

ATTORNEY GENERAL OF THE STATE OF NEW YORK
INTERNET BUREAU

IN THE MATTER OF:

TAGGED, INC.

ASSURANCE OF DISCONTINUANCE

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 Tagged, Inc. ("TAGGED"). Based upon that inquiry, the OAG concludes as follows:

FINDINGS OF ATTORNEY GENERAL

1. TAGGED has engaged in deceptive practices and illegal activity in its operation of a social networking website. Between April and June 2009, TAGGED tested and executed a deceptive email solicitation campaign in a bid to register new members. The company sent out over 60 million messages to individuals falsely stating that someone had requested to share pictures with them in order to lure new members to join TAGGED. TAGGED's deceptive practices violated, *inter alia*, New York General Business Law §§ 349 and 350, New York Civil Rights Law § 50, and New York Executive Law § 63(12).

Background

2. Social networking sites, such as Facebook, MySpace, Twitter, and TAGGED are internet websites that allow individual users to create personal webpages, or "profiles," to share with others. Member profiles typically include a variety of personal information, such as favorite

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books and movies, and often include pictures of family and friends. Active members update their profiles regularly — often daily — with personal details, pictures, and videos of their most recent activity.

3. Many social networking sites only allow members of the sites to view others' profiles. Thus, a non-user of Facebook.com could see only very basic information about a Facebook member's profile page (such as a profile picture and where that person went to school), but could see more detailed information upon joining the site as a Facebook user. Additionally, many social networking sites allow users to share more information with other users who have confirmed each other to the site as "friends" or "contacts."

4. For this reason, most social networking sites provide a feature whereby members of the site can invite others to join the site (and/or become "friends" or "contacts" on the site) in order to obtain access to the member's profile page (as well as other profile pages on the site). Typically, a member provides the email addresses of the persons she wishes to invite, and the site sends out invitation emails on the individual's behalf. The recipient of the invitation email then can decide whether to join the social networking site, become a "friend" or "contact" of the inviting person, view that person's content on the site, and/or create her own profile page and content on the site.

5. TAGGED is a Delaware corporation with its principal office located in San Francisco, California. TAGGED owns and operates the website Tagged.com, reported as the third largest social networking site in the world, and claims over 80 million members.

TAGGED's Deceptive Invitation Practices

6. Between April 16, 2009 and June 7, 2009, TAGGED's email invitation feature operated in a deceptive and illegal manner. As outlined below, TAGGED accessed the email address books of many visitors to the site without clear and conspicuous disclosure or permission from the visitors to send false and deceptive email solicitations to the visitors' contacts. These emails went sent using the name — and sometimes the picture — of persons who registered at the TAGGED site in order to lure new people to join TAGGED. Between April 16, 2009 and June 7, 2009, TAGGED sent over 60 million deceptive email solicitations to the contacts of persons who registered at the TAGGED site.

7. Prior to April 16, 2009, the email invitations sent by TAGGED read “[name] has added you as a friend on Tagged.” A user who clicked on a link in the email would be directed to the Tagged.com website, where she could register to see her friend's page, or create her own profile and upload content.

8. On April 16, 2009, TAGGED began testing deceptive variations to this invitation message in order to increase recipient response rate. In particular, TAGGED started to send invitation messages that falsely stated or intimated that a person who had signed up at Tagged.com had sent photos to the recipient that could be viewed on the TAGGED site. TAGGED experimented with at least 17 different subject lines between April 16, 2009 and June 3, 2009 including:

[name] sent you a photo on Tagged :)

[name] sent you private pics on Tagged :)

[name] sent you a private image on Tagged :)

[name] sent you a photo on Tagged – open this email to see it!

9. Additionally, the message body of these new invitation emails made similar false statements, such as “[name] sent you private photos” and “Want to see [name]’s photos?” Each of these new emails also contained a box for the recipient to click “yes” or “no” in response to whether she wanted to view the pictures. The message further added, “Please respond or [name] may think you said no :(”, despite the fact that the visitor did not affirmatively send photos to the recipient. The message also contained a blue dialog box that stated “Click Yes if you want to see the photos, otherwise click No. But you have to click!” This statement was untrue, as the viewer of the message was not required in any sense to interact with the deceptive email message.

10. These emails were designed to convey the impression that a person had added personal photos to TAGGED’s site and had specifically intended to ask the recipient to view the photos. In reality, however, TAGGED generated the email invitation automatically without regard to whether the person had ever uploaded photographs to Tagged.com or intended to share them with her contacts. The messages also played on the emotions of the recipient, falsely suggesting that their friend’s feelings might be hurt if they did not visit the Tagged.com site to view the “photos.”

11. Although the emails were generated by email servers owned and operated by TAGGED, TAGGED input the name and personal email address of the person who had registered at Tagged.com in the “from” field of each email. Because many email programs only list this “from” field (as opposed to the actual sending address), some contacts saw the deceptive message as coming from the name of the Tagged registrant and the registrant’s personal email account, e.g., Jane Doe (jane.doe@gmail.com), as opposed to Tagged.com. Additionally, if during the required registration process the person had added a “profile picture” to Tagged.com

(as TAGGED invited all registrants to do), the deceptive invitation email also contained the profile image of that person on the Tagged.com site.

12. Many visitors to the Tagged.com site did not intend to authorize TAGGED to send any email invitations to their contacts, let alone ones that were deceptive in nature. Visitors to the TAGGED site were asked to sign up to view content on the site. TAGGED also asked visitors for their email address along with the password to the email account (other times, when a user was already logged onto her email account, TAGGED simply asked permission to access the email account to search for contacts). Visitors who clicked "Next" as a default to subsequent questions in many cases inadvertently authorized Tagged to send invitation emails to everyone in their email contact lists. As Tagged itself subsequently admitted, "Simply put, it was too easy for people to quickly go through the registration process and unintentionally invite all their contacts."

13. Due to the deceptive nature of the new invitation emails, a considerably higher proportion of recipients responded to the emails by visiting the Tagged.com website than to the previous invitation emails. During the test period between April 16, 2009 and June 3, 2009, TAGGED sent out over 20 million deceptive invitation emails. Because the initial test period was so successful in getting new persons to sign up for TAGGED's site, on June 3, 2009, TAGGED decided to make the deceptive photo-sharing email the format for all invitation emails. Between June 3, 2009 and June 7, 2009 when the company ceased the deceptive campaign, TAGGED sent over 21 million additional deceptive email invitations.

14. In addition to these deceptive photo invitation emails, TAGGED sent additional deceptive emails as well. On May 29, 2009, TAGGED instituted a protocol whereby persons

who had received a previous invitation email from the company and signed up for the TAGGED site would receive an additional "Welcome" message designed to appear as if it had been initiated by the person in whose name the invitation had been sent. This deceptive message contained the subject header "[name] sent you a message..." and the body of the message stated: "You have a new message! [name] says: Check out these photos! ...". The recipient was directed to "View message!" by a large orange button.

15. TAGGED sent these deceptive welcome messages to its registrants' contacts even though the registrants had not, in fact, sent any message to their contacts, and regardless of whether they uploaded pictures or images to the Tagged.com website for sharing.

16. If an email recipient did not respond to the initial photo invitation within a prescribed period of time (between one and three days), TAGGED began to send periodic "Reminder" emails such as:

17. Like the deceptive invitation emails, the reminder emails listed the name of the registrant and her personal email address in the "from" field of the email message, and included the profile image of the registrant if she had uploaded such an image.

18. Before ending the use of these deceptive invitation and reminder emails on June 7, 2009, TAGGED sent over 42 million deceptive invitations and over 18 million deceptive reminder messages.

19. Nowhere on its website or elsewhere did TAGGED provide clear and conspicuous disclosure to persons who signed up that these deceptive email message would be sent in their names and using their images, nor did TAGGED receive consent to send these messages.

STATUTORY VIOLATIONS

20. The OAG finds that by engaging in the practices described in Paragraphs 1 through 19 above, TAGGED violated New York General Business Law §§ 349 and 350, New York Civil Rights Law § 50, and New York Executive Law § 63(12).

21. WHEREAS, TAGGED neither admits nor denies the OAG's Findings described in Paragraphs 1-19 above;

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

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

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

AGREEMENT

25. This Assurance of Discontinuance (hereinafter "Assurance") shall apply to Tagged, Inc., whether acting through its principals, officers, shareholders, employees, representatives, agents, assigns, successors, parent or subsidiary or other business entities, whose acts, practices or policies are directed, formulated or controlled by TAGGED.

26. 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 readily noticed and understood by the person to whom it is being disclosed. If such statement is necessary as a modification, explanation, or clarification to other information with which it is presented, it must be presented in close proximity to the information it modifies, in a manner so as to be readily noticed and understood. In addition to the foregoing,

in interactive media, the disclosure shall also be unavoidable, and shall be presented prior to the consumer incurring any financial obligation.¹

27. Before accessing any person's electronic mailboxes maintained as part of the person's use of a third party email service (such as Hotmail, Gmail, or Yahoo! Mail) and/or third party software (such as Microsoft Outlook or Mozilla Thunderbird) ("third party electronic mailboxes"), including contacts stored within third party electronic mailboxes, TAGGED shall clearly and conspicuously disclose to the person that TAGGED intends to access that person's third party electronic mailbox, and TAGGED shall receive the person's affirmative consent before accessing that person's third party electronic mailbox.

28. When proposing to access any person's third party electronic mailboxes in order to import that person's electronic mail contacts into TAGGED's databases, TAGGED shall label the consent button "Import" or in other clear language that gives notice that clicking the button will allow TAGGED to access that person's third party electronic mail contacts; however, to the extent that TAGGED has previously entered into a binding contract with a third party email service provider limiting what TAGGED can label the consent button when TAGGED proposed to access said third party email service provider's electronic mailboxes in order to import electronic mail contacts into TAGGED's databases, TAGGED may label the consent button "Find [third party email service] Friends" or in other clear language that gives notice that clicking the button will allow TAGGED to access that person's third party electronic mail contacts.

29. When proposing to access any person's third party electronic mailboxes, TAGGED shall offer that person the opportunity to decline such access. In doing so, TAGGED

¹ The definition of "clearly and conspicuously" shall be interpreted in accordance with Federal Trade Commission

shall provide a button reading "Skip" or "Decline" or in other clear language that denotes that the person does not wish to share the contacts of her electronic mailbox with TAGGED. Such button shall be of equal or greater size as the "Import" button (described in paragraph 28) or other buttons associated with the import process and shall be placed as prominently and in close proximity to the "Import" or other action buttons associated with the import process.

30. When sending invitations, reminder messages, or any other messages using the name, email address, profile name, or other identifier associated with a person, TAGGED shall label the consent button "Invite" or "Send Message" or in other clear language that gives notice that clicking the button will result in invitations or messages being sent in her name.

31. Before sending pre-generated invitation messages, pre-generated reminder messages, or any other pre-generated messages to a pre-checked contact list using the name, email address, profile name, or other identifier associated with a person, TAGGED shall offer that person the opportunity to decline to send such invitation or message. In doing so, before sending such invitations or messages, TAGGED shall provide a button reading "Skip" or "Decline" or in other clear language that denotes that the person does not wish to send such invitation or message. Such button shall be of equal or greater size as the "Invite" or "Send Message" (described in paragraph 30) or any other action buttons associated with the invitation or message sending process and shall be placed as prominently and in close proximity to the "Invite" or "Send Message" or other such action buttons.

32. Before sending pre-generated invitation messages, pre-generated reminder messages, or any other pre-generated messages to a pre-checked contact list using the name,

guidance and case law interpreting that phrase.

email address, profile name, or other identifier associated with a person, TAGGED shall also pop up a dialog box or redirect to a separate webpage reading "Are you sure you want to send this message to your contacts?" or in other clear language designed to ensure that the person intends to send such invitation or message. Such dialog box shall offer the person the options to either send the message or invitation, or to cancel sending the invitation or message.

33. Before sending pre-generated invitation messages, pre-generated reminder messages, or any other pre-generated messages to a pre-checked contact list using the name, email address, profile name, or other identifier associated with a person that also include a photograph or other depiction of the person (such as a profile picture) and/or the person's electronic mail address, TAGGED shall clearly and conspicuously disclose to the person on any page where a person can affirmatively consent to such invitation or message being sent that the invitation and/or message will contain her photograph and/or electronic mail address.

34. Before sending pre-generated invitation messages, pre-generated reminder messages, or any other pre-generated messages to a pre-checked contact list using the name, email address, profile name, or other identifier associated with a person, TAGGED shall add a clearly and conspicuously identified link to a page where the person can see a sample form of the invitation or message, including how the person's name, email address, profile name, other identifier, or photograph would be used.

35. Before sending pre-generated invitation messages, pre-generated reminder messages, or any other pre-generated messages to a pre-checked contact list using the name, email address, profile name, or other identifier associated with a person, and when TAGGED as a default pre-selects all or some of the person's electronic mail contacts to receive the invitation

or message, TAGGED shall offer the person the opportunity to de-select all contacts at once as recipients of such invitation or message by providing a button reading "Clear All" or in other clear language that denotes that the person intends to de-select all contacts as recipients of such invitation or message.

36. TAGGED shall immediately cease and desist the use of deceptive and confusing subject headers and message bodies in all invitation emails, reminder emails, and other messages sent by TAGGED where the language of the email was authored by TAGGED.

37. TAGGED shall not include language on any invitation or reminder emails stating or suggesting that the recipient's failure to accept the invitation, join TAGGED, or otherwise respond to the invitation email or message shall be communicated to the inviting person whenever such language would be false.

38. TAGGED shall issue a copy of this Assurance to any person involved in the creation or approval of invitation email language at TAGGED.

39. TAGGED shall offer a reasonably simple and accessible mechanism on the Tagged.com website for any person who had previously registered with the website to cancel her membership with TAGGED.

40. TAGGED shall maintain any and all documents (including without limitation emails and other electronic documents) relating to the language of pre-generated invitation emails and related welcome and reminder messages and any complaints it received regarding its email invitation campaign as discussed herein for a period of two (2) years from the date of this Assurance.

41. TAGGED shall designate an officer at the company responsible for ensuring

compliance with the terms of this Assurance. Within forty-five (45) days of the execution date of this Assurance, TAGGED shall provide to the OAG an affidavit confirming that TAGGED has adopted practices and procedures and have taken the steps identified herein to ensure compliance with each and every term of this Assurance. TAGGED agrees to cooperate fully, and supply any documentation requested by the OAG to ensure complete compliance with each and every term of this Order.

42. In consideration of the making and execution of this Assurance, and within ten (10) business days of entry of the Execution Date of this Assurance, TAGGED agrees that it shall tender by wire transfer, certified check, or bank check payable to the State of New York \$500,000, in penalties and costs, and delivered to:

Andrew M. Cuomo
Attorney General of the State of New York
120 Broadway
New York, New York 10271
Attention: Chief, Internet Bureau

43. Any payment and all correspondence relating to this Assurance must reference "Assurance # 09-160."

44. Nothing contained in this Assurance shall be construed to alter, change, modify or enhance any existing legal rights of any consumer or to deprive any person or entity of any existing private right under the law. Nothing in this Assurance shall in any way affect, restrict, or otherwise govern any rights of recourse TAGGED may have or seek to assert against any third party.

45. 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 TAGGED by the Attorney General.

46. Nothing contained herein shall be construed as relieving TAGGED 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.

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

48. TAGGED 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. TAGGED 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 TAGGED's (i) testimonial obligations or (ii) right to take legal or factual positions in litigation or other legal proceedings to which the OAG is not a party. 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 TAGGED.

49. The OAG has agreed to the terms of this Assurance based on, among other things, the representations made to the OAG by TAGGED and its counsel and the OAG's own factual investigations set forth in paragraphs 1-19 above. To the extent that any material representations are later found to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

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

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 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 the OAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of the OAG.

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

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

56. The OAG finds the relief and agreements contained in this Assurance appropriate and in the public interest. The OAG is willing to accept this Assurance pursuant to Executive Law § 63(15) in lieu of commencing a statutory proceeding. This Assurance shall be governed by the State of New York without regard to any conflict of law principles.

WHEREFORE, the following signatures are affixed hereto this 6th day of November, 2009

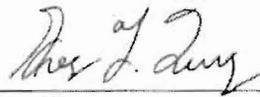
ANDREW CUOMO
NEW YORK ATTORNEY GENERAL
INTERNET BUREAU



By: Michael Berlin

Deputy Attorney General
for Economic Justice
Office of the New York State
Attorney General
120 Broadway
New York, New York 10271
(212) 416-8085

TAGGED, INC.



By: Greg Tseng

Chief Executive Officer, Tagged, Inc.