

ENDORSED FILED
SAN MATEO COUNTY

JUL 24 2009

Clerk of the Superior Court
By S. Peyrot
DEPUTY CLERK

1 Timothy J. Walton (State Bar No. 184292)
2 LAW OFFICES OF TIMOTHY WALTON
3 801 Woodside Road, Suite 11
4 Redwood City, CA 94061
5 Phone: (650) 216-9800
6 Fax: (650) 618-8687

7 Daniel L. Balsam (State Bar No. 260423)
8 THE LAW OFFICES OF DANIEL BALSAM
9 3145 Geary Blvd. #225
10 San Francisco, CA 94118
11 Phone: (415) 276-3067
12 Fax: (415) 373-3783

13 Attorneys for Plaintiff
14 DANIEL L. BALSAM

15 **SUPERIOR COURT OF CALIFORNIA**

16 **COUNTY OF SAN MATEO (UNLIMITED JURISDICTION)**

17 DANIEL L. BALSAM,) Case No.: CIV471797
18)
19 Plaintiff,) **PLAINTIFF'S OPPOSITION TO**
20 vs.) **DEFENDANTS' MOTION FOR**
21) **JUDGMENT ON THE PLEADINGS**
22)
23 TRANCOS INC. et al,) Date: August 10, 2009
24) Time: 9:00 a.m.
25 Defendants.) Dept: 3
26)
27) Action Commenced: April 4, 2008
28) Trial Date: October 13, 2009
29)
30)
31)

[Caption – No Text]

TABLE OF CONTENTS

| | Page |
|--|-------------|
| Table of Contents | ii |
| Table of Authorities | iv |
| I. INTRODUCTION..... | 1 |
| II. LEGAL STANDARD | 1 |
| III. ARGUMENT..... | 2 |
| A. California Business & Professions Code §§ 17529 and 17529.5 | 2 |
| 1. <i>B&P § 17529 was Not the First Anti-Spam Law in the Country, or Even in California</i> | <i>2</i> |
| 2. <i>B&P § 17529.2 Was Arguably Preempted; But B&P § 17529.5 Was Not Preempted By the CAN-SPAM Act.....</i> | <i>2</i> |
| 3. <i>Spam Recipients Have a Remedy Under B&P § 17529.5 Only if the Spam is False or Deceptive.....</i> | <i>2</i> |
| 4. <i>B&P § 17529.5’s Remedy is Actual and/or Liquidated Damages, Not Penalties.....</i> | <i>3</i> |
| 5. <i>This Court Must Accept as True Balsam’s Allegations that the Spams Contain and are Accompanied by False and Deceptive Information.....</i> | <i>3</i> |
| B. The Federal CAN-SPAM Act Preempts State Anti-Spam Laws Except as to “False or Deceptive” Spam, Not “Fraudulent” Spam | 4 |
| 1. <i>This Court Should Use Established Preemption Analysis</i> | <i>4</i> |
| 2. <i>The California Legislature Stated its Intent and Specifically Amended B&P § 17529.5 to Ensure that It Is Not Preempted</i> | <i>6</i> |
| 3. <i>Case Law in Support of Preemption Arose From a Narrow Set of Facts and a Misinterpretation of Falsity vs. Fraud That Has Perpetuated Without Reasonable Basis.....</i> | <i>6</i> |
| 4. <i>Courts Actually Analyzing the Statutory Language Have Found that State Laws are Not Preempted When the Spams at Issue are False or Deceptive, Even Without a Showing of Common-Law Fraud</i> | <i>8</i> |
| 5. <i>The U.S. Supreme Court Recently Held That Federal Laws Do Not Preempt State Deceptive Advertising and Consumer Protection Laws...</i> | <i>11</i> |
| 6. <i>The CAN-SPAM Act Does Not Preempt the CLRA.....</i> | <i>12</i> |
| C. B&P § 17529.5 is a Severable, Standalone Subsection that Survived Federal Preemption | 12 |
| D. A Plaintiff Suing Under B&P § 17529.5 Does Not Need to Plead Fraud | 13 |

TABLE OF CONTENTS (cont.)

| | Page |
|---|-------------|
| E. Balsam Has Standing to Bring a CLRA Cause of Action | 13 |
| 1. <i>The CLRA Applies to Transactions Intended to Result in the Sale/Lease of Goods or Services</i> | 13 |
| 2. <i>Meyer v. Sprint Spectrum L.P. Supports Balsam’s Argument for Standing</i> | 14 |
| 3. <i>Defendants Rely on Entirely on Vonage’s Holding as to CLRA Standing, But Vonage Misinterpreted Schauer v. Mandarin Gems of California</i> | 15 |
| IV. CONCLUSION | 15 |

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

TABLE OF AUTHORITIES

Page

California Cases

CD Investment Co. v. California Insurance Guarantee Assn.,
84 Cal. 4th 1410 (2000) 1, 3, 14

Consolidated Fire Protection Dist. v. Howard Jarvis Taxpayers’ Assn.,
63 Cal. App. 4th 211 (2d Dist. 1998)..... 15

Day v. AT&T Corporation,
63 Cal. App. 4th 325 (1st Dist. 1998)..... 5, 6, 13

Ferguson v. Friendfinders, Inc.,
94 Cal. App. 4th 1255 (1st Dist. 2002)..... 1

Ford Dealers Association v. Department of Motor Vehicles,
32 Cal. 3d 347 (1982) 13

Infinite Monkeys & Co., LLC v. Global Resource Systems Corp.,
No. 1-05-CV039918 (Super. Ct. Cal. Cty. of Santa Clara Sep. 14, 2005)
(order re: demurrer, motion to strike, and motion for preliminary
injunction)..... 9

Jevne v. Superior Court,
35 Cal. 4th 935 (2005) 4

Meyer v. Sprint Spectrum L.P.,
45 Cal. 4th 634 (2009) 14

Murphy v. Kenneth Cole Productions Inc.,
40 Cal. 4th 1094 (2007) 3

Parnell v. Adventist Health System/West,
35 Cal. 4th 595 (2005) 1, 3, 14

Schauer v. Mandarin Gems of Cal., Inc.,
125 Cal. App. 4th 949 (4th Dist. 2005)..... 15

Vantage Interactive LLC v. Householter,
No. CGC-08-480288 (Super. Ct. Cal. Cty. of San Francisco June 10,
2009) (order overruling plaintiff’s demurrer and denying motion for
sanctions) 10

Virginia G. v. ABC Unified School Dist.,
15 Cal. App. 4th 1848 (2d Dist. 1993)..... 15

Walton v. PlasmaNet Inc. et al,
No. 1-04-CV-033020 (Super. Ct. Cal. Cty. of Santa Clara Oct. 31, 2006)
(order re: demurrer to Niutech’s verified amended answer)..... 10, 11

Other States’ Cases

Jaynes v. Commonwealth of Virginia,
666 S.E.2d 303 (Va. 2008)..... 5

Federal Cases

Altria Group Inc. v. Good,
129 S. Ct. 538, 2008 U.S. LEXIS 9127 (U.S. Dec. 15, 2008)..... 11

TABLE OF AUTHORITIES (cont.)

Page

Federal Cases (cont.)

Asis Internet Services v. Active Response Group,
 No. C07 6211 THE, 2008 U.S. Dist. LEXIS 60535 (N.D. Cal. July 30,
 2008) (order denying motion to dismiss)..... 8

Asis Internet Services v. ConsumerBargainGiveaways LLC et al,
 No. C08-04856 WHA, 2009 U.S. Dist. LEXIS 36523 (N.D. Cal. Apr. 17,
 2009) (order re Rule 12 motion) 9, 10

Asis Internet Services v. Optin Global Inc.,
 No. C-05-05124 JCS, 2008 U.S. Dist. LEXIS 34959 (N.D. Cal. Mar. 27,
 2008) (order granting defendant’s motion for summary judgment, denying
 plaintiff’s motion for summary judgment and dismissing action)..... 8

Asis Internet Services v. VistaPrint USA Inc.,
 No. C08-5261-SBA, 2009 U.S. Dist. LEXIS 41384 (N.D. Cal. May 5,
 2009) (order re motion to dismiss)..... 10

Beyond Systems v. Keynetics Inc.,
 No. PJM 04-686 (D. Md. Mar. 26, 2007) (order denying defendant’s
 motion for other relief under FRCP 7 and second renewed motion to
 dismiss for lack of personal jurisdiction)..... 9

Cuomo v. The Clearing House Association LLC et al,
 No. 08-453, 2009 U.S. Lexis 4944 (U.S. June 29, 2009) 11

Free Speech Coalition Inc. v. Shurtleff,
 No. 2:05CV949DAK, 2007 U.S. Dist. LEXIS 21556 (D. Utah Mar. 23,
 2007) (order on motions to dismiss, to strike, and for preliminary
 injunction)..... 4

Gordon v. Impulse Marketing Group Inc.,
 375 F. Supp. 2d 1040 (E.D. Wash. 2005)..... 9

Hoang v. Reunion.com Inc.,
 No. C-08-3518 MMC, 2008 U.S. Dist. LEXIS 85187 (N.D. Cal. Oct. 6,
 2008) (order granting defendant’s motion to dismiss)..... 8

Kleffman v. Vonage Holdings Corp.,
 No. CV 07-2406 GAF (JWJx), 2007 U.S. Dist. LEXIS 40487 (C.D. Cal.
 May 23, 2007) (order granting motion to dismiss)..... 8, 15

Omega World Travel Inc. v. Mummagraphics Inc.,
 469 F.3d 348 (4th Cir. 2006) *passim*

California Statutes, Bills, and Opinions

Assembly Bill 2950, 2007-2008 Sess. (CA 2008) (Enrolled Bill Text Aug. 13,
 2008) 6, 12

Bus. & Prof. Code § 17200..... 13

Bus. & Prof. Code § 17500..... 5, 13

Bus. & Prof. Code §§ 17529, 17529.5..... *passim*

Bus. & Prof. Code § 17538.4..... 2

TABLE OF AUTHORITIES (cont.)

Page

California Statutes and Bills (cont.)

| | |
|---|---------------|
| Civ. Code § 1750 <i>et seq.</i> (Consumers Legal Remedies Act)..... | <i>passim</i> |
| Code Civ. Proc. § 438..... | 1 |
| Opinion from Diane F. Boyer-Vine, Legislative Counsel to Senator Kevin Murray, Unsolicited Commercial E-mail Advertising #22332 (May 10, 2004) (on file with author)..... | 2 |
| Senate Bill 1457, 2003-2004 Sess. (CA 2004) (Assembly Committee Analysis June 15, 2004)..... | 6, 12 |

Federal Statutes and Reports

| | |
|--|---------------|
| CAN-SPAM Act of 2003, 15 U.S.C. § 7701 <i>et seq.</i> and 18 U.S.C. § 1037 | <i>passim</i> |
| Senate Report No. 108-102 (2003) | 5, 10 |

Other Authorities

| | |
|---|---|
| Stephanie Miles, <i>Antispammers Slam First Spam Law</i> , CNET, July 9, 1997, http://news.cnet.com/2100-1023-201296.html | 2 |
| Washington State Office of the Attorney General, Safeguarding Consumers: Spam, http://www.atg.wa.gov/page.aspx?id=7224 (last visited July 22, 2009) | |
| ZDNet Staff, <i>Anti-Spam Laws State by State</i> , ZDNET, Sep. 19, 2002, http://techupdate.zdnet.com/techupdate/stories/main/0,14179,2880726,00.html | 2 |

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

I. INTRODUCTION

Plaintiff Daniel L. Balsam (“Balsam”) filed this Action against unrepentant spammers¹ Defendants Trancos Inc. (“Trancos”), its Chief Executive Officer Brian Nelson (“Nelson”), and its Chief Operating Officer Laure Majcherczyk (“Majcherczyk”), and other parties (since dismissed), for advertising in and sending unlawful spams to Balsam in July-August 2007 that violated Cal. Business & Professions Code (“B&P”) § 17529.5 and the Consumers Legal Remedies Act, Civ. Code § 1750 *et seq.*

Trial was initially set for June 15, 2009. Balsam and Defendants appeared, both fully expecting to go to trial, but due to the unexpected unavailability of a courtroom, trial was delayed until October 13. The Court allowed the parties to file a Motion for Summary Judgment or a Motion for Judgment on the Pleadings (“MJP”).

As described herein, Defendants’ MJP misstates facts and displays a profound lack of understanding of the history of the California and federal anti-spam laws, when and how federal laws preempt state laws, the difference between “falsity” and “fraud,” standing requirements for a CLRA cause of action, and the nature of severability. Defendants’ MJP also disregards Code Civ. Proc. § 438(c)(1)(B)(ii) and (d) by ignoring the Verified Complaint’s allegations of fact.

This Court should deny Defendants’ MJP, and allow the Action to be heard on Balsam’s Motion for Summary Judgment or to go to trial as scheduled.

II. LEGAL STANDARD

A defendant who files a MJP must allege that the court has no jurisdiction, or the complaint does not state facts sufficient to constitute a cause of action. Code Civ. Proc. § 438(c)(1)(B). The grounds for the motion must appear on the face of the challenged pleading or from any matter of which the court shall/may take judicial notice. Code Civ. Proc. § 438(d).

A MJP is analogous to a demurrer in that the court must accept as true all material facts alleged in the complaint. *Parnell v. Adventist Health System/West*, 35 Cal. 4th 595, 598 (2005), *CD Investment Co. v. California Insurance Guarantee Assn.*, 84 Cal. 4th 1410, 1417 (2000).

¹ “Spam” is the commonly accepted term to describe “unsolicited commercial email.” The California Legislature and courts have also used the term. *See* B&P § 17529(a), *Ferguson v. FriendFinders Inc.*, 94 Cal. App. 4th 1255, 1267 and n.5 (1st Dist. 2002).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

III. ARGUMENT

A. California Business & Professions Code §§ 17529 and 17529.5

1. B&P § 17529 was Not the First Anti-Spam Law in the Country, or Even in California

Defendants are not familiar with the relevant laws. Defendants incorrectly claim that “On September 23, 2003, California enacted the nation’s first ban on UCE. Business and Professions Code § 17529 *et seq.*” MJP at 4:10-11. In fact, California enacted its *second* anti-spam law on that date, replacing B&P § 17538.4, which had been in effect since 1998. Nevada was the first state to pass an anti-spam law (in 1997), Washington State banned spam to residents on its do-not-email list in 1998, and many other states had anti-spam laws prior to September 23, 2003. See Washington State Office of the Attorney General, Safeguarding Consumers: Spam, <http://www.atg.wa.gov/page.aspx?id=7224> (last visited July 22, 2009), Stephanie Miles, *Antispammers Slam First Spam Law*, CNET, July 9, 1997, <http://news.cnet.com/2100-1023-201296.html>; ZDNet Staff, *Anti-Spam Laws State by State*, ZDNET, Sep. 19, 2002, <http://techupdate.zdnet.com/techupdate/stories/main/0,14179,2880726,00.html>.

2. B&P § 17529.2 Was Arguably Preempted; But B&P § 17529.5 Was Not Preempted By the CAN-SPAM Act

California intended to prohibit spam altogether. B&P § 17529.2. California also specifically prohibited certain false and deceptive elements in spam. B&P § 17529.5. Therefore, as discussed below, B&P § 17529.2 was arguably preempted by the federal CAN-SPAM Act, because it applied even to “truthful” spam which Congress made legal (so long as spammers met certain requirements), but B&P § 17529.5 was *not* preempted. Balsam asks that this Court take judicial notice of the Opinion from Diane F. Boyer-Vine, Legislative Counsel to Senator Kevin Murray, *Unsolicited Commercial E-mail Advertising #22332* (May 10, 2004) (on file with author), which explains that B&P § 17529 was preempted *except* for § 17529.5.

3. Spam Recipients Have a Remedy Under B&P § 17529.5 Only if the Spam is False or Deceptive

Defendants incorrectly claim in the MJP that “If that same e-mail is sent without the consumer’s affirmative consent (i.e., UCE), the sender is liable for both actual and liquidated damages regardless of whether or not the e-mail was deceptive” at 5:12-13, and “(ii) both [§ 17529.5 and § 17529] regulate and punish the use of UCE” at 12:8.

1 Defendants falsely describe the plain language of B&P § 17529.5 in an improper attempt
2 to deceive the Court into believing that § 17529.5 applies even to “truthful” spam, which means
3 that it may be preempted by the federal CAN-SPAM Act. *See* 15 U.S.C. § 7707(b)(1). But, the
4 plain language of § 17529.5(a) makes it quite clear that § 17529.5 *only* applies to false or
5 deceptive spam, and therefore it falls into the express exception to preemption.

6 **4. B&P § 17529.5’s Remedy is Actual and/or Liquidated Damages, Not Penalties**

7 Throughout their MJP, Defendants repeatedly and incorrectly refer to the remedy of B&P
8 § 17529.5 as a “penalty” and “punitive damages.” However, the plain language of the statute
9 states that the remedy is “actual damages” and/or “liquidated damages.” The purpose of the law
10 is to reimburse those who have suffered damages, and even if such reimbursement impacts
11 spammers’ future actions, the California Supreme Court held that “The fact that [a statute] seeks
12 to shape [] behavior in addition to compensating [] does not automatically render the remedy a
13 penalty.” *Murphy v. Kenneth Cole Productions Inc.*, 40 Cal. 4th 1094, 111 (2007).

14 *Murphy* also held that “The Court of Appeal’s underlying assumption, that payments
15 made pursuant to statutory liability must constitute a penalty, is incorrect,” *id.* at 1112, and
16 “Where damages are obscure and difficult to prove, the Legislature may select a set amount of
17 compensation without converting that remedy into a penalty,” *id.* at 1112.

18 **5. This Court Must Accept as True Balsam’s Allegations that the Spams Contain and**
19 **are Accompanied by False and Deceptive Information**

20 Pursuant to *Parnell* and *CD Investment Co*, *supra*, for purposes of a MJP, this Court must
21 accept as true all material facts alleged in the complaint:

- 22 • Balsam’s Verified Complaint alleged at ¶¶ 1, 33-45, 55-57 and Attach. C that the
23 emails at issue were “spams” because they were unsolicited.
- 24 • Balsam’s Verified Complaint alleged at ¶¶ 42, 69 and Attach. C that the Subject Line
25 “Get paid 5 Dollars for 1 survey” was misleading because it did not disclose that
26 there were prerequisite conditions for the survey taker to receive \$5 – the person *also*
27 has to complete “promotional offers” (and expend monies) in order to “get paid” for
28 taking a survey.
- 29 • Balsam’s Verified Complaint alleged at ¶¶ 38-45, 72-78 that the From Names “Your
30 Promotion,” “Bank Wire Transfer Available,” “Join Elite,” “Paid Survey,” “Your
31 Business,” “ChristianDating,” and “Dating Generic” – misrepresented who the
senders/advertisers in the spams were.
- Balsam’s Verified Complaint alleged at ¶¶ 14, 23, 79-97 and Attach. C that
Defendants’ actions of sending spam from multiple domain names – i.e., multiple
identities – misrepresented the fact that Defendants alone sent all of the spams at

1 issue, and Defendants’ actions were misleading because Defendants intended to trick
2 spam filters by spreading out their spam across multiple domain names.

- 3 • Balsam’s Verified Complaint alleged at ¶¶ 14, 16, 23, 98-102 and Attach. B that
4 because Defendants privately registered their domain names so as to avoid identifying
5 themselves as the spammers, the registration information for the domain names
6 misrepresented who the true operator of the domain names really was, and that
7 Balsam was unable to identify Defendants by querying the publicly available Whois
8 database for their domain names.²
- 9 • Balsam’s Verified Complaint alleged at ¶¶ 17-18 that Defendants did not register
10 their fictitious business name (“FBN”) “USAProductsOnline.com.”
- 11 • Balsam’s Verified Complaint alleged at ¶¶ 19-22, 26, and Attach. A that Defendants
12 deceptively applied for a box at The UPS Store using their unregistered FBN.

13 Defendants’ First Amended Verified Answer asserted no contrary facts and made no
14 contrary arguments.

15 **B. The Federal CAN-SPAM Act Preempts State Anti-Spam Laws Except as to “False or**
16 **Deceptive” Spam, Not “Fraudulent” Spam**

17 **1. This Court Should Use Established Preemption Analysis**

18 Defendants’ MJP misapplies well-established principles of preemption. “Where ... the
19 field which Congress is said to have pre-empted includes areas that have ‘been traditionally
20 occupied by the States,’ congressional intent to supersede state laws must be ‘clear and
21 manifest.’” *Jevne v. Superior Court*, 35 Cal. 4th 935, 949 (2005). “If Congress had intended to
22 completely displace all state regulation of commercial email, it certainly could have done so in
23 CAN-SPAM. It could have provided for no exceptions. But, it did not do so.” *Free Speech*
24 *Coalition Inc. v. Shurtleff*, No. 2:05CV949DAK, 2007 U.S. Dist. LEXIS 21556 at *29-30 (D.
25 Utah Mar. 23, 2007) (order on motions to dismiss, to strike, and for preliminary injunction).

26 In December 2003, Congress passed the federal CAN-SPAM Act, which largely – *but not*
27 *entirely* – preempted California’s anti-spam law. CAN-SPAM states:

28 (1) In general. This Act supersedes any statute, regulation, or rule of a State or
29 political subdivision of a State that expressly regulates the use of electronic mail
30 to send commercial messages, *except* to the extent that any such statute,
31 regulation, or rule prohibits *falsity or deception in any portion of a commercial*
electronic mail message or information attached thereto.

² This Court should note that registering domain names used to send commercial email so as to
impair a person’s ability to identify the sender is an express violation of the CAN-SPAM Act, 18
U.S.C. § 1037(a)(4), (d)(2) – the very federal law that Defendants are attempting to use to avoid
liability under California law.

1 (2) State law not specific to electronic mail. This Act shall not be construed to
2 preempt the applicability of –

3 (A) State laws that are not specific to electronic mail, including State trespass,
4 contract, or tort law; or

5 (B) other State laws to the extent that those laws relate to acts of *fraud* or
6 computer crime.

7 15 U.S.C. § 7707(b) (emphasis added).

8 In the interest of a creating a national uniform standard, Congress chose to exclusively
9 occupy the field of *truthful* commercial email... even spam. As the Senate Report
10 accompanying the CAN-SPAM Act explains:

11 The legislation would preempt State and local statutes, regulations, and rules that
12 expressly regulate the use of e-mail to send commercial messages *except* for
13 statutes, regulations, or rules that target fraud *or deception* in such e-mail. . . . [A]
14 state law prohibiting fraudulent *or deceptive* headers, subject lines, or content in a
15 commercial e-mail would not be preempted.

16 Senate Report No. 108-102 at 21 (2003) (emphasis added). But Congress limited the scope of
17 federal preemption, expressly authorizing the states to define and regulate *false or deceptive*
18 spam, and it did so without imposing a *fraud* requirement. The repeated use of “or deceptive”
19 confirms Congress’ intent that the exception-to-preemption is not dependent *only* upon a finding
20 of fraud; “or” is the operative conjunction, not “and,” so deception *without* fraud is all that is
21 required for state anti-spam laws to *not* be preempted.

22 Moreover, Congress used the words “falsity or deception” in 15 U.S.C. § 7707(b)(1) but
23 “fraud” in § 7707(b)(2)(B); indicating that Congress did *not* intend CAN-SPAM to preempt state
24 anti-spam laws except as to fraud, because it manifested an understanding of the difference
25 between the terms. *If* Congress had intended (b)(1) to mean *fraud*, then (b)(1) would be
26 superfluous, because it would be subsumed by (b)(2)(B).

27 Several courts – none of which are binding upon this Court – have confused *falsity* and
28 *fraud*. But these terms are *not* synonymous, as the Virginia Supreme Court recently pointed out
29 – specifically in the context of spam – noting that *fraud* (but not *falsity*) requires a showing of
30 reliance and damages. *Jaynes v. Commonwealth of Virginia*, 666 S.E.2d 303 at *23-24 and n.10
31 (Va. 2008).

And even *if* Congress meant *fraud* instead of *falsity*, in the context of B&P § 17500
actions, “fraud” does not mean the traditional common law tort (including reliance), but rather
the *likelihood of deception*. “Allegations of actual deception, reasonable reliance, and damage

1 are unnecessary.” *Day v. AT&T Corporation*, 63 Cal. App. 4th 325, 332 (1st Dist. 1998)
2 (citations omitted).

3 Therefore, Defendants’ argument that Balsam’s first cause of action, B&P § 17529.5, is
4 preempted by the federal CAN-SPAM Act because Balsam has not pled *fraud*, fails. The CAN-
5 SPAM Act preempts state anti-spam laws *except* to the extent that such laws prohibit *falsity or*
6 *deception* in commercial email. Balsam has alleged in the Verified Complaint – and for
7 purposes of a MJP the allegations must be taken as true – that the spams *do* contain and are
8 accompanied by false and deceptive content. Verified Complaint at ¶¶ 13-26, 64-102.

9 **2. The California Legislature Stated its Intent and Specifically Amended B&P**
10 **§ 17529.5 to Ensure that It Is Not Preempted**

11 Shortly after B&P § 17529.5 and CAN-SPAM went into effect, the California Legislature
12 revisited the surviving B&P § 17529.5 subsection to provide guidance to marketers and the
13 courts that California’s prohibitions against false and deceptive spam are *not* preempted.

14 Although [the CAN-SPAM Act] preempted California’s complete prohibition of
15 spam, *it did not preempt the private right of action consumers and ISPs have*
16 *against those who send spam with misleading or falsified headers and*
17 *information, as well as the advertisers of those products.* SB 1457 is intended to
merely provide clean-up language and ensure a private right of action against
spammers who use falsified headers, *which is not in conflict with federal law.*

18 Senate Bill 1457, 2003-2004 Sess. (CA 2004) (Assembly Comm. Analysis June 15, 2004) at *4
19 (emphasis added).

20 Additionally, in August 2008, the California Legislature passed Assembly Bill 2950,
21 designed to strengthen and clarify several provisions of California’s anti-spam law, which
22 included adding a statement that:

23 It is the intent of the Legislature that [B&P § 17529.5], which prohibits all types
24 of falsity and deception in commercial e-mail messages, shall operate within the
25 exception to federal preemption to the full extent permitted by the CAN-SPAM
Act of 2003 (15 U.S.C. Sec. 7707(b)) and any other provision of federal law.

26 Assembly Bill 2950, 2007-2008 Sess. (CA 2008) (Enrolled Bill Text Aug. 13, 2008) at *5.

27 **3. Case Law in Support of Preemption Arose From a Narrow Set of Facts and a**
28 **Misinterpretation of Falsity vs. Fraud That Has Perpetuated Without Reasonable**
29 **Basis**

30 There is a line of cases – none of which are binding on this Court and most of which are
31 on appeal – that incorrectly equated *falsity* and *fraud*, and, notwithstanding the plain language of
15 U.S.C. § 7707(b)(1), held that CAN-SPAM preempts state laws except for *fraud*.

1 **a. Omega World Travel v. Mummagraphics**

2 The first – and only – appellate case in support of preemption is *Omega World Travel*
3 *Inc. v. Mummagraphics Inc.*, 469 F.3d 348, 353 (4th Cir. 2006), in which the court incorrectly
4 concluded that *falsity* meant “traditionally tortious conduct” and incorrectly stated that the “link”
5 between *falsity* and *deception* in CAN-SPAM is *and* rather than *or*. *Id* at 354.

6 Defendants misstate the history of their primary authority by claiming in their MJF at
7 7:11-20 that in *Omega*, the plaintiff filed suit for unlawful spam. In fact, it was the *defendant*,
8 Mummagraphics, who filed a *counterclaim* for receipt of purportedly unlawful spam.

9 Defendants falsely claim in their MJF at 7:11 that the facts of the instant matter are
10 “strikingly similar” to the facts in *Omega*, in an attempt to deceive this Court into following
11 *Omega*’s [flawed] logic. *The facts could not be more different*. The only falsity and deception in
12 the *Omega* spams was an unintentional software configuration error that caused an invalid
13 domain name to appear in part of the email headers generally unseen by recipients, and Mark
14 Mumma of Mummagraphics never claimed that he could not identify the sender. I.e., the falsity
15 and deception in the *Omega* spams was arguably immaterial.

16 In sharp contrast to *Omega*, the instant spams falsely claimed that Balsam opted in to
17 receive commercial email. Verified Complaint at ¶¶ 35-37, 55-56. The spams included
18 misleading Subject Lines and misrepresented From Names, and were sent from multiple domain
19 names with deliberate intent to deceive and bypass spam filters, and were sent from privately
20 registered domain names for the specific purpose of misrepresenting Defendants’ identity and
21 ensuring that recipients of the spams could not identify Defendants. Verified Complaint at
22 ¶¶ 14-16, 23-26, 64-102. To further hide their identities, Defendants also failed to register their
23 FBN “USAProductsOnline.com,” Verified Complaint at ¶¶ 17-18, and then applied for a box at
24 The UPS Store – the only address provided in the spams – using that unregistered FBN, Verified
25 Complaint at ¶¶ 19-22, 26 and Attach. A. And Defendants almost succeeded... after querying
26 the Whois database and even after sending a subpoena to The UPS Store and receiving their
27 application for the box, Balsam still could not identify Defendants. Verified Complaint at
28 ¶¶ 16, 26, 100. Thus, unlike *Omega*, the instant spams included multiple, intentional, material
29 elements of falsity and deception.

30 Nevertheless, spammers like Defendants frequently glom onto *Omega* as if it stands for
31 the proposition that CAN-SPAM categorically preempts state laws. It does not. Numerous

1 cases, *infra*, have refused to follow *Omega*'s misinterpretation of "falsity" and narrow
2 underlying fact pattern.

3 **b. Omega's Progeny**

4 *Kleffman v. Vonage Holdings Corp.*, No. CV 07-2406 GAF (JWJx), 2007 U.S. Dist.
5 LEXIS 40487 (C.D. Cal. May 22, 2007) (order granting motion to dismiss), *Asis Internet*
6 *Services v. Optin Global*, No. C-05-05124 JCS, 2008 U.S. Dist. LEXIS 34959 (N.D. Cal. Mar.
7 27, 2008) (order granting defendant's motion for summary judgment, denying plaintiff's motion
8 for summary judgment and dismissing action), and *Hoang v. Reunion.com Inc.*, No. C-08-3518
9 MMC, 2008 U.S. Dist. LEXIS 85187 (N.D. Cal. Oct. 6, 2008) (order granting defendant's
10 motion to dismiss), followed *Omega*, each citing to the previous cases, with little-to-no
11 additional analysis, thereby replicating and perpetuating *Omega*'s original mistake of equating
12 *falsity* and *fraud*. All three cases are on appeal.

13 **c. Some Courts Hearing Spam Cases Have Failed to Actually Analyze the**
14 **Facts and Statutes**

15 Last year, Judge Henderson of the Northern District of California sharply criticized other
16 courts hearing anti-spam cases for perpetuating errors of law by merely following each other,
17 rather than actually analyzing the facts and the plain language of the statutes.

18 [R]ecent decisions . . . imposed additional standing requirements that are neither
19 grounded in the language of the statute itself nor warranted by the legislative
20 history. Their progressively more restrictive interpretations of the Act create a
21 virtually insurmountable barrier to standing that is inconsistent with the statutory
22 structure and purpose. . . . This requirement appears to have evolved as an artifact
23 of courts' paraphrasing each other, without an explicit analysis of what, in reality,
24 would be required to show causation.

25 *Asis Internet Services v. Active Response Group*, No. C07 6211 THE, 2008 U.S. Dist. LEXIS
26 60535 at *3, 12 (N.D. Cal. July 30, 2008) (order denying motion to dismiss).

27 **4. Courts Actually Analyzing the Statutory Language Have Found that State Laws are**
28 **Not Preempted When the Spams at Issue are False or Deceptive, Even Without a**
29 **Showing of Common-Law Fraud**

30 Notwithstanding the cases above – none of which are binding on this Court – the majority
31 of cases have found that CAN-SPAM does *not* preempt state anti-spam laws when there is *falsity*
or *deception* in the emails. These courts have correctly distinguished between *falsity* and *fraud*,
and held that state anti-spam laws that prohibit falsity and deception are not preempted by the
CAN-SPAM Act. While none of these cases are binding on this Court, they are persuasive.

1 **a. Beyond Systems v. Keynetics**

2 The underlying facts of *Omega* are so narrow that the U.S. District Court in Maryland –
3 *part of the Fourth Circuit* – declined to follow *Omega*, holding that CAN-SPAM did *not* preempt
4 Maryland’s anti-spam law. *Beyond Systems v. Keynetics Inc.*, No. PJM 04-686 (D. Md. Mar. 26,
5 2007) (order denying defendant’s motion for other relief under FRCP 7 and second renewed
6 motion to dismiss for lack of personal jurisdiction). If a District Court *from the Fourth Circuit*
7 declined to follow *Omega*, then *Omega* cannot possibly have general applicability.

8 **b. Infinite Monkeys v. Global Resource Systems**

9 *Infinite Monkeys v. Global Resource Systems Corp.* held that the federal CAN-SPAM Act
10 does not preempt § 17529.5 if the emails have false or deceptive content.

11 [A]ctions under Business & Professions Code § 17529.5(a) fall within the *express*
12 *exception to preemption* provided in 15 U.S.C. § 7707(b) (the CAN-SPAM Act)
13 and the *private right of action* provided by Business & Professions Code
14 § 17529.5 is a *permissible exercise of a state’s right to regulate falsity or*
deception in any portion of an electronic mail message *expressly recognized by 15*
U.S.C. § 7707(b).

15 No. 1-05-CV039918 at *2 (Super. Ct. Cal. Cty. of Santa Clara Sep. 14, 2005) (order re:
16 demurrer, motion to strike, and motion for preliminary injunction) (emphasis added).

17 **c. Gordon v. Impulse Marketing Group**

18 In *Gordon v. Impulse Marketing Group Inc.*, the U.S. District Court for the Eastern
19 District of Washington denied defendant’s motion to dismiss on the grounds of federal
20 preemption. The court held that Washington’s “Commercial Electronic Mail Act is excepted
21 from federal preemption because it prohibits ‘falsity and deception’” and denied defendant’s
22 motion to dismiss. 375 F. Supp. 2d 1040, 1045-1046 (E.D. Wash. 2005).

23 **d. Asis Internet Services v. ConsumerBargainGiveaways**

24 Earlier this year, the U.S. District Court for the Northern District of California denied
25 defendant’s motion to dismiss on the grounds of federal preemption, after carefully analyzing the
26 CAN-SPAM Act and B&P § 17529.5. *Asis Internet Services v. ConsumerBargain Giveaways*
27 *LLC et al*, No. C08-04856 WHA, 2009 U.S. Dist. LEXIS 36523 (N.D. Cal. Apr. 17, 2009) (order
28 re Rule 12 motion).

29 [B&P § 17529.5’s] prohibitions are broader than common law fraud “falsity
30 and deception” is not limited *just* to common-law fraud [a]ctual reliance and
31 injury are not required On its own terms, the savings clause exempts from
preemption not only “fraud” claims but rather laws that proscribe “falsity or

1 deception” in email advertisements . . . Congress [] is certainly familiar with the
2 word “fraud” and chose not to use it; the words “falsity *or* deception” suggest
3 broader application. In fact, [] Congress used the word “fraud” in the very next
subsubsection but not in the savings clause.

4 *Id.* at *13, 16, 17 (emphasis in original).

5 The court then noted that the disjunctive preposition “or” demonstrates that – even *if* the
6 terms “falsity” and “fraud” were interchangeable – that “or deception” shows Congressional
7 intent that deception means something different than “fraud,” and therefore, “Plaintiffs’ claims
8 are not preempted merely because the complaint fails to plead, or Section 17529.5 fails to
9 require, reliance and/or damages.” *Id.* at *11-12.

10 Judge Alsup also found that “Most or all of the district court decisions that have equated
11 ‘falsity or deception’ with fraud have relied on [*Omega*],” *id.* at *10, and he then pointed out that
12 *Omega* does not actually stand for the proposition of categorical federal preemption.

13 **e. Asis Internet Services v. VistaPrint USA**

14 Earlier this year, the U.S. District Court for the Northern District of California again
15 denied a defendant’s motion to dismiss due to federal preemption. *Asis Internet Services v.*
16 *VistaPrint USA Inc.*, No. C08-5261-SBA, 2009 U.S. Dist. LEXIS 41384 (N.D. Cal. May 5,
17 2009) (order re motion to dismiss).

18 After analyzing the language of the CAN-SPAM Act and B&P § 17529.5, the court
19 similarly found that: 1) Congress must *not* have meant “fraud” in 15 U.S.C. § 7707(b)(1) because
20 it *did* use “fraud” in § 7707(b)(2), and because Senate Report 108-102 used the disjunctive fraud
21 *or* deception, and 2) B&P § 17529.5 does not require a plaintiff to plead reliance and actual
22 damages. *Id.* at *9-10.

23 **f. Walton v. PlasmaNet et al**

24 The Superior Court of Santa Clara County sustained plaintiff’s demurrer without leave to
25 amend as to defendant Niutech LLC’s preemption defenses.

26 [D]efendant alleged that plaintiff’s second cause of action for violation of
27 Business & Professions Code § 17259, et seq., is barred or preempted by the
28 CAN-SPAM Act. However, a state law is not preempted to the extent it
29 “prohibits falsity or deception in any portion of a commercial electronic mail
30 message or information attached thereto.” 15 U.S.C. § 7707(b). Section 17529.5
31 is explicitly designed to prohibit the transmission of false and/or deceptive-
information. Thus; the CAN-SPAM Act does not preempt plaintiff’s second
cause of action.

1 *Walton v. PlasmaNet Inc. et al*, No. 1-04-CV-033020 at *2 (Super. Ct. Cal. Cty. of Santa Clara
2 Oct. 31, 2006) (order re: demurrer to Niutech’s verified amended answer).

3 **g. Vantage Interactive v. Householter**

4 As in *Omega*, the alleged spammer is the plaintiff, not the defendant. Plaintiff demurred
5 to the cross-complaint alleging violations of B&P § 17529.5 on the grounds of federal
6 preemption, but the Superior Court of San Francisco County found the reasoning in *Asis v.*
7 *ConsumerBargainGiveaways LLC* persuasive and overruled plaintiff’s demurrer. *Vantage*
8 *Interactive LLC v. Householter*, No. CGC-08-480288 (Super. Ct. Cal. Cty. of San Francisco June
9 10, 2009) (order overruling plaintiff’s demurrer and denying motion for sanctions).

10 **5. The U.S. Supreme Court Recently Held That Federal Laws Do Not Preempt State**
11 **Deceptive Advertising and Consumer Protection Laws**

12 In December 2008, the U.S. Supreme Court considered the question of federal
13 preemption (by the Federal Cigarette Labeling and Advertising Act) of state laws prohibiting
14 deceptive advertising (such as the Maine Unfair Trade Practices Act). *Altria Group Inc. v.*
15 *Good*, 129 S. Ct. 538, 2008 U.S. LEXIS 9127 (U.S. Dec. 15, 2008). The Court concluded that
16 “the [federal] Act does *not* pre-empt state-law claims like [Good’s] that are predicated on the
17 *duty not to deceive.*” *Id.* at *35 (emphasis added). The Court explained:

18 Because federal law is said to bar state action in *[a] fiel[d] of traditional state*
19 *regulation, namely, advertising*, we wor[k] on the assumption that the historic
20 police powers of the States *[a]re not to be superseded* by the Federal Act unless
21 that *[is] the clear and manifest purpose of Congress. . . . Thus, when the text of a*
22 *pre-emption clause is susceptible of more than one plausible reading, courts*
23 *ordinarily accept the reading that disfavors pre-emption.*

24 *Id.* at *11 (internal citations omitted) (emphasis added).

25 On June 29, 2009, the U.S. Supreme Court similarly held that the National Banking Act
26 (12 U.S.C. § 484(a)) does not preempt state fair-lending laws and other banking laws designed to
27 protect consumers. *Cuomo v. The Clearing House Association LLC et al*, No. 08-453, 2009 U.S.
28 Lexis 4944 at *1-2 (U.S. June 29, 2009).

29 This Court should follow the guidance of the U.S. Supreme Court. If there is *any way* for
30 this Court to find – given the instant facts – that California law is *not* preempted, it should do so.

31 Defendants can provide no compelling legal reason for federal preemption in this Action,
only their desire to avoid their liability under California law.

1 **6. The CAN-SPAM Act Does Not Preempt the CLRA**

2 The CAN-SPAM Act does not preempt state laws that are not specific to email. 15
3 U.S.C. § 7707(b)(2)(A). The CLRA, Civ. Code § 1750 *et seq.*, is not specific to email; in fact,
4 the CLRA does not even mention the word “email.” Therefore, the CAN-SPAM Act does not
5 preempt the CLRA. Moreover, Defendants’ Verified First Amended Answer did not assert the
6 affirmative defense of federal preemption with regard to Balsam’s CLRA cause of action.

7 **C. B&P § 17529.5 is a Severable, Standalone Subsection that Survived Federal Preemption**

8 Defendants’ argument that B&P § 17529.5 is preempted because it is not severable due to
9 the “mirror image” damages provisions borders on the unintelligible.

10 First and foremost, Defendants neglect to mention that B&P § 17529.9 expressly made
11 all provisions of § 17529 severable.

12 As originally enacted, B&P § 17529.2 made all spam unlawful, § 17529.5 specifically
13 addressed false and deceptive spam, and § 17529.8 set forth damages provisions for both. After
14 CAN-SPAM arguably preempted § 17529.2, the California Legislature passed S.B. 1457
15 specifically to ensure that B&P § 17529.5 remained actionable. The Legislature accomplished
16 its objective by deliberately copying the damages provisions from § 17529.8 into § 17529.5 “to
17 create a ‘stand alone’ section for falsified emails” and “avoid confusion as to what parts of
18 existing state law are preempted by federal law and what parts [§ 17529.5] remain viable in this
19 area.” S.B. 1457, *supra* (emphasis added).

20 Thus, Defendants’ argument in their MJP at 12:6-11 that B&P § 17529.5 “is not
21 severable [] since it is ‘inextricably connected’ to the original California Act” is backwards. It is
22 precisely *because* § 17529.5, as amended by S.B. 1457, incorporates the damages provisions
23 from § 17529.8 that *makes* § 17529.5 a viable, standalone, non-preempted subsection.

24 Additionally, Assembly Bill 2950 reiterated the Legislature’s intent that B&P § 17529.5
25 operate within the exception-to-preemption. A.B. 2950, *supra*.

26 Thus, the legislative history evidences careful, knowing efforts by the Legislature to
27 ensure that § 17529.5, including the damages provisions, remains actionable. Nothing in B&P
28 § 17529.5 frustrates the purpose of the CAN-SPAM Act, because CAN-SPAM expressly permits
29 the states to define and regulate false and deceptive spam.

1 **D. A Plaintiff Suing Under B&P § 17529.5 Does Not Need to Plead Fraud**

2 The California Legislature expressly authorized *recipients* of unlawful spam to bring
3 legal action. B&P § 17529.5(b)(1)(A)(iii). The statute does not require that a plaintiff *rely* upon
4 the deception and make a purchase. In contrast to a common law *tort-fraud* cause of action, the
5 statute provides for a liquidated damages remedy without conditioning standing upon a showing
6 of reliance or actual damages.

7 The “reasonable person” standard of B&P § 17529.5 further confirms that reliance is
8 unnecessary. The “reasonable person” is just a legal construct, so there is no actual person who
9 could rely on anything. In fact, if the Legislature intended B&P § 17529 to require a showing of
10 common-law fraud for standing, the entire statute would be superfluous, as a person who clicked
11 a link in an email and made a purchase could sue under B&P § 17500, which expressly applies to
12 false Internet advertising.

13 Moreover, in B&P §§ 17200 and 17500 actions,

14 Actual deception or confusion caused by misleading statements is not required
15 The term “fraudulent” as used in the section “*does not refer to the common*
16 *law tort of fraud*’ but only requires a showing members of the public “are likely to
17 be deceived.” No proof of direct harm from a defendant’s unfair business practice
18 need be shown, such that “[a]llegations of actual deception, reasonable reliance,
19 and damage are unnecessary.”

18 *AT&T*, 63 Cal. App. 4th at 332 (citations omitted) (emphasis added). “The evils of deceptive
19 advertising cannot be reached effectively if legislation to that end is interpreted to require proof
20 of actual reliance upon a false statement knowingly made, as in a common law action in deceit.”
21 *Ford Dealers Assoc. v. Dept. of Motor Vehicles*, 32 Cal. 3d 347, 359 (1982).

22 **E. Balsam Has Standing to Bring a CLRA Cause of Action**

23 **1. The CLRA Applies to Transactions Intended to Result in the Sale/Lease of Goods**
24 **or Services**

25 The CLRA is a *general* consumer protection statute that “shall be liberally construed.”
26 Civ. Code § 1760. The CLRA defines a consumer to be “an individual who seeks or acquires, by
27 purchase or lease, *any* goods or services for personal, family, or household purposes.” Civ. Code
28 § 1761(d). Therefore, consumers differ from, for example, businesses. The former can bring
29 actions under the CLRA; the latter cannot. The use of the word “any” to describe goods and
30 services, as opposed to limiting the definition of a consumer to one who purchases/leases the
31

1 *specific* goods and services falsely advertised, demonstrates the broad legislative intent to
2 “protect consumers against unfair and deceptive business practices.” Civ. Code § 1760.

3 Nothing in the CLRA states that a plaintiff/consumer must have purchased and be a
4 consumer *of the items advertised* via the allegedly false and deceptive means. In fact, the CLRA
5 expressly applies to deceptive transactions – such as the instant spam advertisements – that are
6 *intended* to result in the sale or lease of goods or services, as well as acts that actually result in
7 the sale or lease of goods or services. Civ. Code § 1770(a) (emphasis added).

8 **2. Meyer v. Sprint Spectrum L.P. Supports Balsam’s Argument for Standing**

9 Defendants dramatically claim in the MJP at 13:14 that *Meyer v. Sprint Spectrum L.P.*, 45
10 Cal. 4th 634 (2009) “spells the death knell for Plaintiff’s Second Cause of Action for
11 Defendants’ purported violation of the CLRA.” *Meyer* is based on a different fact pattern, and
12 *Meyer* actually *supports* the validity of Balsam’s cause of action.

13 Significantly, in *Meyer*, the plaintiffs “did not allege that there was any dispute between
14 them and Sprint. . . . Rather, theirs can be characterized as a preemptive lawsuit to strike these
15 terms *should any dispute arise*.” 45 Cal. 4th at 639 (emphasis added). The court held that “a
16 plaintiff has no standing to sue under the CLRA without some *allegation that he or she has been*
17 *damaged by an alleged unlawful practice*, an allegation plaintiffs do not sufficiently make here.”
18 *Id.* at 638 (emphasis added).

19 In contrast, Balsam alleged in the Verified Complaint at ¶ 127 that there is a dispute
20 between Balsam and Defendants, and at ¶ 63 that he was damaged by each unlawful spam that
21 the received sent by Defendants.³ For the purposes of a MJP, the allegations of the complaint
22 must be taken as true. *Parnell* and *CD Investment Co, supra*. Therefore, since Balsam *was*
23 *damaged* by Defendants’ spams, *Meyer* confirms that Balsam has standing to bring a CLRA
24 cause of action.

25
26
27
28 ³ The California Legislature expressly found that the *receipt* of spam, in and of itself, causes
29 damage. The Legislature found that Californians suffered \$1.2 billion in damages due to spam,
30 and that was in 2003, when only 40% of email was spam. (Current estimates place spam at 90%
31 of total email.) The Legislature specifically found that spam shifts costs from deceptive
spammers to recipients, and compared receiving spam to receiving junk faxes, junk mail postage
due, and telemarketing calls to a pay-per-minute cell phone. B&P § 17529(d), (e), (g), (h).

1 Timothy J. Walton (State Bar No. 184292)
2 LAW OFFICES OF TIMOTHY WALTON
3 801 Woodside Road, Suite 11
4 Redwood City, CA 94061
5 Phone: (650) 216-9800
6 Fax: (650) 618-8687

7 Daniel L. Balsam (State Bar No. 260423)
8 THE LAW OFFICES OF DANIEL BALSAM
9 3145 Geary Blvd. #225
10 San Francisco, CA 94118
11 Phone: (415) 276-3067
12 Fax: (415) 373-3783

13 Attorneys for Plaintiff
14 DANIEL L. BALSAM

ENDORSED FILED
SAN MATEO COUNTY

JUL 24 2009

Clerk of the Superior Court
By S. Peyrot
DEPUTY CLERK

15 **SUPERIOR COURT OF CALIFORNIA**

16 **COUNTY OF SAN MATEO (UNLIMITED JURISDICTION)**

17 DANIEL L. BALSAM,) Case No.: CIV471797
18)
19 Plaintiff,) **PLAINTIFF'S REQUEST FOR JUDICIAL**
20 vs.) **NOTICE IN SUPPORT OF PLAINTIFF'S**
21) **OPPOSITION TO DEFENDANTS'**
22 TRANCOS INC. et al,) **MOTION FOR JUDGMENT ON THE**
23) **PLEADINGS**
24)
25 Defendants.) Date: August 10, 2009
26) Time: 9:00 a.m.
27) Dept: 3
28)
29) Action Commenced: April 4, 2008
30) Trial Date: October 13, 2009
31)

32 Pursuant to Cal. Evidence Code § 452(c), Plaintiff Daniel L. Balsam requests that this
33 Court take judicial notice of an official act of the California Legislature: an opinion prepared for
34 Senator Kevin Murray, the author of Business & Professions Code § 17529, explaining that the
35 § 17529.5 subsection is not preempted by the federal CAN-SPAM Act.

1 Exhibit "A" is a true and correct copy of the Opinion from Diane F. Boyer-Vine,
2 Legislative Counsel to Senator Kevin Murray, Unsolicited Commercial E-mail Advertising
3 #22332 (May 10, 2004) (on file with author).
4

5 THE LAW OFFICES OF DANIEL BALSAM

6 Dated: July 23, 2009

7 By *Daniel L. Balsam*
8 Daniel L. Balsam
9 Attorneys for Plaintiff
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

Exhibit A
**Opinion from Diane F. Boyer-Vine, Legislative Counsel to Senator Kevin Murray,
Unsolicited Commercial E-mail Advertising #22332 (May 10, 2004) (on file with author)**

LEGISLATIVE COUNSEL

Diane E. Wynn-Vine

CHIEF DEPUTIES

Jeffrey A. DeLand
Daniel A. Weitzman

PRINCIPAL DEPUTIES

David B. Jackson
Michael J. Kersien
Robert G. Miller
John I. Scudabaker
Joe Ayala
Edward Nad Cohen
Alvin D. Chess
Jana L. Harrington
Maran M. Johnston
Michael R. Kelly
Romulo I. Lopez
Kirk S. Louis
James A. Marsala
William K. Stark
Jill Thom
Michael H. Upton
Richard B. Weisberg

OFFICE OF LEGISLATIVE COUNSEL

State Capitol, Suite 3021
Sacramento, California 95814

TELEPHONE (916) 341-8000

FACSIMILE (916) 341-8020

WEBSITE www.legislativecounsel.ca.gov

E-MAIL administration@legislativecounsel.ca.gov



May 10, 2004

Honorable Kevin Murray
4082 State Capitol

UNSOLICITED COMMERCIAL E-MAIL ADVERTISING - #22332

Dear Senator Murray:

QUESTION

Does the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (15 U.S.C. Secs. 7701 and following) preempt the provisions of Article 1.8 (commencing with Section 17529) of Chapter 1 of Part 3 of Division 7 of the Business and Professions Code?

OPINION

The federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (15 U.S.C. Secs. 7701 and following) preempts the provisions of Article 1.8 (commencing with Section 17529) of Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, except Section 17529.5 of the Business and Professions Code and the liability provisions applicable to that section.

ANALYSIS

By way of background, the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (15 U.S.C. Secs. 7701 and following; hereafter the CAN-SPAM Act) was enacted on December 16, 2003, to regulate commercial electronic mail messages under the authority of the commerce clause of the United States Constitution (cl. (3), Sec. 8, Art. I, U.S. Const.; hereafter the commerce clause). Under the commerce clause, Congress has broad authority to enact measures regulating interstate commerce (see *Atlanta*

DEPUTIES

JudyAnne Adams
Amy C. Alley
Paul Anzita
Scott A. Baxter
Ann M. Burnstein
Eileen J. Buxton
Cindy M. Cardullo
Sergio F. Carpio
Jennifer Chu
Emilia Custer
Ben E. Dale
Byron D. Damiani, Jr.
J. Christopher Dawson
Clinton J. deWitt
Linda B. Dozier
Kirsta M. Ferris
Sharon R. Fisher
Debra Zidich Gibbons
Lisa C. Goldkuhl
Kristen A. Goodwin-Alexander
Dulcinea A. Grantham
Maria Hinkos Hanke
Baldev S. Har
Thomas R. Heuer
Russell H. Holder
Okema G. Jaffe
Valerie R. Jones
Patricia Han Jorgensen
Lori Ann Joseph
Michael J. Kanor
Thomas J. Kerlas
Jacqueline R. Kinney
Eve B. Krosinger
L. Erik Lange
Kristina M. Launey
Felicia A. Lee
Diana G. Lim
Mira A. Macias
Mariana Marin
Anthony P. Marquez
Francisco A. Marin
Daniel M. Maruccia
William E. Moddelmog
Sheila R. Mohan
Abel Munoz
Michelle E. O'Connor-Katcliff
Gerardo Parida
Christine N. Paxinos
Robert A. Prou
Stephanie Ramirez-Ridgeway
Patricia Gates Rhodes
Beth A. Salaman
Michael B. Salarno
Amanda H. Saxton
Jessica L. Steele
Ellen Sward
Mark Franklin Terry
Bradley N. Webb
Lisa M. Wight
Jack G. Zorman



Motel v. United States (1964) 379 U.S. 241). This authority is complete in itself, and is unlimited except as specified in the United States Constitution (*North America Co. v. Securities and Exch. Commission* (1946) 327 U.S. 686, 704-705).

Article 1.8 (commencing with Section 17529) of Chapter 1 of Part 3 of Division 7 of the Business and Professions Code¹ (hereafter Article 1.8) regulates unsolicited commercial e-mail advertisements. A commercial e-mail advertisement is defined for the purpose of Article 1.8 as meaning "any electronic mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit" (subd. (c), Sec. 17529). Article 1.8 prohibits a person or entity located in California from initiating or advertising in unsolicited commercial e-mail advertisements (hereafter UCEA), prohibits a person or entity from initiating or advertising in UCEA sent to a California e-mail address (Sec. 17529.2), prohibits a person or entity from collecting e-mail addresses or registering for multiple e-mail addresses using automated means for the purpose of initiating or advertising in, or enabling initiating or advertising in, UCEA sent from California or to a California e-mail address (subd. (a) and (c), Sec. 17529.4), prohibits the use of an e-mail address obtained by automated means to initiate or advertise in UCEA sent from California or to a California e-mail address (subd. (b), Sec. 17529.4), and prohibits a person or entity from initiating or advertising in a commercial e-mail advertisement containing certain falsified, misrepresented, obscured, or misleading information (Secs. 17529.5). Article 1.8 also authorizes the recipient of a commercial e-mail advertisement transmitted in violation of these prohibitions, the electronic mail service provider, or the Attorney General to bring an action to recover actual damages,² authorizes these parties to recover specified liquidated damages, and provides for an award of reasonable attorney's fees and costs to a prevailing plaintiff, as specified (Sec. 17529.8).

The question at issue is whether the CAN-SPAM Act preempts the provisions of Article 1.8.³ It is a familiar and well-established principle that the supremacy clause (cl. 2, Art. VI, U.S. Const.) invalidates state laws that "interfere with, or are contrary to, federal law" (*Hillsborough County v. Automated Med. Labs.*(1985) 471 U.S. 707, 712; hereafter *Hillsborough*).

¹ All further section references are to the Business and Professions Code, unless otherwise specified.

² Article 1.8 provides that a cause of action that is in existence prior to January 1, 2004, is governed by the law in effect at the time the cause of action arose (Sec. 4, Ch. 487, Stats. 2003).

³ This opinion does not address the validity of Article 1.8 under the "dormant" commerce clause of, or any other provisions of, the United States Constitution,

State law is preempted by federal law (1) where federal law preempts state law in express terms, (2) where a scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress “left no room” for supplementary state regulation, or (3) where state law actually conflicts with federal law (*Id.*, at p. 713).

The first question under *Hillsborough* is whether the CAN-SPAM Act expressly preempts state law. In this regard, the CAN-SPAM Act states “[t]his Act supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except for any such statute, regulation, or rule that prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto” (15 U.S.C. Sec. 7707(b)(1)). Thus, the CAN-SPAM Act expressly preempts the provisions of a state law governing the sending of commercial e-mail advertisements, except those provisions that prohibit falsity or deception. The CAN-SPAM Act defines a commercial electronic mail message as meaning any “electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service” (15 U.S.C. 7702 (2)).

Sections 17529.2 and 17529.3, and subdivision (b) of Section 17529.4, regulate commercial e-mail advertisements for products and services. Subdivisions (a) and (c) of Section 17529.4 regulate activities that involve e-mail addresses and e-mail accounts and are directly related to the sending of UCEA. These provisions do not regulate activities involving falsity or deception. Therefore, we think that they come under the express prohibition in the CAN-SPAM Act and are thus preempted.

On the other hand, the remaining provision of Article 1.8, Section 17529.5, prohibits commercial e-mail advertisements sent from California or sent to a California e-mail address that (1) contain or are accompanied by a third party’s domain name without the permission of the third party,⁴ (2) contain or are accompanied by falsified, misrepresented, obscured, or forged header information, or (3) have a subject line that would be likely to mislead a recipient about a material fact regarding the contents or subject matter of the message. We think that Section 17529.5 prohibits commercial e-mail advertisements involving falsity or deception and that its provisions, and the related liability provisions in Section 17529.8, are not preempted by the express prohibition in the CAN-SPAM Act.

However, we next review whether the provisions of Section 17529.5, and the related liability provisions, are in actual conflict with any provisions of the CAN-SPAM Act and preempted on that basis. A conflict between federal and state law arises when compliance with

⁴ An e-mail that contains or is accompanied by a third party’s domain name without the permission of the third party may imply that the sender is associated with the third party, that the e-mail was sent with the approval of the third party, or that the third party is the sender of the e-mail, and thus may be deceptive and misleading.

both federal and state regulations is a physical impossibility or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress (*Hillsborough*, supra, at p. 713). Where there is a conflict between federal and state law, state law is nullified to the extent that it actually conflicts with federal law (*Ibid.*).

The CAN-SPAM Act makes it unlawful for a person to initiate the transmission of a commercial e-mail message, or a transactional or relationship message, that contains, or is accompanied by, header information that is materially false or materially misleading (15 U.S.C. Sec. 7704). The CAN-SPAM Act subjects a person who violates these provisions to specified fines and imprisonment (18 U.S.C. Sec. 1037(b)) as indicated above, and imposes fines and penalties if a person (1) accesses a protected computer without authorization, and intentionally initiates the transmission of multiple commercial electronic mail messages from or through the computer, (2) uses a protected computer to relay or retransmit multiple commercial e-mail messages, with the intent to deceive or mislead recipients, or any Internet access service, as to the origin of the messages, (3) materially falsifies header information in multiple commercial e-mail messages and intentionally initiates the transmission of the messages, (4) registers, using information that materially falsifies the identity of the actual registrant, for five or more electronic mail accounts or online user accounts or two or more domain names, and intentionally initiates the transmission of multiple commercial electronic mail messages from any combination of the accounts or domain names, or (5) falsely represents himself or herself to be the registrant or the legitimate successor in interest to the registrant of five or more Internet Protocol addresses, and intentionally initiates the transmission of multiple commercial e-mail messages from the addresses, or conspires to do so (15 U.S.C. Sec. 1037(a)). Section 17529.5 makes it unlawful for a person or entity to advertise using a commercial e-mail advertisement sent from California or to a California e-mail address where the e-mail advertisement contains or is accompanied by a third party's domain name without the permission of the third party, where the e-mail advertisement contains or is accompanied by falsified, misrepresented, obscured, or forged header information, or where the e-mail advertisement has a subject line that a person knows would be likely to mislead a recipient about a material fact regarding the contents or subject matter of the message. Although the CAN-SPAM Act provisions and Section 17529.5 overlap, we think that compliance with both the federal and state regulations is possible and that there is no actual conflict between them.

Finally, in the CAN-SPAM Act, Congress determined that (1) there is a substantial government interest in regulation of commercial e-mail on a nationwide basis, (2) senders of commercial e-mail should not mislead recipients as to the source or contents of the mail, and (3) recipients of commercial e-mail have a right to decline to receive additional commercial e-mail from the same source (15 U.S.C. Sec. 7701). The CAN-SPAM Act was intended to further these objectives. We do not think that the provisions in Section 17529.5, or the related liability provisions in Section 17529.8, stand as an obstacle to the accomplishment and execution of these purposes and objectives. Therefore, we conclude that Section 17529.5, and the liability

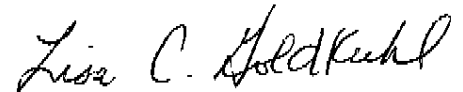
Honorable Kevin Murray — Request #22332 — Page 5

provisions related thereto, are not in conflict with the CAN-SPAM Act and are not preempted by that act on the basis of an actual conflict between federal law and state law.

Accordingly, it is our opinion that the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (15 U.S.C. Secs. 7701, and following) preempts the provisions of Article 1.8 (commencing with Section 17529) of Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, except Section 17529.5 of the Business and Professions Code and the liability provisions applicable to that section.

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel



By
Lisa C. Goldkuhl
Deputy Legislative Counsel

LCG:jwb

1 Timothy J. Walton (State Bar No. 184292)
2 LAW OFFICES OF TIMOTHY WALTON
3 801 Woodside Road, Suite 11
4 Redwood City, CA 94061
5 Phone: (650) 216-9800
6 Fax: (650) 618-8687

7 Daniel L. Balsam (State Bar No. 260423)
8 THE LAW OFFICES OF DANIEL BALSAM
9 3145 Geary Blvd. #225
10 San Francisco, CA 94118
11 Phone: (415) 276-3067
12 Fax: (415) 373-3783

13 Attorneys for Plaintiff
14 DANIEL L. BALSAM

ENDORSED FILED
SAN MATEO COUNTY

JUL 24 2009

Clerk of the Superior Court
By S. Peyrot
DEPUTY CLERK

15 **SUPERIOR COURT OF CALIFORNIA**

16 **COUNTY OF SAN MATEO (UNLIMITED JURISDICTION)**

17 DANIEL L. BALSAM,) Case No.: CIV471797
18)
19 Plaintiff,) **INDEX OF NON-CALIFORNIA**
20 vs.) **AUTHORITIES IN SUPPORT OF**
21) **PLAINTIFF'S OPPOSITION TO**
22 TRANCOS INC. et al,) **DEFENDANTS' MOTION FOR**
23) **JUDGMENT ON THE PLEADINGS**
24)
25 Defendants.) Date: August 10, 2009
26) Time: 9:00 a.m.
27) Dept: 3
28)
29) Action Commenced: April 4, 2008
30) Trial Date: October 13, 2009
31)

32 Plaintiff Daniel L. Balsam hereby lodges on compact disc in PDF format the following
33 non-California authorities, cited in his Opposition to Defendants' Motion for Judgment on the
34 Pleadings, filed concurrently herewith:
35

1 **California Cases**

- 2 1. *Infinite Monkeys & Co., LLC v. Global Resource Systems Corp.*, No. 1-05-CV039918
3 (Super. Ct. Cal. Cty. of Santa Clara Sep. 14, 2005) (order re: demurrer, motion to strike,
4 and motion for preliminary injunction)
- 5 2. *Vantage Interactive LLC v. Householter*, No. CGC-08-480288 (Super. Ct. Cal. Cty. of
6 San Francisco June 10, 2009) (order overruling plaintiff's demurrer and denying motion
7 for sanctions)
- 8 3. *Walton v. PlasmaNet Inc. et al*, No. 1-04-CV-033020 (Super. Ct. Cal. Cty. of Santa Clara
9 Oct. 31, 2006) (order re: demurrer to Niutech's verified amended answer)

10 **Other States' Cases**

- 11 4. *Jaynes v. Commonwealth of Virginia*, 666 S.E.2d 303 (Va. 2008)

12 **Federal Cases**

- 13 5. *Altria Group Inc. v. Good*, 129 S. Ct. 538, 2008 U.S. LEXIS 9127 (U.S. Dec. 15, 2008)
- 14 6. *Asis Internet Services v. Active Response Group*, No. C07 6211 THE, 2008 U.S. Dist.
15 LEXIS 60535 (N.D. Cal. July 30, 2008) (order denying motion to dismiss)
- 16 7. *Asis Internet Services v. ConsumerBargainGiveaways LLC et al*, No. C08-04856 WHA,
17 2009 U.S. Dist. LEXIS 36523 (N.D. Cal. Apr. 17, 2009) (order re Rule 12 motion)
- 18 8. *Asis Internet Services v. Optin Global Inc.*, No. C-05-05124 JCS, 2008 U.S. Dist. LEXIS
19 34959 (N.D. Cal. Mar. 27, 2008) (order granting defendant's motion for summary
20 judgment, denying plaintiff's motion for summary judgment and dismissing action)
- 21 9. *Asis Internet Services v. VistaPrint USA Inc.*, No. C08-5261-SBA, 2009 U.S. Dist.
22 LEXIS 41384 (N.D. Cal. May 5, 2009) (order re motion to dismiss)
- 23 10. *Beyond Systems v. Keynetics Inc.*, No. PJM 04-686 (D. Md. Mar. 26, 2007) (order
24 denying defendant's motion for other relief under FRCP 7 and second renewed motion to
25 dismiss for lack of personal jurisdiction)
- 26 11. *Cuomo v. The Clearing House Association LLC et al*, No. 08-453, 2009 U.S. Lexis 4944
27 (U.S. June 29, 2009)
- 28 12. *Free Speech Coalition Inc. v. Shurtleff*, No. 2:05CV949DAK, 2007 U.S. Dist. LEXIS
29 21556 (D. Utah Mar. 23, 2007) (order on motions to dismiss, to strike, and for
30 preliminary injunction)
- 31 13. *Gordon v. Impulse Marketing Group Inc.*, 375 F. Supp. 2d 1040 (E.D. Wash. 2005)

1 **Federal Cases (cont.)**

- 2 14. *Hoang v. Reunion.com Inc.*, No. C-08-3518 MMC, 2008 U.S. Dist. LEXIS 85187 (N.D.
3 Cal. Oct. 6, 2008) (order granting defendant's motion to dismiss)
- 4 15. *Kleffman v. Vonage Holdings Corp.*, No. CV 07-2406 GAF (JWJx), 2007 U.S. Dist.
5 LEXIS 40487 (C.D. Cal. May 23, 2007) (order granting motion to dismiss)
- 6 16. *Omega World Travel Inc. v. Mummagraphics Inc.*, 469 F.3d 348 (4th Cir. 2006)

7 **California Bills and Opinions**

- 8 17. California Assembly Bill 2950, 2007-2008 Sess. (CA 2008) (Enrolled Bill Text Aug. 13,
9 2008)
- 10 18. California Senate Bill 1457, 2003-2004 Sess. (CA 2004) (Assembly Committee Analysis
11 June 15, 2004)
- 12 19. Opinion from Diane F. Boyer-Vine, Legislative Counsel to Senator Kevin Murray,
13 Unsolicited Commercial E-mail Advertising #22332 (May 10, 2004) (on file with author)

14 **Federal Statutes and Reports**

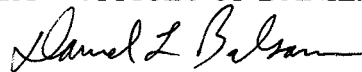
- 15 20. CAN-SPAM Act of 2003, 15 U.S.C. § 7701 *et seq.* and 18 U.S.C. § 1037
- 16 21. Senate Report No. 108-102 (2003)

17 **Other Authorities**

- 18 22. Stephanie Miles, *Antispammers Slam First Spam Law*, CNET, July 9, 1997, <http://news.cnet.com/2100-1023-201296.html>
- 19 23. Washington State Office of the Attorney General, *Safeguarding Consumers: Spam*,
20 <http://www.atg.wa.gov/page.aspx?id=7224> (last visited July 22, 2009)
- 21 24. ZDNet Staff, *Anti-Spam Laws State by State*, ZDNET, Sep. 19, 2002,
22 <http://techupdate.zdnet.com/techupdate/stories/main/0,14179,2880726,00.html>

23
24
25
26 THE LAW OFFICES OF DANIEL BALSAM

27 Dated: July 23, 2009

28 By 
29 Daniel L. Balsam
30 Attorneys for Plaintiff
31

1 Timothy J. Walton (State Bar No. 184292)
2 LAW OFFICES OF TIMOTHY WALTON
3 801 Woodside Road, Suite 11
4 Redwood City, CA 94061
5 Phone: (650) 216-9800
6 Fax: (650) 618-8687

7 Daniel L. Balsam (State Bar No. 260423)
8 THE LAW OFFICES OF DANIEL BALSAM
9 3145 Geary Blvd. #225
10 San Francisco, CA 94118
11 Phone: (415) 276-3067
12 Fax: (415) 373-3783

13 Attorneys for Plaintiff
14 DANIEL L. BALSAM

15 **SUPERIOR COURT OF CALIFORNIA**

16 **COUNTY OF SAN MATEO (UNLIMITED JURISDICTION)**

| | | | |
|------------------------|---|----------------------------------|------------------|
| 17 DANIEL L. BALSAM, |) | Case No.: | CIV471797 |
| |) | | |
| 18 Plaintiff, |) | [PROPOSED] ORDER DENYING | |
| |) | DEFENDANTS' MOTION FOR | |
| 19 vs. |) | JUDGMENT ON THE PLEADINGS | |
| |) | | |
| 20 |) | | |
| 21 TRANCOS INC. et al, |) | Date: | August 10, 2009 |
| |) | Time: | 9:00 a.m. |
| 22 Defendants. |) | Dept: | 3 |
| |) | | |
| 23 |) | | |
| 24 |) | Action Commenced: | April 4, 2008 |
| |) | Trial Date: | October 13, 2009 |

25
26 Defendant's Motion for Judgment on the Pleadings came on regularly for hearing before
27 the Court on August 10, 2009, in Department 3, in the Superior Court of San Mateo County. The
28 parties appeared through their counsel of record.

29 The Court finds that Plaintiff's Verified Complaint states facts sufficient to constitute a
30 cause of action.

1 The Court finds that the remedy of Business & Professions Code § 17529.5 is liquidated
2 damages, not penalties.

3 The Court finds that Business & Professions Code § 17529.5, which prohibits false and
4 deceptive spam, is a severable, standalone subsection of California's anti-spam law.

5 The Court finds that the plain language of the federal CAN-SPAM Act at 15 U.S.C.
6 § 7707(b)(1) states that the CAN-SPAM Act preempts state anti-spam laws except to the extent
7 that state laws prohibit falsity or deception, not common-law fraud. The Court finds the
8 reasoning of *Asis v. ConsumerBargainGiveaways LLC*, No. C-05-05124 JCS, 2008 U.S. Dist.
9 LEXIS 34959 (Mar. 27, 2008), *Asis v. VistaPrint USA Inc.*, No. C08-5261-SBA, 2009 U.S. Dist.
10 LEXIS 41384 (N.D. Cal. May 5, 2009) and *Vantage Interactive LLC v. Householter*,
11 No. CGC-08-480288 (Super. Ct. Cal. Cty. of San Francisco June 10, 2009) persuasive.
12 Therefore, given the instant facts, the Court finds that the CAN-SPAM Act does not preempt
13 Plaintiff's cause of action pursuant to California Business & Professions Code § 17529.5.

14 The Court finds that the Consumers Legal Remedies Act applies to transactions, such as
15 spam advertisements, intended to result in the sale or lease of goods or services. The Court
16 acknowledges that the Legislature found that recipients of spam are damaged. Therefore, the
17 Court finds that Balsam has standing to bring an action pursuant to the CLRA.

18 Therefore, Defendants' Motion for Judgment on the Pleadings is DENIED.

19
20 **IT IS SO ORDERED.**

21
22 Dated: _____

By _____
JUDGE OF THE SUPERIOR COURT