

1 ROBERT L. NELSON (SBN 57887)

Nelson & Weinkauf

2 35 Mitchell Blvd, Suite 15

San Rafael, CA 94903

3 Telephone: (415) 479-1911

4 Fax: (415) 479-1909

5 Attorney for Defendants,

TRANCOS, INC., BRIAN NELSON, and

6 LAURE MAJCHERCZYK

8 SUPERIOR COURT OF CALIFORNIA

9 COUNTY OF SAN MATEO

10 DANIEL L. BALSAM, an individual,

11 Plaintiff,

12 vs.

13 TRANCOS, INC., a California corporation;

14 LEWIS J. WRIGHT, an Individual; BRIAN

15 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.

Case No. CIV471797

REPLY OF DEFENDANTS TRANCOS,  
INC., BRIAN NELSON AND LAURE  
MAJCHERCZYK TO PLAINTIFF'S  
OPPOSITION TO DEFENDANTS'  
MOTION FOR JUDGMENT ON THE  
PLEADINGS

Date: August 10, 2009

Time: 9:00 AM

Dept: Law and Motion, Dept. 3

Complaint filed on April 4, 2008

Trial Date: October 13, 2009

27 Defendants, TRANCOS, INC., BRIAN NELSON, AND LAURE MAJCHERCZYK, file this

28 Reply to Plaintiff's Opposition to Defendants' Motion for Judgment on the Pleadings in the

1   aforementioned action.

2           Defendants recognize and have acknowledged in their moving papers that there is a split of  
3 authority relating to the use by Congress of the key phrase “falsity or deception” in the CAN-SPAM Act,  
4 and in particular, the use of this language as it relates to the words utilized in Business and Professions  
5 Code §17529.5. In their moving papers, Defendants urged this Court to adopt the reasoning of *Omega*  
6 *World Travel, Inc. v. Mummagraphics, Inc.* (“*Omega*”), 469 F.3d 348, (4<sup>th</sup> Cir., November 17, 2006),  
7 which is the sole Court of Appeals decision on the issue of preemption, and which Defendants submit is  
8 sound. Balsam, on the other hand, insults Defendants, and more significantly, the Court of Appeals in  
9 *Omega* as well as the District Court in *Kleffman v. Vonage Holdings Corp.* (“*Kleffman*”), 2007 WL  
10 1518650 (C.D. Cal. May 23, 2007). If you do not agree with Balsam, you are guilty of deception and  
11 you misunderstand the law.<sup>1</sup> See Plaintiff’s Opposition at 3:1-5.

12           Ultimately, it is up to this Court to decide whether it adopts the analysis in *Omega*, rejects that  
13 reasoning, or decides to stay the action until our Supreme Court decides the certified question by the  
14 Court of Appeals in *Kleffman*, 551 F.3d 847 (9<sup>th</sup> Cir., 2008), as Defendants alternatively recommend.

15           In order to aid this Court in its analysis, Defendants will address the substantive arguments raised  
16 by Plaintiff in his Opposition.<sup>2</sup>

17  
18  
19 <sup>1</sup> Plaintiff is so confident of the outcome here that he bragged in a post on his website, “Danhatesspam.com,” (posted well before the instant hearing):

20           [O]n August 10, a hearing on Defendants’ Motion for Judgment on the Pleadings, in which *Defendants display a*  
21 *profound lack of understanding of the history of the California and federal anti-spam laws, when and how federal*  
22 *laws preempt state laws, the difference between “falsity” and “fraud,” standing requirements for a CLRA cause of*  
23 *action, and the nature of severability. Defendants also conveniently ignore the fact that for purposes of a MJP, the*  
*allegations of the complaint must be taken as true. Click here to read my Opposition to Defendants’ Motion for*  
*Judgment on the Pleadings.*

24           Defendants also filed a Motion to Stay/Continue the trial until after the Cal. Supreme Court rules on the question of  
25 multiple sending domain names (certified by the 9th Circuit in *Kleffman v. Vonage*), but *whichever way the*  
26 *Supremes rule will not be dispositive of my case* because I have other theories of liability. Moreover, the Motion to  
27 Stay is untimely because if Defendants thought waiting for the Supremes was so important, they should have filed the  
28 Motion to Stay before the initial trial date. Since Defendants appeared in June expecting to go to trial, they can  
hardly argue hardship by keeping an October trial date. Click here to read my Opposition to Defendants’ Motion to  
Stay/Continuc. (Emphasis added)

<sup>2</sup> Plaintiff asserts that Nevada was the first state to *ban* spam. This is incorrect. Rather than giving this Court an appropriate cite to the Nevada statute, Plaintiff relies on a secondary source for his information. Furthermore, Plaintiff does not bother to note that Nevada did *not* ban spam, but only required that an unsolicited commercial email (“UCE”) alert the recipient that the

1           1.       Business and Professions Code §17529.5 and CAN-SPAM Act

2           Defendants submit that the reasoning in *Omega* and *Kleffman* provide this Court with the proper  
3 standard for analyzing the instant facts. However, Defendants acknowledged in their moving papers that  
4 there is a split of authority. Here, Defendants examine Balsam's arguments in opposition to the *Omega*  
5 and *Kleffman* cases.

6           **First**, Defendants cited the law on motions for judgment on the pleading in their moving papers  
7 and are well aware that the allegations in Balsam's Complaint must be taken as true. See Defendants'  
8 Motion for Judgment on the Pleadings at pp.2-4. In their moving papers, Defendants made it quite clear  
9 that the allegations of Balsam's Complaint, *taken as true*, cannot withstand the instant Motion because  
10 Balsam failed to allege facts that fall under the statutory exception set forth in the CAN-SPAM Act, and  
11 because Balsam failed to allege facts demonstrating that he has standing to bring an action under the  
12 CLRA, that he suffered damages, and that he is a consumer under the CLRA.

13           Indeed, each of the allegations to which Balsam points as demonstrating that he can overcome  
14 the instant Motion does not provide comfort to Balsam. See Plaintiff's Opposition at 3:22-4:9. Rather,  
15 these allegations fall under the auspices of *Omega* and *Kleffman* - - they do not allege the elements of  
16 actual fraud required by these cases.

17           **Second**, Balsam unsuccessfully attempts to distinguish *Omega* from the case at bar.<sup>3</sup>  
18 Defendants stand by the assertion discussed in their moving papers that the facts in *Omega* are strikingly  
19 similar to the instant facts as the emails Mummagraphics received stated that the recipient had signed up  
20 to receive the emails, which Mummagraphics claimed was incorrect. Additionally, the sender's email  
21 address incorrectly identified the sender, and the recipient did not use the email opt-out feature.<sup>4</sup> The  
22 *Omega* Court's analysis was extensive and well reasoned. The Court observed at p. 353 that:

23  
24 email was an advertisement, provide certain information about the sender, and provide the recipient with a notice that he/she  
25 could opt-out. See Nevada Bill No. 13, adopted in 1997.

26 <sup>3</sup> Plaintiff insists that there was "an unintentional software configuration error that caused an invalid domain name to appear  
in part of the email headers." There is no support in the *Omega* decision to support this bald assertion.

27 <sup>4</sup> Plaintiff tries to embarrass Defendants because Defendants referred to Mummagraphics as the Plaintiff rather than as the  
28 Cross-Complainant. Defendants did so because it was easier to explain the facts of the case in that manner and not to mislead  
or deceive this Court.

1 By its terms, the [Oklahoma] statute is *not* limited to inaccuracies in transmission information  
2 that were material, led to detrimental reliance by the recipient, and were made by a sender who  
3 intended that the misstatements be acted upon and either knew them to be inaccurate or was  
reckless about their truth. (Emphasis added) (Citations omitted)

4 The same *might* be said for Business and Professions Code §17529.5(a)(2), as it utilizes the  
5 phrase “falsified, misrepresented, or forged header information.” However, what this phrase means is  
6 currently before the California Supreme Court; that is, do these words require a showing of actual fraud  
7 or something less?

8 Furthermore, Mummagraphics alleged, as does Balsam here, that the federal preemption  
9 provision was “straightforward,” by allowing states to “to prohibit ‘falsity or deception’ in commercial  
10 email messages.” *Id.* at 354. The *Omega* Court analyzed the issues giving credence to both sides of the  
11 argument, but in the end concluded that Congress intended that the term “falsity” to refer to traditional  
12 tortious or wrongful conduct. See Defendants’ moving papers for full discussion of *Omega* at pp. 7-8.

13 Balsam has failed in any meaningful way to articulate why the *Omega* analysis is not correct, and  
14 should not be followed here.

15 **Third**, Balsam at 5:27-28 cites to *Jaynes v. Commonwealth of Virginia* (2008) 276 Va. 443, 666  
16 S.E.2d 303 (“*Jaynes*”).<sup>5</sup> *Jaynes* involved the violation of a criminal statute, under which defendant was  
17 sentenced to nine years in jail. Furthermore, the *Jaynes* Court addressed defendant’s claims, which were,  
18 in pertinent part, that the criminal statute under which he was convicted, violated the First Amendment  
19 and was overbroad. Footnote 10 referred to by Balsam simply stated the elements of fraud. Indeed, the  
20 discussion of the words “false” and “fraudulent” concerned Defendant’s First Amendment argument - -  
21 not preemption, not CAN-SPAM, and certainly not the California Act. Accordingly, this case has no  
22 precedential value whatsoever with respect to the instant case with respect to preemption.

23 **Fourth**, Balsam dismisses *Kleffman, supra*, 2007 WL 1518650 (C.D. Cal., May 22, 2007); *Asis*  
24 *Internet Services v. Optin Global*, 2008 WL 1902217 (N.D. Cal., April 29, 2008),<sup>6</sup> and *Hoang v.*  
25 *Reunion.Com, Inc.* (“*Hoang*”), 2008 WL 4542418 (N.D. Cal., October 6, 2008), without discussion. He  
26

27 <sup>5</sup> The page citations set forth in Plaintiff’s Opposition with respect to *Jaynes* are incorrect. Footnote 10 is at p. 460.  
28 Defendants cannot discern the remaining proper citations to the case.

<sup>6</sup> This case is not cited in F. Supp.

1 simply asserts that they replicated and perpetuated *Omega's* mistake of equating falsity and fraud.  
2 Plaintiff's Opposition at 8:4-12.

3 To the contrary, the District Court in *Kleffman* did analyze the law and in so doing, did not rely  
4 on *Omega*. Indeed, the *Kleffman* Court opined that Vonage "overrelied" on *Omega*. This case went up  
5 on appeal to the Ninth Circuit, which certified the question that hovers over this case. See *Kleffman*,  
6 *supra*, 551 F.3d 847.

7 *Asis Internet Services v. Optin Global, supra*, 2008 WL 1902217, was not relied upon by  
8 Defendants in their moving papers. However, and most significantly, the *Asis* Court did not mention  
9 *Omega* as precedent. Rather, the Court followed the District Court's conclusion in *Kleffman* that actual  
10 fraud must be shown under Business and Professions Code §17529.5. This was a very small portion of  
11 the opinion, most of which was devoted to plaintiff's claims under the CAN-SPAM Act, and not to  
12 plaintiff's claims relating to §17529.5.

13 *Hoang, supra*, 2008 WL 4542418, relies on *Omega* and the District Court's decision in *Kleffman*  
14 in reaching its conclusion that actual fraud is a necessary component of a §17529.5 claim. Defendants  
15 submit that the Court followed the better reasoned cases by so doing.

16 **Fifth**, Balsam relies on a series of cases that he asserts aid his argument.

17 • *Infinite Monkeys v. Global Resource Systems Corp., Walton v. PlasmaNet, et al.*, and  
18 *Vantage Interactive v. Householder*, are Superior Court cases, and thus improperly cited by Balsam. See  
19 California Rules of Court, Rule 8.1115.

20 • *Beyond Systems, Inc. v. Keynetics, Inc. ("Beyond Systems")*, 422 F.Supp.2d 523 (D.  
21 Maryland, February 14, 2006):

22 Balsam asserts that the Maryland District Court in its decision in *Beyond Systems*, categorically  
23 refused to follow *Omega*. However, *Omega* was not decided until November of 2006, months after the  
24 *Beyond Systems* case was decided. So, the Court in *Beyond Systems* could not reject the *Omega*  
25 decision.

26 Furthermore, the Court in *Beyond Systems* never addressed or decided the issue surrounding  
27 whether actual fraud must be shown. The Court only concluded that the CAN-SPAM Act carves-out an  
28 exception allowing the states to legislate for falsity or deception. However, the measure of this falsity or

1 deception (e.g., the burden of pleading and demonstrating actual fraud or some lesser standard) was  
2 never addressed by the Court.

- 3 • *Asis Internet Services v. Active Response Group*, 2008 WL 2952809 (N.D. Cal., 2008):<sup>7</sup>

4 The language in this case upon which Balsam relies had nothing whatsoever to do with the issues  
5 before this Court. Indeed, in making the comments relied upon by Balsam, the *Asis* Court was  
6 addressing a standing provision in the CAN-SPAM Act, which is not an issue here.

- 7 • *Gordon v. Impulse Marketing Group, Inc.* (“*Gordon*”), 375 F.Supp.2d 1040 (E.D.  
8 Washington, 2005):

9 Balsam incorrectly relies on *Gordon* by inferring that the *Gordon* case denied defendants’ motion  
10 to dismiss on the grounds of federal preemption without a showing of actual fraud. Once again, the  
11 *Gordon* Court noted that Washington law prohibits a person from sending emails with a  
12 misrepresentation in the subject line or transmission path and/or which contains false or misleading  
13 information in the subject line of the emails. The Court never addressed the standard that a plaintiff  
14 faces in pleading and proving false or misleading, that is, whether actual fraud must be pled and proved  
15 or some lesser standard.

- 16 • *Asis Internet Services v. Consumerbargaingiveaways, LLC*, 2009 WL 1035538 (N.D.  
17 Cal., April 17, 2009):

18 Defendants acknowledged this contrary authority in its moving papers.<sup>8</sup>

- 19 • *Asis Internet Services b. VistaPrint USA*, 617 F.Supp.2d 898 (N.D. CA, 2009):

20 The District Court accepted the reasoning of the Court in *Asis Internet Services v.*  
21 *Consumerbargaingiveaways, LLC*. What is curious is the fact that the Court did not mention or address  
22 the decision by the Court in *Omega*.

23 **Sixth**, Balsam cites to two United States Supreme Court cases on preemption outside the field of  
24 the CAN-SPAM Act. The cases are *Altria Group Inc. v. Good*, 129 S.Ct. 538, 172 L.Ed.2d 398

---

26 <sup>7</sup> Not reported in F. Supp.

27  
28 <sup>8</sup> Indeed, it is because of the split in authority that Defendants alternatively recommended that this Court stay the instant proceedings until our Supreme Court decides the central issue raised by the Ninth Circuit in *Kleffman*.

1 (2008)<sup>9</sup>, which Balsam acknowledges addresses the Federal Cigarette Labeling and Advertising Act, and  
2 *Cuomo v. The Clearing House Association LLC*, 129 S.Ct. 2710 (2009), which Balsam recognizes deals  
3 with banking laws.

4 These cases provide no insight here because the CAN-SPAM Act states in the legislation itself  
5 what is governed by the Act and what is left to the states - - CAN-SPAM specifically preempts any state  
6 laws or regulations that expressly regulate the use of email to send commercial messages; however, state  
7 laws that regulate falsity or deception in emails are not preempted.

8 Defendants addressed this issue in great detail in their moving papers so they shall not repeat it  
9 here. See Defendants' Motion for Judgment on the Pleadings at pp. 5-10. Suffice it to say, Balsam's  
10 argument that Defendants "can provide no compelling legal reason for federal preemption," misses the  
11 mark. See Plaintiff's Opposition at 11:29-30. The statute is self-defining with respect to preemption.  
12 Furthermore, given Congress' intent to create a single national standard, exceptions to CAN-SPAM's  
13 "preemptive reach should be narrowly construed." *Degan v. Ford Motor Co.*, 869 F.2d 889, 894  
14 footnote 7, (5th Cir., 1989) ("exceptions to ERISA's preemptive reach should be narrowly construed").

15 **Seventh**, Balsam asserts that §17529.5 is severable and survives federal preemption. Here,  
16 Balsam does not seem to understand the argument set forth by Defendants in their moving papers.

17 The California Legislature enacted Business and Professions Code §17529.9 to make the  
18 provisions of the California Act severable. However, saying it does not make it so. While §17529.5(a)  
19 properly regulates falsity and deception in commercial email within the scope of the limited exception to  
20 CAN-SPAM's preemption, the remedy provided under §17529.5(b) goes beyond this by allowing a  
21 private right of action and civil penalties to cases involving UCE, with an opt-in model. Thus, as clearly  
22 stated in Defendants' moving papers, the punitive damages provision of the California Act falls squarely  
23 within the scope of the federal preemption because California is regulating the use of commercial email  
24 by imposing an opt-in requirement. See 15 U.S.C. §7701(b)(1). Accordingly, an opt-in standard, which  
25 violates the CAN-SPAM Act, is tied to the punitive damage provision - - one does not exist without the  
26 other.

27  
28 <sup>9</sup> Plaintiff's page citation is incorrect. The proper citation is to 129 S.Ct.538, at 543, and the Supreme Court was quoting  
*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 at 541-542.

1 Accordingly, the punitive damages provision of §17529.5(b) is not severable.

2 2. The CLRA

3 Here, Defendants respond to Balsam's assertions with respect to the CLRA.

4 **First**, Defendants do not assert that CAN-SPAM preempts the CLRA. See Plaintiff's Opposition  
5 at 12:1-6. Accordingly, there is no need to respond.

6 **Second**, Balsam's assertion that *Meyer v. Sprint Spectrum L.P.* ("*Meyer*") (January 29, 2009) 45  
7 Cal.4<sup>th</sup> 634, *rehearing denied* April 1, 2009, aids his position is baffling, and Balsam offers no  
8 illumination into his reasoning. Balsam states that in his Complaint he alleged that he experienced  
9 damages but does not state how he was damaged. See Plaintiff's Complaint at ¶63. *Meyer* requires  
10 Balsam to allege that he relied on the emails by expending any "palpable threshold of damage." *Meyer*,  
11 *supra* at 646. Indeed, Plaintiff proudly asserts that he does not have to purchase anything in reliance on  
12 the emails. Complaint at ¶¶116; 26:19-22 and 117; 27:1-3. Plaintiff, however, points to ¶127 in his  
13 Declaratory Relief Cause, where he asserts that, "An actual controversy has arisen between BALSAM  
14 and Defendants as to the nature of their email advertising." This paragraph says nothing about Plaintiff  
15 experiencing any "palpable threshold of damage." See thorough discussion in Defendants' Motion for  
16 Judgment on the Pleadings with respect to the *Meyer* case at pp. 12-19.

17 **Third**, Plaintiff once again alleges that a Court was in error in relying on another Court's  
18 decision. After arguing that the District Court's opinion in *Kleffman, supra*, 2007 WL 1518650, is not  
19 binding on this Court because it is on appeal and because it is a federal case, citing no authority for these  
20 propositions,<sup>10</sup> he asserts that the District Court in *Kleffman* "misinterpreted" the holding in *Schauer v.*  
21 *Mandarin Gems of Cal., Inc.* (2005) 125 Cal.App.4th 949.

22 While attempting to distinguish these cases, Plaintiff does not provide this Court with any other  
23 authority that supports his claim that he is a consumer under the CLRA.

24 Furthermore, the CLRA is clear in requiring that the person be a consumer, that is, one who  
25 "seeks or acquires by purchase or lease, any goods or services for personal, family or household  
26 purposes." Civil Code §1761(d). Balsam is clearly not a consumer under the terms of the statute.

27  
28 <sup>10</sup> Interestingly, *Kleffman* was cited, although with disapproval, in April 2009 by the Court in *Asis v.*  
*Consumerbargaingiveaways, LL, supra*, 2009 WL 1035538 at \*10, footnotes 5 and 7, even after recognizing that the certified  
question was taken up by the California Supreme Court.


1 As set forth above, Balsam has not alleged facts sufficient to establish that he has standing - -  
2 that he has suffered some "palpable threshold of damage" - - or that he acquired goods or services as  
3 required by the statute. Civil Code §1761; *Meyer, supra*, 45 Cal.4<sup>th</sup> 634; and, *Kleffman, supra*.

4 3. Conclusion

5 For the reasons set forth in Defendants' moving papers, and as further set forth herein,  
6 Defendants urge this Court to adopt the reasoning of *Omega* and *Kleffman*, thus granting Defendants  
7 Motion as to First Cause of Action. Additionally, Defendants submit that they are entitled to have their  
8 Motion granted as to the Second Cause of Action for the reasons set forth immediately above.  
9 Moreover, as Plaintiffs Third Cause of Action rests on the other two Causes, Defendants submit that  
10 they are entitled to have this Motion granted as to his Cause as well.

11 Finally, Plaintiff seeks leave to amend his Complaint if this Court grants Defendants' instant  
12 Motion. While any information gained in discovery is not appropriate for consideration in this Motion,  
13 Defendants will carefully scrutinize any amended pleading, if Plaintiff is permitted to amend, as Plaintiff  
14 has testified under oath at his deposition that: (1) he did not detrimentally rely on any of the emails he  
15 purportedly received from Defendant Trancos; (2) did not purchase, acquire or lease anything as the  
16 result of the emails he purportedly received from Trancos; and, (3) suffered no damages whatsoever.

17 Dated: July 31, 2009

18   
19 ROBERT L. NELSON  
20 Attorney for Defendants,  
21 Trancos, Inc., Brian Nelson, and  
22 Laure Majcherczyk  
23  
24  
25  
26  
27  
28

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 Plaintiff,  
 TRANCOS, INC., BRIAN NELSON and  
 LAURE MAJCHERCZYK

8 SUPERIOR COURT OF CALIFORNIA  
 9 COUNTY OF SAN MATEO - UNLIMITED JURISDICTION

10 DANIEL L. BALSAM, an individual,  
 11 )  
 Plaintiff, )  
 12 )  
 13 vs. )  
 14 TRANCOS INC., a California corporation;  
 15 LEWIS J. WRIGHT, an Individual; BRIAN  
 16 NELSON, an Individual; LAURE  
 MAJCHERCZYK, an Individual; AD  
 17 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.

**Case No. CIV471797**

**COPIES OF NON-CALIFORNIA  
AUTHORITIES**

**Date: August 10, 2009**

**Time: 9:00 AM**

**Dept: Law and Motion, Dept. 3**

**Complaint filed on April 4, 2008**

**Trial Date: October 13, 2009**

**TABLE OF AUTHORITIES**

**Exhibit**

Other References

Nevada Senate Bill No. 13 .....A

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

**EXHIBIT A**

**Nevada Senate Bill No. 13**

Introduced by Senator Raggio  
Prefiled on January 14, 1997

As amended and passed by Assembly June 30, 1997 (third reprint)  
Amended version concurred in by Senate July 1, 1997

AN ACT relating to actions concerning persons; providing that a person who transmits certain items of electronic mail is liable to the recipient for civil damages under certain circumstances; providing that the district court may enjoin a person from transmitting certain items of electronic mail under certain circumstances; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND  
ASSEMBLY, DO ENACT AS FOLLOWS:

**Section 1** Chapter 41 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 8, inclusive, of this act.

**Sec. 2** *As used in sections 2 to 8, inclusive, of this act, unless the context otherwise requires, the words and terms defined in sections 3 to 6, inclusive, of this act have the meanings ascribed to them in those sections.*

**Sec. 3** *"Advertisement" means material that:*

*1. Advertises for commercial purposes the availability or the quality of real property, goods or services; or*

*2. Is otherwise designed or intended to solicit a person to purchase real property, goods or services.*

**Sec. 4** *"Electronic mail" means a message, a file or other information that is transmitted through a local, regional or global network, regardless of whether the message, file or other information is:*

*1. Viewed;*

*2. Stored for retrieval at a later time;*

*3. Printed onto paper or other similar material; or*

*4. Filtered or screened by a computer program that is designed or intended to filter or screen items of electronic mail.*

**Sec. 5** *"Network" means a network comprised of one or more computers that may be accessed by a modem, electronic or optical technology or other similar means.*

**Sec. 6** *"Recipient" means a person who receives an item of electronic mail.*

**Sec. 7** 1. *Except as otherwise provided in section 8 of this act, if a person transmits or causes to be transmitted to a recipient an item of electronic mail that includes an advertisement, the person is liable to the recipient for civil damages unless:*

*(a) The person has a preexisting business or personal relationship with the recipient; or*

*(b) The recipient has expressly consented to receive the item of electronic mail from the person; or*

*(c) The advertisement is readily identifiable as promotional, or contains a statement providing that it is an advertisement, and clearly and conspicuously provides:*

*(1) The legal name, complete street address and electronic mail address of the person transmitting the electronic mail; and*

*(2) A notice that the recipient may decline to receive additional electronic mail that includes an advertisement from the person transmitting the electronic mail and the procedures for declining such electronic mail.*

2. *If a person is liable to a recipient pursuant to subsection 1, the recipient may recover from the person:*

*(a) Actual damages or damages of \$10 per item of electronic mail received, whichever is greater; and*

*(b) Attorney's fees and costs.*

3. *In addition to any other recovery that is allowed pursuant to subsection 2, the recipient may apply to the district court of the county in which the recipient resides for an order enjoining the person from transmitting to the recipient any other item of electronic mail that includes an advertisement.*

**Sec. 8** 1. *If a person provides users with access to a network and, as part of that service, transmits items of electronic mail on behalf of those users, the person is immune from liability for civil damages pursuant to sections 2 to 8, inclusive, of this act, unless the person transmits an item of electronic mail that includes an advertisement he prepared or caused to be prepared.*

2. *The provisions of sections 2 to 8, inclusive, of this act do not apply to an item of electronic mail that is obtained by a recipient voluntarily. This subsection includes, but is not limited to, an item of electronic mail that is obtained by a recipient voluntarily from an electronic bulletin board.*