial records. He accepted initial statements made by Plasmanet and its President and Chief Executive Officer about the company's advertising revenue from 1999 to the present. Plasmanet, however, has since contradicted those statements and the more Plasmanet attempts to explain away these contradictions the more incredible and contradictory the company's statements about revenue have become. For example, Plasmanet has maintained that over 90% of its advertising revenue – roughly \$80 million – was earned in

the company's first three years, an assertion which defies logic particularly when Plasmanet's Chief Executive Officer testified, under oath, that Plasmanet's per-click earnings from advertising are "more significant now-a-days than when I started the business back in '99." *See Geduldig Aff.*, ¶ 14. The Attorney General requested clarification on this point which, to date, Plasmanet has refused to provide. *See Geduldig Aff.*, ¶ 14.

Similarly, Plasmanet has now provided the Attorney General with two wildly different assessments of its advertising revenue over the past five years claiming first that it earned \$5.9 million in gross advertising revenue and then later "correcting" that number to \$9.1 million in net advertising revenue. *See Geduldig Aff.*, ¶ 14.

The Attorney General has identified Plasmanet's revenue as necessary to his assessment of the State's claims. He has attempted to obtain this information outside of tax records and other financial documents to no avail. He has been consistently flexible with Plasmanet by adjourning the taking of testimony and by accepting documents and statements informally. To the contrary, Plasmanet has refused to provide any detail regarding the company's erratic earning pattern and has made conflicting representations about its revenues. In doing so, Plasmanet has undermined its own credibility and put it at issue. The Attorney General cannot assess or compromise claims of the State based on the company's questionable statements and motives. Rather, he must obtain neutral documentation. The Attorney General has, therefore, established that the documents called for in the February 2009 subpoena are not only reasonably related to the investigation at hand and the public purpose to be achieved, but are also extremely necessary and desirable. He, therefore, seeks an order compelling Plasmanet's compliance with the February 2009 subpoena pursuant to New York Civil Practice Law and Rule section 2308(b).

CONCLUSION

For the foregoing reasons, this Court should grant the Attorney General's motion to compel compliance with its subpoena served on Plasmanet on or near February 6, 2009.

Dated: New York, New York
June 30, 2009

Respectfully submitted,

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