

1 ROBERT L. NELSON (SBN 57887)
Nelson & Weinkauf
2 35 Mitchell Blvd, Suite 15
San Rafael, CA 94903
3 Telephone: (415) 479-1911
Fax: (415) 479-1909
4

5 Attorney for Defendants,
TRANCOS, INC., BRIAN NELSON, and
LAURE MAJCHERCZYK
6
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8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SAN MATEO

10 DANIEL L. BALSAM, an individual,
11
12 Plaintiff,

13 vs.

14 TRANCOS, INC., a California corporation;
15 LEWIS J. WRIGHT, an Individual; BRIAN
NELSON, an Individual; LAURE
16 MAJCHERCZYK, an Individual;
17 AD SPONSORS LLC, an Oklahoma limited
liability company;
18 CASHONLINEAMERICA.COM LLC, a New
York limited liability company;
19 AFFILIATENETWORK.COM LLC, a New
York limited liability company;
20 AFFILIATENETWORK.COM MARKETING
21 LLC, a New York limited liability company;
22 EHARMONY.COM INC., a California
corporation; QUINSTREET INC., a California
23 corporation; STRATEGIC FINANCIAL
PUBLISHING INC., an Indiana corporation;
24 and DOES 1-100,

25 Defendants.
26

Case No. CIV471797

NOTICE OF MOTION AND MOTION
FOR JUDGMENT ON THE PLEADINGS
BY DEFENDANTS TRANCOS, INC.,
BRIAN NELSON, AND LAURE
MAJCHERCZYK

Date: August 10, 2009
Time: 9:00 AM
Dept: Law and Motion

Complaint filed on April 4, 2008
Trial Date: October 13, 2009

MOTION TO STAY/CONTINUE THE
ACTION UNTIL THE CERTIFIED
QUESTION IN *KLEFFMAN* IS DECIDED
BY THE CALIFORNIA SUPREME
COURT FILED CONCURRENTLY
HEREWITH

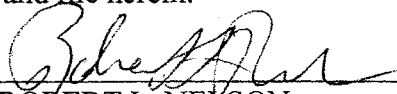
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1 To Plaintiff DANIEL L. BALSAM and to his attorneys of record:

2 NOTICE IS HEREBY GIVEN that, on August 10, 2009, at 9:00 AM, or as soon
3 thereafter as the matter may be heard, in the Law and Motion Department of this court, located at
4 400 County Center, Redwood City, California, Defendants TRANCOS, INC., BRIAN NELSON,
5 and LAURE MAJCHERCZYK, will, and hereby do, move pursuant to Code of Civil Procedure
6 Section 438 for entry of judgment on the pleadings in favor of Defendants TRANCOS, INC.,
7 BRIAN NELSON, and LAURE MAJCHERCZYK and against Plaintiff DANIEL L. BALSAM.
8 The motion will be made on the ground that the complaint does not state facts sufficient to
9 constitute a cause of action.

10 The motion will be based on this notice of motion, on the supporting memorandum
11 served and filed herewith, and on the records and file herein.

12 Dated: July 15, 2009



ROBERT L. NELSON
Attorney for Defendants,
Trancos, Inc., Brian Nelson, and
Laure Majcherczyk

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and DOES 1-100,
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26 Defendants.

Case No. CIV471797

**MEMORANDUM OF POINT AND
AUTHORITIES IN SUPPORT OF
MOTION FOR JUDGMENT ON THE
PLEADINGS BY DEFENDANTS
TRANCOS, INC., BRIAN NELSON, AND
LAURE MAJCHERCZYK**

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312 F.Supp.2d 1285, 1303 (S.D.Cal. 2003) 2, 14

1 Defendants, TRANCOS, INC., BRIAN NELSON, AND LAURE MAJCHERCZYK, file this
2 Motion for Judgment on the Pleadings in the aforementioned action.

3 **1. STATEMENT OF FACTS**

4 On April 4, 2008, Plaintiff, Balsam, filed his Verified Complaint (“Complaint”) against these
5 responding Defendants, and other named Defendants. Balsam bases this action on California Business
6 and Professions Code §§17529, *et seq.* (the “California Act”), which is encompassed in Plaintiff’s First
7 Cause of Action, the Consumers Legal Remedies Act (Civil Code §1750, *et seq.*), which is set forth in
8 his Second Cause of Action, and upon the First and Second Causes of Action for his entitlement to
9 Declaratory Relief. See Complaint.

10 Balsam asserts that he received eight unsolicited commercial e-mails (“UCE”) between July 21,
11 2007 and August 13, 2007. Complaint at ¶1; 2:1-12. In pertinent part, Balsam alleges that the headers
12 of these eight UCE contained or were accompanied by “numerous falsified, misrepresented, or forged
13 header information, in violation of Business and Professions Code §17529.5 (Complaint at ¶2; 2:13-14),
14 contained deceptive information prohibited by Civil Code §1750, *et seq.* (Complaint at ¶2; 2:15-16).
15 Plaintiff seeks statutory damages in the amount of \$1,000 per electronic e-mail advertisement pursuant
16 to Section 17529.5, which allows recovery of liquidated damages “for each unsolicited commercial
17 email advertisement” sent in violation of Section 17529.5. Complaint at ¶3; 2:17-21 and Prayer.
18 Balsam further seeks an injunction to prohibit Defendants from engaging in such purported deceptive
19 marketing practices. Complaint at ¶4; 2:22-3:3. Plaintiff does not claim that he was ever deceived by
20 the emails at issue.

21 Defendants filed their First Amended Verified Answer (“Answer”) on August 26, 2008, in
22 pertinent part denying the material allegations of the Complaint, and raising two Affirmative Defenses.
23 The First Affirmative Defense alleged preemption of the California Act by the federal CAN-SPAM Act,
24 in that “Defendants’ activities do not meet the exceptions to the federal CAN-SPAM Act . . .” Answer
25 at 8:23-9:8.

26 Defendants contend that Balsam’s allegations of wrongdoing are preempted by the CAN-SPAM

27 ////

28 ////

1 Act, the Federal Law regulating commercial email, and that Balsam has not and cannot state a valid
2 cause of action under the California Act in this case. See 15 U.S.C. §§7701-7713.¹ Most significantly, a
3 determination of whether there is preemption is an issue of law.

4 Furthermore, Plaintiff Balsam does not have standing to bring an action under the CLRA
5 because: (1) he has not suffered any damages; and, (2) he was not a consumer under the statute. *Meyer*
6 *v. Sprint Spectrum* (January 29, 2009) 45 Cal.4th 634, *rehearing denied* April 1, 2009 (“*Meyer*”);
7 *Kleffman v. Vonage Holdings Corp.*, 2007 WL 1518650 (C.D. Cal. May 23, 2007); *Von Grabe v. Sprint*
8 *PCS*, 312 F.Supp.2d 1285 (S.D.Cal., 2003). Similarly, whether Balsam has standing is an issue of law
9 to be determined by this Court prior to the commencement of trial. *O’Neil v. General Security Corp.*
10 (1992) 606, 4 Cal.App.4th 587, (“Since the motion for judgment on the pleadings is effectively a
11 demurrer, the facts are admitted and only questions of law are in issue, permitting new theories to be
12 evaluated on appeal.”)

13 Finally, Plaintiff’s Third Cause of Action seeking Declaratory Relief fails as it is based solely on
14 the allegations supporting the First and Second Causes of Action.

15 2. STATEMENT OF LAW

16 A. Motion for Judgment on the Pleadings

17 A motion for judgment on the pleadings serves the same function as a general demurrer but is
18 made some time after the time for bringing a demurrer has expired “and hence attacks only defects
19 disclosed on the face of the pleadings or by matters that can be judicially noticed. (See, *e.g.*, Weil &
20 Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 1998) ¶¶ 7:275, 7:322, pp.
21 7-78, 7-84; *Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194,
22 198 [51 Cal.Rptr.2d 622].) Presentation of extrinsic evidence is therefore not proper on a motion for
23 judgment on the pleadings. (*Ibid.*)” *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999.

24 Before 1994, there was no statutory basis for such a motion, although its long standing use was
25 well recognized by case law. *Colbert, Inc. v. State of California, ex rel. Dept. of Publ Works* (1967) 67
26

27
28 ¹ All Federal citations, including cases and statutes, and all other miscellaneous authorities are appended to an Appendix
filed concurrently herewith.

1 Cal.2d 408, 412. The enactment of Code of Civil Procedure §438², however, does not appear to
2 override the non-statutory motion, as persuasively urged by Weil and Brown:

3 CCP §438 imposes major limitations on the motion . . . It also imposes limits. However, these
4 limitations may be meaningless because a nonstatutory motion for judgment on the pleadings
apparently survives *without* such limitations:

5 “A motion for judgment on the pleadings may be made at any time either prior to the trial
6 or at the trial itself.” [*Stoops v. Abbassi* (2002) 100 Cal.App.4th 644, 650, . . . (citing pre-
7 CCP §438 case of *Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 877 . . .; see
8 also *Smiley v. Citibank (South Dakota) N.A.*, supra, 11 Cal.4th at 145 . . . fn. 2 - -
9 “common law motion for judgment on the pleadings” upheld despite fact CCP §438 had
been enacted during course of proceedings; and *Saltarelli & Steponovich v. Douglas*
(1995) 40 Cal.App.4th 1, 5, . . . - - treating defective motion for summary judgment as
“nonstatutory motion for judgment on the pleadings.”

10 Comment: Case authority for the nonstatutory motion is rather thin. None of the cited cases
11 expressly deal with this issue; they simply assume its existence. But these cases reach a practical
12 result. A court should be able to decide there is no valid cause of action *at any time*. There is no
point in forcing a case to go to trial because the motion was made too late or otherwise failed
13 CCP §438 requirement. (Emphasis in original) Weil & Brown, *California Practice Guide, Civil
Procedure Before Trial*, (The Rutter Group, as revised 2009) ¶7:277 at 7(1)-75.

14 Indeed, even under §438, the trial court may consider a motion for judgment on the pleadings *sua*
15 *sponte*. Code of Civil Procedure §438(b)(2); see *Camacho v. Automobile Club of Southern California*
16 (2006) 142 Cal.App.4th 1394, 1396. Further, trial courts have the inherent power to control litigation
17 and conserve judicial resources through whatever procedural method reaches that result. *Lucas v.*
County of Los Angeles (1996) 47 Cal.App.4th 277, 284-285.

18
19 ² Code of Civil Procedure 438, provides in pertinent part, that:

- 20
21 (b)(1) A party may move for judgment on the pleadings.
22 (2) The court may upon its own motion grant a motion for judgment on the pleadings.
23 (c)(1) The motion provided for in this section may only be made on one of the following grounds:
24 (A) If the moving party is a plaintiff, that the complaint states facts sufficient to constitute a cause or causes of action
25 against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint.
26 (B) If the moving party is a defendant, that either of the following conditions exist:
27 (i) The court has no jurisdiction of the subject of the cause of action alleged in the complaint.
28 (ii) The complaint does not state facts sufficient to constitute a cause of action against that defendant.
(2) The motion provided for in this section may be made as to either of the following:
(A) The entire complaint or cross-complaint or as to any of the causes of action stated therein.
. . . .
(3) If the court on its own motion grants the motion for judgment on the pleadings, it shall be on one of the following
bases:
. . . .
(B) If the motion is granted in favor of the defendant, that either of the following conditions exist:
(i) The court has no jurisdiction of the subject of the cause of action alleged in the complaint.
(ii) The complaint does not state facts sufficient to constitute a cause of action against that defendant.

1 Defendants submit that Plaintiff's claims under the California Act have been preempted by the
2 federal CAN-SPAM Act, and that the facts alleged do not fall under the statutory exception set forth in
3 the CAN-SPAM Act. Moreover, Plaintiff has no standing to bring a claim under the CLRA, he did not
4 suffer any damages and is not a consumer under the CLRA, and therefore has not and cannot state a
5 cause of action here. The Third Cause for Declaratory Relief falls as well as it is based upon the First
6 and Second Causes of Action.

7 Accordingly, it would be a waste of judicial resources to allow this case to proceed to trial when
8 Plaintiff's claims have no legal bases.

9 B. The California Act

10 On September 23, 2003, California enacted the nation's first ban on UCE. Business and
11 Professions Code §17529, *et seq.*

12 Business and Professions Code §17529.5, contains the meat of the California Act, and provides,
13 in pertinent part, that:

14 (a) It is unlawful for any person or entity to advertise in a commercial email advertisement either
15 sent from California or sent to a California electronic mail address under any of the following
16 circumstances:

17 (1) The email advertisement contains or is accompanied by a third-party's domain name without
18 the permission of the third party.

19 (2) The email advertisement contains or is accompanied by **falsified, misrepresented, or forged
header information**. This paragraph does not apply to truthful information used by a third party
20 who has been lawfully authorized by the advertiser to use that information.

21 (3) The email advertisement has a **subject line that a person knows would be likely to mislead
a recipient, acting reasonably under the circumstances, about a material fact** regarding the
22 contents or subject matter of the message.

23 (b)(1)(A) In addition to any other remedies provided by any other provision of law, the following
24 may bring an action against a person or entity that violates any provision of this section:

25

26 (iii) A recipient of an unsolicited commercial email advertisement, as defined in Section 17529.1.

27 (B) A person or entity bringing an action pursuant to subparagraph (A) may recover either or
28 both of the following:

(i) Actual damages.

(ii) Liquidated damages of one thousand dollars (\$1,000) for each unsolicited commercial email
advertisement transmitted in violation of this section, up to one million dollars (\$1,000,000) per
incident. (Emphasis added)

1 By enacting this legislation, the California legislature chose an “opt-in” model in which
2 marketers may only send e-mails to consumers who have expressly elected to receive them. Business
3 and Professions Code §17529.2.

4 Indeed, the California Act defines UCE in a manner that would ban almost all e-mail
5 advertisements, since whether or not something was UCE depended not on whether the recipient had
6 consented to receive e-mails from the sender, but rather whether the recipient had consented to receive e-
7 mails promoting the particular advertiser. Business and Professions Code §17529.1(o).

8 The California Act as creates a two-tiered damage structure which allows a plaintiff to recover
9 his actual damages and also establishes an additional penalty of \$1,000 per e-mail solely for UCE sent in
10 violation of the Act. For example, if an e-mail is sent to a consumer with his affirmative consent but
11 was deceptive in a manner set forth in §17529.5, the sender is only liable for the recipient’s actual
12 damages. If that same e-mail is sent without the consumer’s affirmative consent (*i.e.*, UCE), the sender
13 is liable for both actual and liquidated damages regardless of whether or not the e-mail was deceptive.

14 C. The Federal CAN-SPAM Act Preempts State Law

15 The potential disastrous impact of the California Act spurred Congress to revive stalled
16 legislation and pass CAN-SPAM before the California law took effect. See *e.g.*, Lisa Thomas and
17 Ashok Pinto, “Bush Has Signed Federal Anti-Spam Legislation to Take Effect January 1, 2004, Mondaq
18 Business Briefing (December 22, 2003) (law enacted “[i]n large part to block the implementation of the
19 California law”).

20 Two points were stressed throughout CAN-SPAM’s legislative history: (i) marketers’ First
21 Amendment right to utilize UCE should be protected; and, (ii) state laws should be preempted to
22 establish a single uniform national standard to prevent the patchwork of state laws. This is reflected in
23 the language of CAN-SPAM which expressly permits unsolicited commercial email; declares there “is a
24 substantial government interest in the regulation of commercial electronic mail on a nationwide basis”
25 and preempts “any statute, regulation, or rule of a State or political subdivision of a State that expressly
26 regulates the use of electronic mail to send commercial messages, except to the extent that any such
27 statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail
28

1 message or information attached thereto.” 15 U.S.C. §§7701(a)(11) and (b)(1), 7704(5), 7707(b)(1).³

2 In approving the bill, the Senate Commerce, Science and Transportation Committee explained:

3 Given the inherently interstate nature of e-mail communications, the . . . creation of one national
4 standard is a proper exercise of the Congress’s power to regulate interstate commerce that is
5 essential to resolving the significant harms from spam faced by American consumers,
6 organizations, and businesses throughout the United States. This is particularly true because, in
7 contrast to telephone numbers, e-mail addresses do not reveal the State where the holder is
8 located. As a result, a sender of e-mail has no easy way to determine with which State law to
9 comply.

7 S. Rep. No. 102, 108th Cong, 1st Sess 21-22 (2003).

8 Accordingly, to ensure that American businesses had clear guidance on commercial e-mail
9 advertising, Congress included in the CAN-SPAM Act a provision preempting “all state laws expressly
10 regulating the use of electronic mail to send commercial messages, except to the extent that [the state
11 statute] prohibits **falsity or deception** in any portion” of a commercial email. (Emphasis added) 15
12 U.S.C. §7707(b)(1). Thus, **courts have consistently held that the preemption clause in the CAN-**
13 **SPAM Act “left states room only to extend their traditional fraud prohibitions and deception**
14 **prohibitions into cyberspace.”** (Emphasis added) See *Kleffman v. Vonage Holdings Corp.*, 2007 WL
15 1518650 at *5 (C.D. Cal. May 23, 2007).⁴

16 _____
17 ³ Specifically, 15 U.S.C. §7701(a)(11), in pertinent part provides that:

18 (a) The Congress finds the following: . . .

19 Many States have enacted legislation intended to regulate or reduce unsolicited commercial electronic mail, but these
20 statutes impose different standards and requirements . . . since an electronic mail address does not specify a
21 geographic location, **it can be extremely difficult for law-abiding businesses to know with which of these**
22 **disparate statutes they are required to comply.** (Emphasis added)

21 ⁴ This District Court case was not reported in F. Supp. However, a fundamental question, which is central to adjudicating the
22 case at bar, has been certified to the California Supreme Court by the Ninth Circuit in *Kleffman* at 551 F.3d 847 (9th Cir.
23 2008), and our Supreme Court has agreed to address the certified question. In requesting help in interpreting the California
24 Act, the Ninth Circuit observed at 848-849 that:

24 Pursuant to Rule 8.548 of the California Rules of Court, a panel of the United States Court of Appeals for the Ninth Circuit,
25 before which this appeal is pending, certifies to the California Supreme Court a question of law concerning interpretation of
26 California’s anti-spam law, Cal. Bus. & Prof. Code §17529.5. The decisions of the California Courts of Appeal and California
27 Supreme Court provide no precedent to the certified question, and the answer may be determinative of this appeal.

26 The California Supreme Court is respectfully requested to answer the certified question presented below. The
27 phrasing of the issue is not meant to restrict the court’s consideration of the case. We agree to follow the answer
28 provided by the California Supreme Court. If the California Supreme Court declines certification, the issue will be
resolved according to our perception of California law.

....
The question of law to be answered is:

1 Defendants submit that §17529.5, with a limited fraud exception, is preempted by the provisions
2 of the CAN-SPAM Act, which preempts the entirety of §17529, including §17529.5(b), except “to the
3 extent” it regulates fraudulent e-mail headers and subject lines. 15 U.S.C. §7707. To state it another
4 way, **to the extent §17529.5 regulates anything beyond fraudulent e-mail headers and subject lines,**
5 **it is preempted by CAN-SPAM.**

6 Moreover, in explaining the enactment of the CAN-SPAM Act, the Court in *Omega World*
7 *Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, (4th Cir., November 17, 2006) (“*Omega*”), addressed
8 the issue of preemption. Indeed, as far as Defendants can tell, *Omega* is the only case that has made its
9 way up to the Court of Appeals, and Defendants are similarly unaware that any state Supreme Court has
10 addressed the issue of preemption.

11 The facts of *Omega* are strikingly similar to those alleged by Plaintiff Balsam. In *Omega*,
12 plaintiff, who operated websites devoted to opposing “spam” messages and also provided other internet
13 related services, alleged that it received unwanted commercial e-mails that contained inaccuracies. First,
14 plaintiff alleged that the messages it received inaccurately stated that the recipient had signed up on the
15 sender’s mailing list when it had not. Second, plaintiff asserted that the identity of the sender was
16 misleading.

17 Plaintiff filed suit and both sides presented the Court with motions for summary judgment. The
18 District Court’s holding that the CAN-SPAM Act preempted the state claims was upheld by the Court of
19 Appeals. In its discussion upholding preemption, the *Omega* Appeals Court stated at 352-353 as
20 follows:

21 **.... First, under our federal system, we do not presume that Congress intends to clear**
22 **whatever field it enters. Instead, we start from “the basic assumption that Congress did not**
23 **intend to displace state law,”** *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 68
24 **L.Ed.2d 576 (1981), and “that the historic police powers of the States were not to be superseded**
25 **by the Federal Act unless that was the clear and manifest purpose of Congress,”** *Medtronic*, 518
26 **U.S. at 485, 116 S.Ct. 2240 (citations omitted). Second, from this departure point, we address**
preemption issues in accordance with the “oft-repeated comment ... that ‘[t]he purpose of
27 **Congress is the ultimate touchstone’ in every preemption case.”** *Id.* (alteration in original)

27 Does sending unsolicited commercial email advertisements from multiple domain names for the purpose of
28 bypassing spam filters constitute falsified, misrepresented, or forged header information under Cal. Bus. &
Prof.Code § 17529.5(a)(2)?

Indeed, in January 2009, our Supreme Court agreed to resolve the certified question. In order to do so, the Court
will have to address what is a false or deceptive header. It may also decide what amounts to a misleading subject line.

1 (citation omitted).

2 The Court continued its discussion at 353-354 as follows:

3

4 **Since the word “falsity” considered in isolation does not unambiguously establish**
5 **the scope of the preemption clause, we read “falsity” in light of the clause as a whole.**
6 **Reading “falsity” as referring to traditionally tortious or wrongful conduct is the**
7 **interpretation most compatible with the maxim of *noscitur a sociis*, that a word is generally**
8 **known by the company that it keeps. See, e.g., *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303,**
9 **307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961); *Neal v. Clark*, 95 U.S. 704, 708-09, 24 L.Ed. 586**
10 **(1877). The canon applies in the context of disjunctive lists. See *Neal*, 95 U.S. at 706, 709;**
11 ***Jarecki*, 367 U.S. at 304 n. 1, 307, 81 S.Ct. 1579. Here, the preemption clause links “falsity” with**
12 **“deception”—one of the several tort actions based upon misrepresentations. Keeton et al., Prosser**
13 **and Keeton on the Law of Torts § 105, at 726-27 (5th ed.1984) (defining deceit as species of**
14 **false-statement tort); Restatement (Second) of Torts § 525 (describing elements of deceit). This**
15 **pairing suggests that Congress was operating in the vein of tort when it drafted the**
16 **preemption clause’s exceptions, and intended falsity to refer to other torts involving**
17 **misrepresentations, rather than to sweep up errors that do not sound in tort.**

18 Whether linked with materiality, see 15 U.S.C. § 7704(a)(1), or “deception,” see *id.* §
19 7707(b)(1), we can find **nowhere in the statute that Congress meant to apply falsity in a**
20 **mere error sense.** (Emphasis added)

21 The *Omega* Court also acknowledged that the patchwork of state laws made it virtually
22 impossible for businesses to comply, and that federal preemption created the most logical solution to this
23 problem. *Id.* at 355-356. The Court observed that “Congress targeted only e-mails containing
24 something more than an isolated error,” and “created civil causes of action relating to error, but attached
25 requirements beyond simply mistake to each of them.” *Id.* at 355. Indeed, the *Omega* Court noted that
26 “Congress’ enactment governing commercial e-mails reflects a calculus that a national strict liability
27 standard for errors would impede ‘unique opportunities for the development and growth of frictionless
28 commerce,’ while more narrowly tailored causes of action could effectively respond to the obstacles to
‘convenience and efficiency’ that unsolicited messages present. *Id.* §7701(a).” *Id.* at 355.

See also discussion in *Ferron v. Subscriberbase Holdings, Inc.*, 2009 WL 650731 (E.D. Ohio,
March 11, 2009), which concurred and applied the holding in *Omega*; *Ferron v. Echostar Satellite*, 2008
WL 4377309 (S.D. Ohio Sept. 24, 2008), which concluded at *6 that:

To date, *Omega* remains the only circuit court decision fairly addressing preemption of
state law claims under the CAN-SPAM Act. District court decisions since *Omega* have either
followed or at least consulted it. See, e.g., *Ferguson v. Quinstreet, Inc.*, []2008 WL 3166307, at
*8-9 (W.D.Wash. Aug. 5, 2008); *Kleffman v. Vonage Holdings Corp.*, [] 2007 WL 1518650, at *
3 n. 1 (C.D.Cal. May 23, 2007); *Gordon v. Virtumundo, Inc.*, []2007 WL 1459395, at *11-12

1 (W.D. Wash. May 15, 2007).

2 This Court agrees with the reasoning of *Omega*. Permitting states to enforce laws which
3 impose liability for email advertisements which contain only inaccuracies would thwart the goal
4 of Congress in enacting the CAN-SPAM Act.

5 In a further discussion of preemption, the Court in *Hoang v. Reunion.Com, Inc.*, 2008 WL
6 4542418 (N.D. Cal., October 6, 2008) (“*Hoang*”), which relied on the opinion in *Omega*, stated at *1-*2
7 as follows:

8 Plaintiffs allege that each of the five emails at issue herein had “falsified, misrepresented
9 and/or forged header information,” because each email, in the “From” line in the header,
10 included the name of the member of defendant’s website who provided “email contacts” to
11 defendant. (See Compl. 5, 18, 19.) Plaintiffs also allege that each email had a “subject line” that
12 was “false and/or misleading,” (see *id.* 26, 29, 34); specifically, plaintiffs allege that “[Member
13 Name] Wants to Connect with You,” which was the subject line of four of the five emails at
14 issue, and “Please Connect With Me:),” which was the subject line of the fifth email, were
15 “likely to mislead” the recipients into believing the emails were a “personal request to connect
16 with the individual, rather than an unsolicited commercial email advertisement.” (See *id.* 5.) . . .
17 Based on such allegations, plaintiffs allege three causes of action, each arising under
18 §17529.5(a) of the California Business & Professions Code, a statute that makes unlawful the
19 sending of certain commercial emails.

20

21 CAN-SPAM preempts state statutes that “expressly regulate[] the use of electronic mail
22 to send commercial messages,” except to the extent such statutes prohibit “falsity or deception in
23 any portion of a commercial electronic mail message or information attached thereto.” See 15
24 U.S.C. § 7707(b)(1). **Section 7701(b)(1) has been interpreted to preempt state law claims,
25 unless such claims are for “common law fraud or deceit.”** See *Omega World Travel, Inc. v.*
26 *Mummagraphics, Inc.*, 469 F.3d 348, 353-56 (4th Cir.2006) . . .

27 **Here, plaintiffs fail to allege facts to support a claim of fraud, which must be alleged
28 with particularity.** See Fed.R.Civ.P. 9(b). In that regard, plaintiffs fail to allege with the
requisite specificity why the statements at issue were false and why defendant knew they were
false when made. Further, **plaintiffs fail to allege plaintiffs relied to their detriment on any
misrepresentation and that, as a result of such reliance, they incurred damage.**

Accordingly, plaintiffs’ claims are preempted and subject to dismissal.

Of course, there is alternate authority as set forth in *Asis Internet Services v.*
Consumerbargaingiveaways, LLC, 2009 WL 1035538 (N.D. Cal., April 17, 2009), in which the Court
concluded that since no appellate decision (as opposed to a district court decision) has limited the phrase
“falsity or deception” to only common law fraud actions, the Court refused to hold that a showing of
actual fraud was necessary.

However, until our Supreme Court addresses the question of preemption, Defendants submit that
the reasoning set forth by the Court in *Omega, supra* at 355-356, and relied upon by the Court in *Hoang*,

1 *supra*, should be followed here and represents the weight of authority:

2 As we have noted, Congress found that because e-mail addresses do not specify recipients'
3 physical locations, it can be difficult or impossible to identify where recipients live and hence to
4 determine the state laws that apply. *Id.* § 7701(a)(11). Moreover, commercial e-mails are a bulk
5 medium used to target thousands of recipients with a single mouse-click, meaning that the typical
6 message could well be covered by the laws of many jurisdictions. As a result, law-abiding
7 senders would likely have to assume that their messages were governed by the most stringent
8 state laws in effect. The strict liability standard imposed by a state such as Oklahoma would
9 become a de facto national standard, with all the burdens that imposed, even though the CAN-
10 SPAM Act indicates that Congress believed a less demanding standard would best balance the
11 competing interests at stake. Because Mummagraphics' reading of the "falsity or deception"
12 exception would thus permit an exception to preemption to swallow the rule and undermine the
13 regulatory balance that Congress established, Mummagraphics' reading of the exception is not
14 compatible with the structure of the CAN-SPAM Act as a whole.

9 To summarize, the federal legislation enacted as the CAN-SPAM Act expressly acknowledges
10 that the federal law was to preempt all state laws except where "falsity or deception" is utilized.
11 Although Congress failed to specifically define "falsity" or "deception," it is clear from the authorities
12 cited above that these terms refer to traditional tort theories. An exception which allows for claims
13 based on a lesser standard, such as negligence and inadvertence, would create a loophole so large that the
14 CAN-SPAM Act would be defeated, rendered meaningless, and would "swallow the preemption clause
15 itself." *Id.*, 469 F.3d at 355.

16 D. Section 17529.5(b) Liquidated Damage Provision is Preempted and
17 is Not Severable From The Act's Preempted Provisions

18 CAN-SPAM preempts "any statute, regulation, or rule of a State or political subdivision of a
19 State that expressly regulates the use of electronic mail to send commercial messages." 15 U.S.C. §§
20 7701(b)(1). The California Act's punitive damage provision falls squarely within the scope of this
21 preemption since, by awarding punitive damages solely for the use of UCE, California is "expressly
22 regulating the use of commercial email" by imposing an opt-in requirement on commercial email.

23 In addition, by maintaining and re-enacting punitive damages for UCE, California is penalizing a
24 right which Congress chose to protect and thereby defeating both the balance of interests that were
25 carefully struck by CAN-SPAM and Congress' attempt to set a "uniform, nationwide spam standard."
26 This is contrary to nearly two centuries of Supreme Court jurisprudence, since as early as 1819 the
27 Supreme Court has held that under the Constitution's Supremacy Clause, states may not "retard,
28 impede, burden, or in any manner control, the operations of the constitutional laws enacted by

1 Congress.” *Nash v. Florida Industrial Commission*, 389 U.S. 235, 240 (1967) (quoting *McCulloch v.*
2 *Maryland*, 4 Wheat. 316, 436 (1819)) (state law that imposed penalty for exercising rights under the
3 National Labor Relations Act was preempted because it would “defeat or handicap a valid national
4 objective”). Since *McCulloch*, the Supreme Court has consistently found that a state law that “frustrates
5 the purpose of the national legislation” cannot stand. *Id.* (quoting *Davis v. Elmira Savings Bank*, 161
6 U.S. 275 (1896)). The punitive damages provision of the California Act clearly “frustrates the purpose”
7 of CAN-SPAM, and must be struck down in order to preserve Congress’ authority to regulate
8 commercial email.

9 Moreover, while §17529.5(a) proscribes conduct that is within the scope of the CAN-SPAM
10 preemption exception, the remedy provided under Section 17529(b) exceeds this scope by attempting to
11 regulate UCE by imposing civil penalties on unsolicited mail that otherwise violates the statute.
12 Distinguishing between solicited and unsolicited commercial e-mail, however, is a regulation of “the use
13 of electronic mail to send commercial messages” and is entirely distinct from and has nothing to do with
14 regulating “falsity or deception in any portion of a commercial electronic mail message.” The harm to
15 consumers from fraudulent e-mails is the same regardless of whether or not the e-mail was sent with
16 consent. Consequently, the attempt of §17529.5(b) to draw distinctions between solicited and
17 unsolicited commercial e-mail can only be for a purpose other than regulating fraudulent e-mails and, by
18 definition, is outside the scope of the Act’s preemption exception.

19 Moreover, the conclusion that the punitive damages provision is preempted by CAN-SPAM is
20 further supported by case law on statutory severability. See *McMahan v. City and County of San*
21 *Francisco* (2005) 127 Cal.App.4th 1368, 1374. Functionally severable provisions ““must stand on their
22 own, unaided by the invalid provisions nor rendered . . . inextricably connected to them by policy
23 considerations.”” (Citations omitted) *Id.* at 1379.

24 For example, in *Long Beach Lesbian and Gay Pride, Inc. v. City of Long Beach* (1993) 14
25 Cal.App.4th 312, 327, *r’hrq denied* (1993), *review denied* (1994). the court invalidated the central
26 provision of the city’s parade permit ordinance and would not sever other provisions regulating permit
27 holders, since the invalid provision was the hub of the ordinance’s wheel and “without it the spokes
28 cannot stand.”

1 The current penalty provision is derived from SB 1457, which was enacted after CAN-SPAM
2 and sought “to mirror the penalty provisions” of the original California Act. Assembly Committee on
3 the Judiciary, *Should Recent State Law Banning E-Mail Spam Be Updated?* (June 22, 2004) at 4. Since
4 it was passed as a stand alone provision after CAN-SPAM, the provision clearly satisfies the volitional
5 test.

6 Moreover, §17529.5(b) still is not severable, however, since it is “inextricably connected” to the
7 original California Act because: (i) the penalty provisions are a “mirror [of] the penalty provisions” of
8 each other, and, (ii) both regulate and punish the use of UCE. As in *Long Beach Lesbian and Gay Pride,*
9 *Inc., supra* at 327, the two provisions are connected like a hub and spokes since Section 17529.5(b) is
10 only viable to the extent that California’s regulation of UCE is permissible. With CAN-SPAM
11 removing the hub, Section 17529.5(b) is a spoke that cannot stand.”

12 E. Balsam’s Complaint Fails to Allege Fraud

13 As set forth above, actual fraud must be pleaded and proven to qualify for an exception to
14 preemption by the CAN-SPAM Act. The elements of fraud/deceit are (1) a false representation or
15 concealment of a material fact (or, in some cases, an opinion) susceptible of knowledge, (2) made with
16 knowledge of its falsity or without sufficient knowledge on the subject to warrant a representation, (3)
17 with the intent to induce the person to whom it is made to act on it, (4) and an act by that person in
18 justifiable reliance on the representation, (5) to that person’s damage. See Civil Code §§1709-1710;
19 *South Tahoe Gas Co. v. Hofmann Land Improvement Co.* (1972) 25 Cal. App. 3d 750, 765; *Balfour,*
20 *Guthrie & Co. v. Hansen* (1964) 227 Cal. App. 2d 173, 192-193.

21 There are no allegations whatsoever in Plaintiff’s Complaint that set forth the required elements
22 of fraud.

23 Balsam’s state claims are clearly preempted by the CAN-SPAM Act, leaving him with the
24 traditional tort claim for fraud. However, the Complaint makes it abundantly clear that Plaintiff has not
25 stated a cause of action for fraud.

26 Accordingly, Defendants are entitled to have this Motion for Judgment on the Pleadings granted
27 as to the First Cause of Action. Plaintiff has not (and cannot) state a cause of action for actual fraud.

28 F. Claims Under the Consumer Legal Remedies Act
and for Declaratory Relief

1 With respect to Balsam's Second Cause of Action for violations of the CLRA, Balsam's
2 Complaint fails to allege that he relied on the emails by expending any "palpable threshold of damage."
3 *Meyer, supra* at 45 Cal.4th 646. Indeed, Plaintiff proudly asserts that he does not have to purchase
4 anything in reliance on the emails. Complaint at ¶¶116; 26:19-22 and 117; 27:1-3.

5 Defendants submit that Plaintiff does not have standing to bring an action under the CLRA
6 because: (1) he suffered no "palpable threshold of damages;" and, (2) he was not a consumer under the
7 statute.

8 To the first point (that he sustained no "palpable threshold of damages"), in Plaintiff's Complaint
9 at ¶117, Balsam cites to the case of *Kagan v. Gibraltar Savings and Loan Assoc.* (1984) 35 Cal.3d 582,
10 593 ("*Kagan*"), to support his contention that "a consumer who simply receives false or deceptive
11 advertising is *per se* damaged . . ."

12 However, our Supreme Court in *Meyer* addressed the issue of whether a "consumer" must sustain
13 some "palpable threshold of damage" in order to have standing to sue under the CLRA. *Id.* at 646.
14 *Meyer* spells the death knell for Plaintiff's Second Cause of Action for Defendants' purported violation
15 of the CLRA. In *Meyer*, the Court declined to extend *Kagan* to situations in which an allegedly unlawful
16 practice under the CLRA has not resulted in some kind of tangible cost to the consumer.

17 The *Meyer* Court at 641 concluded that the CLRA clearly and unambiguously requires a plaintiff
18 to sustain some tangible damage in order to have standing to bring such an action:

19 We conclude based on the language of the statute that Sprint has the better position.
20 Section 1780(a) provides that: "Any consumer who suffers any damage as a result of the use or
21 employment by any person of a method, act, or practice declared to be unlawful by Section 1770
22 may bring an action" under the CLRA. **The statute speaks plainly about the use of an
23 unlawful practice causing or resulting in some sort of damage. Thus, the statute provides
24 that in order to bring a CLRA action, not only must a consumer be exposed to an unlawful
25 practice, but some kind of damage must result. If the Legislature had intended to equate
26 "any damage" with being subject to an unlawful practice by itself, it presumably would
27 have omitted the causal link between "any damage" and the unlawful practice, and instead
28 would have provided something like "any consumer who is subject to a method, act, or
practice declared to be unlawful by Section 1770 may bring an action" under the CLRA.**
(Emphasis added)

26 As to the second point (Plaintiff is not a consumer under the Act), the Court in *Kleffman, supra*,
27 promptly disposed of an argument by plaintiff that he was entitled to pursue relief under the CLRA. The
28 Court at *4 concluded that plaintiff was not a consumer under the provisions of the statute:

1 “Consumer’ means an individual who seeks or acquires by purchase or lease, any goods or
2 services for personal, family, or household purposes.” Cal. Civ.Code § 1761(d). **It is not enough**
3 **that the plaintiff is a consumer of just any goods or services; rather, the plaintiff must have**
4 **acquired or attempted to acquire the goods or services in the transaction at issue.** See
5 *Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal.App.4th 949, 960, 23 Cal.Rptr.3d 233
6 (Ct.App.2005).

7 Here, Kleffman is not a “consumer” because he specifically alleges that **he and the class**
8 **members have not acquired or sought any products or services offered by Vonage.** (Compl.
9 57.) Moreover, **the emails clearly are not goods, and Kleffman offers only a conclusory**
10 **argument that they constituted a “service.” “Service” means “[t]he act of doing something**
11 **useful for a person or company for a fee.”** Black’s Law Dictionary at 1372 (2004 ed.). **This**
12 **excludes spam emails, which are essentially advertisements for which the recipient pays no**
13 **fee.** See also Cal. Bus. & Prof.Code § 17500 (distinguishing between advertisements and
14 services). Therefore, the Court holds he lacks standing and cannot state a CRLA claim.
15 (Emphasis added)

16 See also *Von Grabe v. Sprint PCS*, (S.D.Cal., 2003), 312 F.Supp.2d 1285, 1303.

17 Balsam fails to allege that he acquired goods or services as the result of purportedly receiving the
18 eight e-mails; thus, he is not a consumer under the CLRA. Balsam cannot use the provisions of the
19 CLRA to obtain relief against Defendants herein. This, of course, includes Balsam’s request for punitive
20 damages pursuant to Civil Code §1780(a)(4).

21 Moreover, Plaintiff’s entitlement to attorney’s fees pursuant to the CLRA similarly fails as
22 explained by the *Meyer* Court at 644.

23 However, reasonable attorney’s fees may be awarded to a prevailing defendant on a finding by
24 the court that the plaintiff’s prosecution of the action was not in good faith. Civil Code, §1780(d).
25 Defendants herein will seek an award of attorney’s fees under the CLRA.

26 As to the Third Cause of Action for Declaratory Relief, Defendants assert that such claim is
27 preempted by the CAN-SPAM Act, and that Plaintiff does not have standing to bring an action under the
28 CLRA. Since the Third Cause is based on the same allegations as the First and Second Causes of
Action, it falls of its own weight.

3. CONCLUSION

While CAN-SPAM’s broad preemption clause contains a savings clause for state statutes that
prohibit “falsity or deception” in commercial e-mail, these words should be given their ordinary meaning
as explained by the Court in *Omega*. Linking “falsity” with “deception” strongly suggests that Congress
meant to apply the state exception to tortious conduct only as opposed to errors that do not sound in tort.

1 Thus, it is clear that in order to fall under the “falsity or deception” exception to the CAN-SPAM Act,
2 Plaintiff can recover under the California Act **only** if he received an e-mail with **fraudulent** headers
3 and/or subject lines.

4 Furthermore, it is persuasive that Congress did not ban all commercial e-mails, and did not
5 impose strict liability on those that send commercial e-mails. Rather, the CAN-SPAM Act imposes an
6 “opt-out” model in contrast to the California Act, which imposes an “opt-in” requirement. The “opt-
7 out” model set forth in the CAN-SPAM Act preempts California law to the contrary. Thus, the
8 California Act cannot impose a penalty, which it attempts to do, on senders of commercial e-email that
9 are complying with the federal law “opt-out” model.

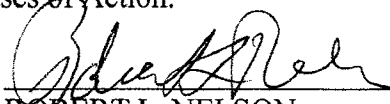
10 Accordingly, Plaintiff has not stated a cause of action for violation of the California Act - - he did
11 not allege the elements of the tort of fraud, and he cannot collect statutory liquidated damages as such
12 are preempted by the federal CAN-SPAM Act. Defendants submit that Balsam has not and cannot assert
13 a valid cause of action under §17529.5, as it is preempted by the CAN-SPAM Act.

14 With respect to the CLRA, Plaintiff does not have standing to bring such an action - - he did not
15 sustain any “palpable threshold of damage” as required by *Meyer*, and he is not a consumer under the
16 CLRA.

17 Finally, Plaintiff’s Third Cause of Action seeking declaratory relief adds nothing to his claims
18 and similarly fails.

19 Accordingly, Defendants are entitled to have their Motion for Judgment on the Pleadings granted
20 as to the First, Second and Third Causes of Action.

21 Dated: July 15, 2009



ROBERT L. NELSON
Attorney for Defendants,
Trancos, Inc., Brian Nelson, and
Laure Majcherczyk

1 ROBERT L. NELSON (SBN 57887)
Nelson & Weinkauff
2 35 Mitchell Blvd, Suite 15
San Rafael, CA 94903
3 Telephone: (415) 479-1911
Fax: (415) 479-1909
4

5 Attorney for Defendants,
TRANCOS, INC., BRIAN NELSON, and
LAURE MAJCHERCZYK
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8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SAN MATEO

10 DANIEL L. BALSAM, an individual,
11
12 Plaintiff,

13 vs.

14 TRANCOS, INC., a California corporation;
15 LEWIS J. WRIGHT, an Individual; BRIAN
NELSON, an Individual; LAURE
16 MAJCHERCZYK, an Individual; AD
SPONSORS LLC, an Oklahoma limited
17 liability company;
18 CASHONLINEAMERICA.COM LLC, a New
York limited liability company;
19 AFFILIATENETWORK.COM LLC, a New
York limited liability company;
20 AFFILIATENETWORK.COM MARKETING
21 LLC, a New York limited liability company;
22 EHARMONY.COM INC., a California
corporation; QUINSTREET INC., a California
23 corporation; STRATEGIC FINANCIAL
PUBLISHING INC., an Indiana corporation;
24 and DOES 1-100,

25 Defendants.
26

Case No. CIV471797

(PROPOSED)
ORDER ON MOTION FOR JUDGMENT
ON THE PLEADINGS

Date: August 10, 2009
Time: 9:00 AM
Dept: Law and Motion

Complaint filed on April 4, 2008
Trial Date: October 13, 2009

27 CAPTION – NO TEXT
28

1 The Motion of Defendants, TRANCOS, INC., BRIAN NELSON, and LAURE
2 MAJCHERCZYK for Judgment on the Pleadings as to the First, Second and Third Causes of
3 Action of the Verified Complaint of Plaintiff, DANIEL L. BALSAM, came for hearing in the
4 Law and Motion Department of this Court on August 10, 2009. Timothy J. Walton, Esq. and
5 Daniel L. Balsam, Esq., appeared on behalf of Plaintiff; Robert L. Nelson, Esq., appeared on
6 behalf of Defendants.

7 Having read and considered the Motion and the Memorandum of Points and Authorities
8 filed by the parties herein, and having heard argument of counsel,

9 IT IS ORDERED THAT:

10 The Motion for Judgment on the Pleadings as to the First, Second and Third Causes of
11 Action is granted without leave to amend, and Judgment shall be entered in favor of Defendants
12 TRANCOS, INC., BRIAN NELSON, and LAURE MAJCHERCZYK.

13
14 Dated: _____ JUDGE OF THE SUPERIOR COURT

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