

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 REPLY TO**  
20 vs. ) **DEFENDANTS’ OPPOSITION TO**  
21 ) **PLAINTIFF’S MOTION FOR SUMMARY**  
22 ) **JUDGMENT/ADJUDICATION**  
23 )  
24 ) Date: September 25, 2009  
25 ) Time: 9:00 a.m.  
26 ) Dept: 3  
27 )  
28 ) Action Commenced: April 4, 2008  
29 ) Trial Date: October 13, 2009  
30 )  
31 )

[Caption – No Text]

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## **I. INTRODUCTION**

Defendant Trancos Inc.’s (“Trancos”) CEO, Brian Nelson (“Nelson”), describes Trancos as a leading online advertising agency, with an A+ rating from the Better Business Bureau. Defendants’ Opposition to Plaintiff’s Motion for Summary Judgment (“Opposition”) at 2:2-7. Even if true, that does not change the fact that Trancos admitted to sending spam<sup>1</sup> to Plaintiff Daniel L. Balsam (“Balsam”)... and most likely to millions of other California residents.

Trancos, Nelson, and Chief Operating Officer Laure Majcherczyk (collectively, “Defendants”), took extensive steps to hide their identities as the spammers. In their Opposition, Defendants attempt to distract the Court from the key question – whether Trancos’ spam violated Business & Professions Code (“B&P”) § 17529.5 and the Consumers Legal Remedies Act (“CLRA”), Civil Code § 1750 *et seq.* – by insulting Balsam and using “professional plaintiff” as a pejorative, apparently because Balsam was professional and sophisticated enough to track down Defendants, who are professional spammers, despite their willful attempts to hide.

Defendants spend the majority of their Opposition improperly attempting to relitigate arguments from their Motion for Judgment on the Pleadings (“MJOP”) as to federal preemption, severability of the damages provisions of B&P § 17529.5, and standing under the CLRA. On August 26, 2009, this Court ruled *against* Defendants’ arguments and denied their MJOP.

Defendants also falsely claim that Balsam threatened criminal charges, improperly introduce settlement communications into the proceedings, misrepresent how “most courts” have ruled in anti-spam actions, falsely equate the fact pattern of the instant Action with two federal cases, and conveniently ignore testimony from Nelson’s deposition.

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## **II. DISCUSSION**

### **A. Balsam’s Separate Statement Provides Sufficient Admissible Evidence**

Notwithstanding Defendants’ claims to the contrary, Balsam’s Motion for Summary Judgment (“MSJ”) does *not* rely solely on the Verified Complaint. The Undisputed Statement of

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<sup>1</sup> “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 Material Facts (“UMF”) repeatedly cites to the Declarations of Daniel Balsam, Judy Hopelain  
2 (the only expert witness designated by either side), and Timothy Walton (which attached  
3 numerous pages from Defendants’ discovery responses and Nelson’s deposition), and also cites  
4 to Trancos’ own publicly viewable website, to which Defendants bizarrely object as hearsay.  
5 Defendants ignore voluminous amounts of admissible evidence pointing to their deceptive  
6 practices whenever such evidence inconveniently undermines their hope to win the Action based  
7 on procedural issues, without regard for the merits. For example:

- 8 • Trancos admitted that it hid its identity when it registered its domain names. UMF at  
9 ¶¶ 12, 13 (supported by the Declaration of Daniel Balsam, Defendants’ responses to  
10 Balsam’s Requests for Admissions, and Nelson’s deposition testimony).
- 11 • The only identifier included in the spams was the fictitious business name (“FBN”)  
12 “USAProductsOnline.com,” and Trancos applied even for the box at The UPS Store  
13 using the FBN. *Id.* at ¶¶ 10, 14 (supported by Nelson’s deposition testimony).
- 14 • Defendants failed to register their FBN, *id.*, even though they knew that they are  
15 required by law to register FBNs and they knew how to register FBNs, *id.* at ¶ 16  
16 (supported by the Declaration of Daniel Balsam, attaching the first two pages of a  
17 lawsuit initiated by Trancos on file with this Court).
- 18 • Defendants knew that *not* registering their FBN would make it difficult for spam  
19 recipients to identify Trancos. *Id.* at ¶ 15 (supported by Nelson’s deposition  
20 testimony).
- 21 • Defendants admitted to sending spams in general, and admitted to sending the specific  
22 eight spams at issue to Balsam. *Id.* at ¶¶ 20, 22 (supported by Nelson’s deposition  
23 testimony).
- 24 • Defendants admitted that Balsam never consented to receive commercial email. *Id.* at  
25 ¶ 25 (citing Nelson’s deposition testimony). Trancos now backpedals on this point;  
26 Nelson hypothesizes in his Declaration at ¶ 2 that “Plaintiff could have registered with  
27 a Trancos partner, and by so doing, consented to receive emails from that partner’s  
28 affiliates or partners, including Trancos.” Defendants have no evidence to support this  
29 entirely hypothetical “third party consent,” which in any case cannot be “direct  
30 consent” as defined by B&P § 17529(d). Moreover, “A court may disregard a  
31 declaration, prepared for purposes of a summary judgment motion, which conflicts  
with deposition testimony of the declarant.” *Jacobs v. Fire Ins. Exch.*, 36 Cal. App. 4th  
1258, 1270 (3d Dist. 1995).
- The emails were false and deceptive to such an extent that not only did the only expert  
witness find them to be misleading, UMF at ¶¶ 12-15, 33-44, 58-60 (supported by the  
Declaration of Judy Hopelain), but Nelson himself could not identify the advertised  
entities in seven of the eight emails at issue, *id.* at ¶¶ 34-40 (supported by Nelson’s  
deposition testimony).

- 1 • Defendants also admitted to deceptively using multiple domain names to send their  
2 spam because they know that spam filters block spams if many emails are sent using  
3 the same domain name, but by sending spam using multiple domain names, they can  
4 bypass spam filters to “get the emails through.” *Id.* at ¶ 43 (supported by Nelson’s  
deposition testimony).

5 While Defendants make much of their objections to Balsam’s evidence, they fail to rebut  
6 evidence put forward in declarations filed concurrently with the moving papers. Nor does  
7 Defendants’ First Amended Verified Answer put forth an affirmative defense that their email  
8 advertising complies with California law. Balsam has shown that he is entitled to relief, and  
9 because Defendants have no defense on the merits, they seek every procedural means at their  
10 disposal to attempt to avoid liability for their unlawful actions.

11 **B. Defendants’ Arguments are Barred by Issue Preclusion/Collateral Estoppel**

12 It is near axiomatic that parties cannot relitigate the same issues. “Issue preclusion  
13 ‘prevents relitigation of all ‘issues of fact or law that were actually litigated and necessarily  
14 decided’ in a prior proceeding.” *Kopp v. Fair Political Practices Comm’n*, 11 Cal. 4th 607, 682  
15 (Cal. 1995) (citations omitted).

16 In their Opposition, Defendants make the same arguments – even using the same  
17 language – that were previous litigated in their MJOP, which this Court denied.

18 **C. Defendants Introduce New “Arguments” into their Opposition that are False,  
19 Irrelevant, and Improper Because They Go Outside the Scope of the MSJ Pleadings**

20 Evidence of settlement discussions is inadmissible. Ev. Code § 1154. Only evidence  
21 relevant to the merits of the MSJ is admissible. Ev. Code § 350. Because Defendants cannot  
22 win on the merits, they try to discredit Balsam by improperly introducing “evidence” in the  
23 Opposition that goes beyond the scope of, and has no bearing on the merits of, Balsam’s MSJ.

24 **1. Defendants Improperly Introduce Settlement Communications**

25 Defendants’ Opposition at 2:20-3:5 quotes from an email that Balsam sent to Nelson on  
26 March 5, 2008, which expressly refers to settlement. As shown in Exhibit 8 (not 7) to  
27 Defendants’ Table of Exhibits, the subject line of this email is “Final Notice; *Offer to Settle*  
28 Expires Thursday at 5pm; Superior Court Litigation” (emphasis added). The email also states,  
29 “Your deadline for resolving this matter with me – if it is to be resolved – is Thursday 3/6 at  
30 6.p.m. . . . The door is still open if you want to avoid litigation, but the door is rapidly closing.”  
31 This email is inadmissible pursuant to Evidence Code § 1154, 350.

1           **2. Defendants Falsely Claim that Balsam Threatened Them With Criminal Charges**

2           Defendants falsely claim in their Opposition at 3:6-9 that Balsam threatened Defendants  
3 with false criminal charges by the mere statement that “Also, all sending domain names were  
4 privately registered, which is an express violation of 18 USC 1037(a)(4), (d)(2).” This statement  
5 is accurate; Defendants’ actions of privately registering their domain names *did* impair Balsam’s  
6 ability to identify Defendants, UMF at ¶ 12, which is precisely what 18 U.S.C. § 1037(a)(4),  
7 (d)(2) prohibits.

8           Balsam never “threaten[ed] to present criminal, administrative, or disciplinary charges to  
9 obtain an advantage in a civil dispute,” in violation of Cal. Rule of Professional Conduct 5-100.  
10 Balsam never stated that he would report Defendants to any law enforcement or regulatory  
11 organization. All Balsam did in his email was outline his arguments why Defendants’ spams  
12 violated B&P § 17529.5, and point out that privately registering domain names violates federal  
13 law (in anticipation of Defendants’ reliance on federal law).

14           **D. Business & Professions Code § 17529.5 Does Impose Strict Liability**

15           Defendants’ Opposition at 2:11-12 criticizes Balsam’s supposedly “flawed premise that  
16 the law [B&P § 17529.5] imposes strict liability on advertisers to pay outrageous sums of money  
17 based on allegedly defective ‘headers or from lines’ that actually deceived no one, and certainly  
18 not Plaintiff!” Nearly every word of this sentence is incorrect.

19           B&P § 17529.5(a) *does* impose strict liability on advertisers: “It is unlawful for any  
20 person or entity to advertise in a commercial e-mail advertisement either sent from California or  
21 sent to a California electronic mail address under any of the following circumstances...”

22           Nothing in B&P § 17529.5 requires a plaintiff to allege or prove common-law fraud,  
23 reliance, or actual damages.<sup>2</sup> In B&P § 17500 actions, “Allegations of actual deception,  
24 reasonable reliance, and damage are unnecessary.” *Day v. AT&T Corporation*, 63 Cal. App. 4th  
25 325, 332 (1st Dist. 1998) (citations omitted). “The evils of deceptive advertising cannot be  
26 reached effectively if legislation to that end is interpreted to require proof of actual reliance upon  
27

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28  
29           <sup>2</sup> B&P § 17529.5 refers to the “reasonable person” standard, but since the “reasonable person” is  
30 a legal construct, there is no actual person who could ever actually rely on anything. If the  
31 Legislature intended B&P § 17529.5 to require a showing of traditional common-law fraud, that  
would render the entire anti-spam statute superfluous, as a person could file suit under § 17500.

1 a false statement knowingly made, as in a common law action in deceit.” *Ford Dealers Assoc. v.*  
2 *Dept. of Motor Vehicles*, 32 Cal. 3d 347, 359 (1982).

3 Moreover, the sums of money are not outrageous. The liquidated damages remedy of  
4 B&P § 17529.5(b)(1)(B)(ii) was debated by the Legislature and signed into law by the Governor.  
5 The \$1,000 remedy is in line with damages for junk faxes under California and federal law,  
6 which range from \$500-\$1,500. B&P 17538.43, 47 U.S.C. § 227(b)(3).

7 Defendants also attempt to minimize the magnitude of the falsity and deception in their  
8 spams by describing “allegedly defective ‘headers or from lines.’” As described in the UMF at  
9 ¶¶ 10-62, Defendants’ spamming and other business practices demonstrates material falsity and  
10 deliberate, willful intent to evade detection, and the headers are *not* “merely defective.”

11 Defendants are flat-out wrong when they claim that their spams “actually deceived no  
12 one, and certainly not Plaintiff!” Opposition at 2:13.

- 13 • Balsam could not identify Defendants by researching the FBN “USAProductsOnline.  
14 com.” UMF at ¶ 14 (supported by the Declaration of Daniel Balsam).
- 15 • Balsam could not identify Defendants by querying the publicly-accessible Whois  
16 database for Defendants’ domain names because Defendants privately registered their  
17 domain names. UMF at ¶ 12 (supported by the Declaration of Daniel Balsam).
- 18 • Balsam subpoenaed The UPS Store for the boxholder’s application, and even then,  
19 Balsam could not identify Defendants, since Defendants used their unregistered FBN  
20 as the “Company” on the box application form. UMF at ¶ 19 (supported by the  
21 Declarations of Daniel Balsam and Timothy Walton). However, Defendants did use  
22 their real Los Angeles address on The UPS Store box application, which – after  
23 additional research – finally led Balsam to Trancos. *Id.*

24 Thus, Balsam *was* deceived about the identity of the spammer, just as Defendants intended.  
25 Balsam submits that most people would not have had the knowledge and ability to break through  
26 the barriers Defendants erected to mask themselves.

27 **E. The Remedy of Business & Professions Code § 17529.5 is Liquidated Damages, Not**  
28 **Penalties**

29 Notwithstanding the plain language of the statute, Defendants incorrectly describe the  
30 *liquidated damages* remedy of B&P § 17529.5 as “penalties.” Opposition at 12:12-14:7.

31 In *Murphy v. Kenneth Cole Productions Inc.*, 40 Cal. 4th 1094 (2007), the California  
Supreme Court addressed the connections between legislative intent, statutory language,  
liquidated damages, and penalties:

- 1 • “The Legislature certainly knows how to impose a penalty when it wants to.” *Id.* at  
2 1107.
- 3 • “That the Legislature chose to eliminate penalty language in section 226.7 while  
4 retaining the use of the word in other provisions of Bill No. 2509 is further evidence  
5 that the Legislature did not intend section 226.7 to constitute a penalty.” *Id.* at 1108.
- 6 • “The fact that section 226.7 seeks to shape employer behavior in addition to  
7 compensating the employee does not automatically render the remedy a penalty.” *Id.*  
8 at 1111.
- 9 • “The Court of Appeal’s underlying assumption, that payments made pursuant to  
10 statutory liability must constitute a penalty, is incorrect.” *Id.* at 1112.
- 11 • “Where damages are obscure and difficult to prove, the Legislature may select a set  
12 amount of compensation without converting that remedy into a penalty.” *Id.*

13 Following *Murphy*, the fact that the \$1,000 liquidated damages remedy of B&P  
14 § 17529.5 may have a penal, behavior-modifying element to it “does not automatically render the  
15 remedy a penalty.” The Legislature knows what penalties in the Business & Professions Code  
16 are – “penalties” appears close to B&P § 17529.5 in B&P § 17535.5, and the competing Senate  
17 Bill 12 and the former anti-spam law (B&P § 17538.4) did use the word “penalties” – so if the  
18 Legislature had really intended the \$1,000 remedy in B&P § 17529.5 for unlawful spam to be a  
19 penalty, it could have easily used the word “penalty” in the statute. Instead, the Legislature  
20 made a choice to set *liquidated damages* at \$1,000 per email because actual damages may be  
21 difficult to prove. The Legislature’s terminology is entitled to at least some weight.

22 *See also Stone v. The Travelers Corporation*, 58 F.3d 434, 438-9 (9th Cir. 1995)  
23 (“ERISA’s figure of \$ 100 per day is [not] calculated in any measurable way according to the  
24 loss actually suffered by the plaintiff. . . and it should not make ERISA’s \$ 100 sum a penalty . . .  
25 [It] is instead a remedy sought by an individual as compensation to address a private wrong.”)

#### 26 **F. The CAN-SPAM Act Does Not Preempt California Law in This Action**

27 Defendants *again* make the argument, which this Court denied in Defendants’ MJOP,  
28 that the CAN-SPAM Act preempts California’s anti-spam law except for traditional common-  
29 law fraud. But, the plain language of the CAN-SPAM Act states that it preempts State anti-spam  
30 law except for *falsity* (not fraud) *or deception*. The spams at issue contain materially false  
31 information, and therefore fall squarely into the exception to preemption. Notably, Defendants  
do *not* argue that their spams comply with California law; rather, they are trying to evade the  
liability that the California Legislature intended to impose.

1           **1. This Court Should Use Established Preemption Analysis – Federal Law Preempts**  
2           **State Anti-Spam Laws Except as to False or Deceptive Spam, Not Fraudulent Spam**

3           **a. Traditional Preemption Analysis**

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

11          **b. “Falsity” and “Deception” Do Not Mean “Fraud”**

12          Congress claims only to exclusively occupy the field of *truthful* commercial email.  
13          Congress limited the scope of federal preemption, expressly authorizing the states to define and  
14          regulate *false or deceptive* spam, and it did so without imposing a *fraud* requirement. Congress  
15          used the words “falsity or deception” in 15 U.S.C. § 7707(b)(1) but used the word “fraud” in  
16          § 7707(b)(2)(B), indicating that Congress did *not* intend that state anti-spam laws survive federal  
17          preemption only when a plaintiff alleges common-law fraud (i.e., reliance and actual damages).

18          The use of “*or deceptive*” confirms that: 1) *deception* cannot mean *fraud*,<sup>3</sup> for if it did,  
19          then the phrase “fraudulent or deceptive” itself would be redundant, and 2) Congress did not  
20          intend that the exception to preemption depend *only* upon a finding of fraud.<sup>4</sup>

21 \_\_\_\_\_  
22  
23 <sup>3</sup> Additionally, under California law, “deception” by definition does not mean “fraud.” *Compare*  
24 *Civ. Code § 1710*, defining “deceit,” with *Civ. Code § 1709*, defining “fraudulent deceit.” Not  
25 only is there no mention of reliance in Section 1710’s definition of “deceit,” but the fact that  
26 there are *separate* code sections for “deceit” and “fraudulent deceit” indicates that “deceit” – on  
27 its own – does not require the elements of common-law fraud, including reliance.

28 <sup>4</sup> The title of 15 U.S.C. § 7704(a)(2) is “Prohibition of *deceptive* subject headings” and the  
29 language – just like B&P § 17529.5(a)(3) – includes the phrases “*likely* to mislead *a* recipient”  
30 and “*acting reasonably* under the circumstances.” If Congress meant to impose a traditional  
31 fraud standard, the statute would have probably read “a subject heading that *actually* misled *the*  
recipient.” Section 7704(a)(2) also refers to the Federal Trade Commission Act, but nothing in  
the definition of “false advertisement” at 15 U.S.C. § 55(a)(1) requires or even suggests any  
reference to the common-law tort of fraud, or reliance, and 15 U.S.C. § 52(a) refers to false  
advertisements as being *likely* to induce purchases.

1 Therefore, even if *falsity* meant *fraud*, the phrase “or deception” still means that state  
2 laws are not preempted as to deceptive spam, and *deceptive* does not require a *fraud* standard.

3 **2. Case Law is Mixed, But Most Courts – And in Particular California Courts – Have**  
4 **Held Against Preemption**

5 As shown in Exhibit A, there is a line of federal cases – none of which are binding on this  
6 Court and most of which are on appeal – that incorrectly equated *falsity* with *fraud*, and –  
7 notwithstanding the plain language of 15 U.S.C. § 7707(b)(1) – held that CAN-SPAM preempts  
8 state anti-spam laws except for *fraud*. However, the majority of California state court cases (and  
9 federal cases in California) have found that CAN-SPAM does *not* preempt state anti-spam laws  
10 when there is *falsity or deception* in the emails; i.e., even without a showing that the plaintiff  
11 clicked a link in a spam and purchased anything. These courts have correctly found that  
12 California’s anti-spam law *further*s Congress’ goals of combating false and deceptive spam.

13 In Defendants’ MJOP at 7:11, Defendants falsely claimed that “The facts of *Omega*  
14 [*World Travel Inc. v. Mummagraphics Inc.*, 469 F.3d 348 (4th Cir. 2006)] are strikingly similar  
15 to those alleged by Plaintiff Balsam.” In Defendants’ Opposition at 8:5-6, Defendants falsely  
16 claim that the facts of *Gordon* [*v. Virtumundo Inc.*, No. 07-35487, 2009 U.S. App. LEXIS 17518  
17 (9th Cir. Aug. 6, 2009)] and *Omega* are strikingly similar...” Thus, Defendants also falsely  
18 claim that the facts of *Omega* and *Gordon* are similar. They are not. As shown in Exhibit B,  
19 Defendants’ attempt to equate *Omega*, *Gordon*, and the instant Action indicates a lack of  
20 understanding of the factual bases, or an attempt to mislead this Court, or both. Most notably,  
21 the spams at issue in *Omega* and *Virtumundo* allowed the recipients to easily identify the  
22 senders. Here, Defendants privately registered their domain names and used an unregistered  
23 FBN and a box at The UPS Store, which constitutes material falsity and misrepresentations.

24 **G. Business & Professions Code § 17529.5 is a Severable, Standalone Section Precisely**  
25 **Because it Incorporates the Damages Provisions From § 17529.8**

26 Defendants *again* make the incomprehensible argument that the damages provisions of  
27 the standalone B&P § 17529.5 subsection are preempted because the language is the same as that  
28 in § 17529.8. Opposition at 12:12-14:7. Defendants lost their MJOP.

29 Senate Bill 1457 demonstrated legislative intent to “create a ‘stand alone’ section for  
30 falsified emails” and “avoid confusion as to what parts of existing state law are preempted by  
31 federal law and what parts [§ 17529.5] remain viable in this area.” Senate Bill 1457, 2003-2004

1 Sess. (CA 2004) (Assembly Committee Analysis June 22, 2004). Defendants’ argument that the  
2 remedy of B&P § 17529.5 “ is not severable [] since it is ‘inextricably connected’ to the original  
3 California Act,” Opposition at 14:2-3, is backwards. Section 17529.5 is a viable, standalone,  
4 non-preempted subsection precisely *because* S.B. 1457 amendments added the damages  
5 provisions from § 17529.8 to § 17529.5, and B&P § 17529.9 specifically addresses severability.

#### 6 **H. Balsam Has Standing Under the CLRA**

7 Defendants *again* make the argument that the CLRA only applies when deceptive  
8 advertising induced a consumer to make a purchase. Opposition 14:21-16:10. Defendants lost  
9 their MJOP.

##### 10 **1. The CLRA Applies to Transactions Intended to Result in a Purchase**

11 Balsam is a consumer as defined by Civil Code § 1761(d). The use of the word “any” to  
12 describe goods and services, as opposed to limiting the definition of a consumer to one who  
13 purchases/leases the *specific* goods and services falsely advertised, demonstrates the broad  
14 legislative intent to “protect consumers against unfair and deceptive business practices.” Civ.  
15 Code § 1760. But Section 1761(d) is merely a definition; it does not determine standing. Rather,  
16 standing is determined by Section 1780, which states that “Any consumer who suffers *any*  
17 *damage* as a result of the use or employment by any person of a method, act, or practice declared  
18 to be unlawful by Section 1770 may bring an action...” (emphasis added). Since the *receipt* of  
19 spam causes damages, B&P § 17529(d), (e), (g), (h), Balsam has standing. Nothing in the CLRA  
20 states that a plaintiff bringing a suit under the CLRA must have purchased the items advertised  
21 via the allegedly false and deceptive means. The CLRA expressly applies to deceptive  
22 advertising – such as spams – that are *intended to result* in the sale or lease of goods or services.  
23 Civ. Code § 1770(a) (emphasis added). If actual purchase were necessary, the phrase “intended  
24 to result” would be superfluous.

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

26 Defendants dramatically – and incorrectly – claim in their Opposition at 15:9-10 that  
27 *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634 (2009) “spells the death knell for Plaintiff’s  
28 Second Cause of Action for Defendants’ purported violation of the CLRA.”

29 *Meyer* held that “a plaintiff has no standing to sue under the CLRA without some  
30 *allegation that he or she has been damaged by an alleged unlawful practice*, an allegation  
31

1 plaintiffs do not sufficiently make here.” *Id.* at 638 (emphasis added). But in *Meyer*, the  
2 plaintiffs “did not allege that there was any dispute between them and Sprint. . . . Rather, theirs  
3 can be characterized as a preemptive lawsuit to strike these terms *should any dispute arise.*” *Id.*  
4 at 639 (emphasis added). I.e., plaintiffs made *no* claim of harm or damages at the time of filing.

5 But here, there is a dispute between Balsam and Defendants, and Balsam was damaged  
6 by Defendants’ spams. Therefore, *Meyer* confirms that Balsam has standing under the CLRA.

7 **3. Defendants’ Authority Does Not Support Their Argument Against Standing**

8 Defendants’ Opposition at 15:22-16:5 relies on *Kleffman v. Vonage Holdings Corp.*,  
9 No. CV 07-2406 GAF (JWJx), 2007 U.S. Dist. LEXIS 40487 (C.D. Cal. May 23, 2007) (order  
10 granting motion to dismiss), a federal case that is not binding *and* is on appeal to the Ninth  
11 Circuit, for the premise that a spam recipient who does not purchase anything via a spam does  
12 not have standing under the CLRA. But *Vonage* came to its holding by misinterpreting *Schauer*  
13 *v. Mandarin Gems of Cal., Inc.*, 125 Cal. App. 4th 949, 960 (4th Dist. 2005). *Schauer* is  
14 distinguishable on the facts, as this Court noted when it denied Defendants’ MJOP, because in  
15 *Schauer*, the deception – the misrepresentation of the quality of the ring – was in the advertising  
16 sales pitch that was directed primarily at Schauer’s (then) fiancé, and *not* directed at her. But in  
17 *Vonage* and in the instant Action, Defendants’ deceptive spam advertisements *were* directed at  
18 Kleffman and Balsam, respectively.

19 Defendants also cite to *Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 185 (S.D. Cal. 2003),  
20 with no explanatory text, but this case provides no support for Defendants’ position. In *Von*  
21 *Grabe*, the court dismissed the plaintiff’s CLRA claim only because the plaintiff did not meet the  
22 notice requirements of Civil Code § 1782, *id.* at 1304. Here, Defendants have never alleged –  
23 because they cannot – that Balsam did not comply with Civil Code § 1782.

24 **III. CONCLUSION**

25 For the above reasons, Balsam asks that this Court grant Balsam’s Motion for Summary  
26 Judgment.

27 LAW OFFICES OF TIMOTHY WALTON

28 Dated: September 18, 2009

29 By \_\_\_\_\_  
30 Timothy J. Walton  
31 Attorneys for Plaintiff

**Exhibit A**

**CAN-SPAM Preemption Cases**

## CAN-SPAM PREEMPTION CASES

Case Name	Holding	Description
<p><i>Omega World Travel Inc. v. Mummagraphics Inc.</i>, 469 F.3d 348 (4th Cir. 2006)</p>	<p>Preemption; falsity was immaterial.</p>	<p>In <i>Omega World Travel Inc. v. Mummagraphics Inc.</i>, the court incorrectly concluded that <i>falsity</i> meant “traditionally tortious conduct” and incorrectly read the “link” between <i>falsity</i> and <i>deception</i> in CAN-SPAM as <i>and</i> rather than <i>or</i>. <i>Id</i> at 354.</p> <p><i>Omega</i> arose from a narrow set of facts that were markedly different from the instant facts; the only alleged “falsity” in the <i>Omega</i> spams was an apparently non-functional sending email address and an invalid domain name appearing in part of the email headers that most email users never even see, an issue arising from a software configuration error. The <i>Omega</i> opinion repeatedly referred to “immaterial error,” “immaterial misrepresentations,” “bare error,” and “bare immaterial error.” <i>Id.</i> at 353, 354, 359. There was no dispute as to misleading Subject Lines, deceptive From Names, multiple sending domain names, privately registered domain names, or the extraordinary efforts to avoid detection as shown in this Action. “The [Omega] e-mails at issue were chock full of methods to ‘identify, locate, or respond to’ the sender or to ‘investigate [an] alleged violation’ of the CAN-SPAM Act.” <i>Id.</i> at 357.</p> <p>Nevertheless, spammers frequently glom onto <i>Omega</i> as if it stood for the proposition that CAN-SPAM categorically preempts state anti-spam laws. It does not. Numerous courts, <i>infra</i>, have refused to follow <i>Omega</i>’s misinterpretation of “falsity.”</p>
<p><i>Beyond Systems v. Keynetics Inc.</i>, 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).</p>	<p>No preemption.</p>	<p>The facts of <i>Omega</i> are so narrow that the U.S. District Court in Maryland – <i>part of the Fourth Circuit</i> – declined to follow <i>Omega</i>, holding that CAN-SPAM did <i>not</i> preempt Maryland’s anti-spam law. If a District Court <i>from the Fourth Circuit</i> did not follow <i>Omega</i>, then <i>Omega</i> cannot possibly have general applicability</p>
<p><i>Kleffman v. Vonage Holdings Corp.</i>, No. CV 07-2406 GAF (JWJx), 2007 U.S. Dist. LEXIS 40487 (C.D. Cal. May</p>	<p>Preemption; no showing of common-law fraud.</p>	<p><i>Vonage</i> cited to <i>Omega</i>, with little-to-no additional analysis, thereby replicating and perpetuating <i>Omega</i>’s original mistake of equating <i>falsity</i> and <i>fraud</i>.</p>

Case Name	Holding	Description
<p>22, 2007) (order granting motion to dismiss).</p> <p>(Currently on appeal)</p>		
<p><i>Asis Internet Services v. Optin Global Inc.</i>, 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).</p> <p>(Currently on appeal)</p>	<p>Preemption; no showing of common-law fraud.</p>	<p><i>Optin Global</i> followed <i>Omega</i> and <i>Vonage</i>, with little-to-no additional analysis, thereby replicating and perpetuating <i>Omega</i>’s original mistake of equating <i>falsity</i> and <i>fraud</i>.</p>
<p><i>Hoang v. Reunion.com Inc.</i>, No. C-08-3518 MMC, 2008 U.S. Dist. LEXIS 85187 (N.D. Cal. Oct. 3, 2008) (order granting defendant’s motion to dismiss).</p> <p>(Currently on appeal)</p>	<p>Preemption; no showing of common-law fraud.</p>	<p><i>Reunion.com</i> followed <i>Omega</i>, <i>Vonage</i>, and <i>Optin Global</i>, with little-to-no additional analysis, thereby replicating and perpetuating <i>Omega</i>’s original mistake of equating <i>falsity</i> and <i>fraud</i>.</p>
<p><i>Gordon v. Virtumundo Inc.</i>, No. 07-35487, 2009 U.S. App. LEXIS 17518 (9th Cir. Aug. 6, 2009).</p>	<p>Preemption; falsity was immaterial.</p>	<p>On August 6, 2009, the Ninth Circuit entered an ambiguous order that superficially seemed to support preemption of state anti-spam laws except for <i>fraud</i>. <i>Gordon v. Virtumundo Inc.</i> However, a careful reading indicates that the Ninth Circuit actually agreed with <i>Omega</i>, that “Congress could not have intended, by way of the carve-out language, to allow states to enact laws that prohibit ‘mere error’ or ‘insignificant inaccuracies’.” <i>Id.</i> at *53-54 (emphasis added). The Ninth Circuit allows material falsity, fraud, and deception to survive federal preemption. <i>Id.</i> at *54, 57.</p> <p>A careful reading of <i>Virtumundo</i> reveals that even though the Ninth Circuit seemed to equate “falsity” with “fraud,” as did <i>Omega</i>, the court also “acknowledge[d] facial ambiguity in the statutory text,” <i>id.</i> at *56, and furthermore, the court did <i>not</i> say that fraud was the only way to avoid preemption. The court actually said that only <i>immaterial</i> falsity leads to preemption of state law</p>

Case Name	Holding	Description
		claims, <i>id.</i> at *54-55, 57, 62-64, but if spams are materially false, fraudulent, or deceptive, then state laws would <i>not</i> be preempted.
<p><i>Infinite Monkeys &amp; Co., LLC v. Global Resource Systems Corp.</i>, 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).</p>	<p>No preemption; emails were false and deceptive.</p>	<p><i>Infinite Monkeys</i> held at *2 that the federal CAN-SPAM Act does not preempt B&amp;P § 17529.5 if the emails have false or deceptive content.</p> <p>[A]ctions under Business &amp; Professions Code § 17529.5(a) fall within the <i>express exception to preemption</i> provided in 15 U.S.C. § 7707(b) (the CAN-SPAM Act) and the <i>private right of action</i> provided by Business &amp; Professions Code § 17529.5 is a <i>permissible exercise of a state's right</i> to regulate falsity or deception in any portion of an electronic mail message expressly recognized by 15 U.S.C. § 7707(b).</p>
<p><i>Gordon v. Impulse Marketing Group Inc.</i>, 375 F. Supp. 2d 1040 (E.D. Wash. 2005).</p>	<p>No preemption; emails were false or deceptive.</p>	<p>In <i>Impulse Marketing Group Inc.</i>, the U.S. District Court for the Eastern District of Washington denied defendant's motion to dismiss on the grounds of federal preemption. The court held that Washington's "Commercial Electronic Mail Act is excepted from federal preemption because it prohibits 'falsity and deception'" and denied defendant's motion to dismiss. <i>Id.</i> At 1045-46.</p>
<p><i>Walton v. PlasmaNet Inc. et al</i>, No. 1-04-CV-033020 at *2 (Super. Ct. Cal. Cty. of Santa Clara Oct. 31, 2006) (order re: demurrer to Niutech's verified amended answer)</p>	<p>No preemption; emails were false or deceptive.</p>	<p>In <i>Walton v. PlasmaNet</i>, the Superior Court of Santa Clara County sustained plaintiff's demurrer without leave to amend as to defendant Niutech LLC's preemption defenses and held at *2 that</p> <p>[D]efendant alleged that plaintiff's second cause of action for violation of Business &amp; Professions Code § 17259, et seq., is barred or preempted by the CAN-SPAM Act. However, a state law is not preempted to the extent it "prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto." 15 U.S.C. § 7707(b). Section 17529.5 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.</p>

Case Name	Holding	Description
<p><i>Balsam v. SubscriberBASE Inc. et al</i>, No. 1-06-CV-066258 (Super. Ct. Cal. Cty. of Santa Clara Oct. 24, 2008) (order re: motion for summary judgment or adjudication)</p>	<p>No preemption; CAN-SPAM exception to preemption is not limited to common-law fraud.</p>	<p>In <i>Balsam v. SubscriberBASE</i>, the Superior Court of Santa Clara County rejected SubscriberBASE’s arguments for federal preemption, even though Balsam did not make any purchases after clicking through the links in the spams.</p>
<p><i>Asis Internet Services v. ConsumerBargainGiveaways LLC et al</i>, 622 F. Supp. 2d 935 (N.D. Cal. 2009) (order re Rule 12 motion).</p>	<p>No preemption; CAN-SPAM exception to preemption is not limited to common-law fraud.</p>	<p>In <i>Asis Internet Services v. ConsumerBargainGiveaways LLC</i>, the U.S. District Court for the Northern District of California denied defendant’s motion to dismiss on the grounds of federal preemption, after carefully analyzing the language of the CAN-SPAM Act and B&amp;P § 17529.5.</p> <p>[B&amp;P § 17529.5’s] prohibitions are broader than common law fraud . . . . “falsity and deception” is not limited <i>just</i> to common-law fraud . . . . Actual reliance and injury are not required . . . .</p> <p>The text and structure of the provision indicate that defendants interpret the savings clause too narrowly: “falsity or deception” is not limited <i>just</i> to common-law fraud and other similar torts. . . . On its own terms, the savings clause exempts from preemption not only “fraud” claims but rather laws that proscribe “falsity or deception” in email advertisements . . . . Congress [] is certainly familiar with the word “fraud” and chose not to use it; the words “falsity or deception” suggest broader application. In fact, [] Congress used the word “fraud” in the very next subsection but not in the savings clause.</p> <p><i>Id.</i> at 941-942 (emphasis in original).</p> <p>The court then noted that even <i>if</i> the terms “falsity” and “fraud” were interchangeable, “or deception” shows Congressional intent that deception means something different than “fraud,” and therefore, “Plaintiffs’ claims are not preempted merely because the complaint fails to plead, or Section 17529.5 fails to require, reliance and/or damages.” <i>Id.</i> at 944.</p>

Case Name	Holding	Description
		<p>The court also found that “Most or all of the district court decisions that have equated ‘falsity or deception’ with fraud have relied on [<i>Omega</i>],” <i>id.</i> at 943, and then pointed out that “<i>Omega</i>, however, merely held that state laws were preempted insofar as they permitted claims for <i>immaterial errors</i>.” <i>Id.</i></p>
<p><i>Asis Internet Services v. VistaPrint USA Inc.</i>, No. C 08-5261-SBA, 2009 U.S. Dist. LEXIS 41384 (N.D. Cal. May 5, 2009) (order re motion to dismiss).</p>	<p>No preemption; CAN-SPAM exception to preemption is not limited to common-law fraud.</p>	<p>The Northern District Court again denied a defendant’s motion to dismiss due to federal preemption in <i>Asis Internet Services v. VistaPrint USA Inc.</i> After analyzing the language of the CAN-SPAM Act and B&amp;P § 17529.5, the court similarly found that: 1) Congress must <i>not</i> have meant “fraud” in 15 U.S.C. § 7707(b)(1) because it <i>did</i> use “fraud” in § 7707(b)(2), and Senate Report 108-102 used the disjunctive “fraud or deception,” and 2) B&amp;P § 17529.5 does not require a plaintiff to plead reliance and actual damages. <i>Id.</i> at *9-10.</p>
<p><i>Vantage Interactive LLC v. Householter</i>, No. CGC-08-480288 (Super. Ct. Cal. Cty. of San Francisco June 10, 2009) (order overruling demurrer and denying motion for sanctions).</p>	<p>No preemption; CAN-SPAM exception to preemption is not limited to common-law fraud.</p>	<p>In <i>Vantage Interactive LLC v. Householter</i>, a spammer demurred to a cross-complaint alleging violations of B&amp;P § 17529.5 on the grounds of federal preemption, but the Superior Court of San Francisco County found the reasoning in <i>ConsumerBargainGiveaways</i> persuasive and overruled the spammer’s demurrer.</p>
<p><i>White Buffalo Ventures LLC v. University of Texas at Austin</i>, 420 F.3d 366 (5th Cir. 2005).</p>	<p>If language is ambiguous, courts should rule against preemption.</p>	<p>Although preemption in <i>White Buffalo Ventures</i> did not turn on the question of falsity vs. fraud, the Fifth Circuit held at *369, 372-3 that the University’s anti-spam policy was <i>not</i> preempted by the CAN-SPAM Act because the “strong presumption against preemption” was triggered by ambiguities in 15 U.S.C. § 7707.</p> <p>Therefore, to the extent that CAN-SPAM’s statutory language may be ambiguous with regard to <i>falsity vs. fraud</i> – and the Ninth Circuit expressly acknowledged such ambiguity, <i>Virtumundo</i>, 2009 U.S. App. LEXIS 17518 at *56 – that should similarly lead this Court to find <i>against</i> preemption in areas traditionally regulated by the states.</p>

**Exhibit B**

**Factual Comparison of *Omega v. Mummagraphics*,  
*Gordon v. Virtumundo*, and *Balsam v. Trancos***

**FACTUAL COMPARISON OF OMEGA v. MUMMAGRAPHICS,  
GORDON v. VIRTUMUNDO, AND BALSAM v. TRANCOS**

<b><i>Omega v. Mummagraphics</i></b>	<b><i>Gordon v. Virtumundo</i></b>	<b><i>Balsam v. Trancos</i></b>
1. Mummagraphics sued under Oklahoma law.	1. Gordon sued under federal and Washington law.	1. Balsam sues under California law.
2. Mummagraphics sued as an individual recipient.	2. Gordon sued as an Internet Access Service (“IAS”) even though his “company” had no customers or revenue.	2. Balsam sues as an individual recipient.
3. Oklahoma law describes “fraudulent” emails (not “false”) emails, and includes no findings that the receipt of spam causes damages.	3. Gordon’s IAS could not show any adverse effect of receiving spam.	3. The California Legislature found that recipients of spam are damaged merely by receiving spam, whether or not they click through and purchase anything, and the statute does not require proving up actual damages.
4. Mark Mumma alleged he had not opted in, but offered no proof.	4. Gordon deliberately opted in to receive commercial email 100-150 times just to file lawsuits.	4. Balsam never opted in to receive the spams at issue; Defendants’ claims that Balsam opted in are demonstrably false.
5. Mummagraphics received the emails.	5. Gordon sued for spams sent to “abandoned” email accounts that his friends and family had turned over to him.	5. The spams were sent to Balsam’s own email addresses.
6. The only falsity in the emails was a non-functional sending email address and an invalid domain name appearing in part of the email headers that most email users never even see, an issue arising from a software configuration error. The emails identified Omega and were “chock full” of ways to contact Omega.	6. Gordon offered no proof that the spam headers had been altered to impair a recipient’s ability to identify, locate, or respond to the person who initiated the e-mail, or had anything beyond non-deceptive, technical falsities.	6. The spams have materially false and deceptive information, including misrepresented From Names and Subject Lines, multiple sending domain names, privately registered domain names, and an unregistered FBN that do not identify Defendants.