IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT [DIVISION 3]

DANIEL L. BALSAM,

Appellant and Plaintiff,

v.

DSG DIRECT INC. *et al*,

Defendants,

TROPICINKS LLC,
DATASTREAM GROUP INC., and
LEIGH-ANN COLQUHOUN,

Respondents and Real Parties in Interest.

CASE NO. A126680
(Superior Court No. CGC-05-441630)

Appeal from the Superior Court of the State of California,
County of San Francisco, No. CGC-05-441630
The Honorable William Gargano, Commissioner

APPELLANT'S REPLY TO RESPONDENTS' OPENING BRIEF

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On Appeal from an Order of the Superior Court of the State of California,
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I. INTRODUCTION

Respondents' Opening Brief ("ROB") is more notable for what it *does not* say than for what it does say. Respondents fail to address numerous issues in Appellant's Opening Brief, and instead misstate facts and law in an attempt to mislead this Court. This Court should reverse the trial court below and remand for amendment of the judgment.

II. THE UNDERLYING JUDGMENT IS VALID AND AMENDING THE JUDGMENT DOES NOT VIOLATE DUE PROCESS

The trial court below entered judgment against Defendants DSG Direct Inc. ("DSG Direct") and Your-Info Inc. ("Your-Info") for violations of Business & Professions Code § 17529.5 and the CLRA. Judgment Debtors never filed an appeal, filed a motion to vacate, or took any other steps to "undo" the judgment.

Yet, Respondents TropicInks LLC ("TropicInks"), Datastream Group Inc. ("Datastream"), and Leigh-Ann Colquhoun ("Colquhoun") argue in their ROB that the underlying judgment against Judgment Debtors is substantively invalid. Respondents also argue that amending the judgment would violate due process.

Respondents' legal arguments are incorrect.

A. Balsam's Business & Professions Code § 17529.5 Cause of Action was Valid

Respondents' claim that the underlying judgment is "contrary to law," arguing that the federal CAN-SPAM Act "clearly" preempts Cal. Business & Professions Code § 17529.5 because the CAN-SPAM Act supposedly preempts all state law causes of action except those based on common law fraud. (ROB at *2, 22-24.)

In the CAN-SPAM Act, Congress expressly allowed the states to use their traditional police power to define and regulate false and deceptive email advertising.

> This 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 to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.

15 U.S.C. § 7707(b)(1) (emphasis added).

Business & Professions Code § 17529.5 prohibits falsified, misrepresented, or forged information in spam, and thus fits squarely within the exception to preemption. Nothing in the plain language of the CAN-SPAM Act or Business & Professions Code § 17529.5 requires a plaintiff to prove reliance or actual damages. Indeed, 15 U.S.C. § 7707(b)(2)(B) – just two lines after the text quoted above – states that the CAN-SPAM Act does not preeempt "other State laws to the extent that those laws relate to acts of fraud or computer crime." Thus, the word "fraud" in Section 7707(b)(2)(B) indicates that Congress meant something else in Section 7707(b)(1). If Congress meant Section 7707(b)(1) to require fraud to avoid preemption, Section 7707(b)(1) would be superfluous because it would be subsumed into Section 7707(b)(2)(B).

Respondents mistakenly equate "falsity" and "fraud." Even *if* falsity meant fraud, which it does not, in the context of Business & Professions Code § 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 are unnecessary." *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 332 (1st Dist. 1998). And,

> The evils of deceptive advertising cannot be reached effectively if legislation to that end is interpreted to require proof of actual reliance upon a false statement knowingly made, as in a common law action in deceit.

Ford Dealers Assoc. v. Dept. of Motor Vehicles, 32 Cal. 3d 347, 359 (1982).

Moreover, the exception to preemption provision refers to "falsity *or* deception" in the disjunctive. Thus, even without "falsity," there is no preemption in the case of "deception." California law defines "deceit" and "fraudulent deceit" separately – *contrast* Civil Code §§ 1709 and 1710 – so

"deception" without any qualifications cannot require a showing of fraud. Therefore, a plaintiff does not have to prove common law fraud to avoid preemption.

The spams at issue in this case were deceptive in violation of California law.

Numerous California courts and federal courts in California have found that the preemption defense lacks merit. *See, e.g., Asis Internet Services v. ConsumerBargainGiveaways LLC*, 622 F. Supp. 2d 935 (N.D. Cal. 2009). Respondents' attorney is fully aware of this, as his business partner, Brian Benenhaley, is the Chief Operating Officer of SubscriberBase Inc., which lost on its preemption defense in at least two cases: *Balsam v. SubscriberBase Inc. et al*, No. 1-06-CV-066258 (Super. Ct. Cal. Cty. of Santa Clara Oct. 24, 2008) (order re: motion for summary judgment or adjudication), and *Asis Internet Services v. SubscriberBase Inc. et al*, No. 09-3503 SC, 2009 U.S. Dist. LEXIS 112852 (N.D. Cal. Dec. 4, 2009) (order granting defendants' motion to dismiss). Respondents cite *Hoang v. Reunion.com Inc.*, No. 08-3518, 2008 U.S. Dist. LEXIS 85187 (N.D. Cal. Oct. 6, 2008) (order granting defendant's motion to dismiss) in support of preemption, but that case has been appealed.

Respondents cite to *Kleffman v. Vonage Holdings Corp.*, No. 07-2406 GAF (JWJx), 2007 U.S. Dist. LEXIS 40487 (C.D. Cal. May 23, 2007) (order granting motion to dismiss) (ROB at *23) – without including it in their Index of Non-California Authorities – as to the question of whether sending spam from multiple domain names is unlawful, but that case is also on appeal. Furthermore, decisions of the lower federal courts are not binding on state courts. *Elliot v. Albright*, 209 Cal. App. 3d 1028, 1034 (6th Dist. 1989).

Respondents also cite to *Gordon v. Virtumundo Inc.*, 575 F.3d 1040 (9th Cir. 2009) (ROB at *23), but *Gordon* only holds that immaterial falsity and specific content requirements are preempted, and it does not address California's law at all. Balsam never alleged that Defendants had to use any specific content or format, e.g., beginning the Subject Line with "ADV:." Moreover, *Gordon* was entered a year and a half *after* the underlying judgment, and it has no retroactive power.

Respondents also claim that the use of the word "free" in a Subject Line is not false and deceptive (ROB at *22), even though Respondents' attorney was formerly Assistant General Counsel at ValueClick Inc. when the United States of America sued ValueClick for advertising in/sending false and deceptive spam with "free" Subject Lines, even though consumers had to spend significant monies to get the "free" merchandise. *United States of America v. ValueClick Inc. et al*, No. CV08-01711 MMM (RZx) (C.D. Cal. Mar. 13, 2008) (complaint, without exhibits).

In short, Respondent's attorney is being disingenuous and intellectually dishonest in suggesting that the underlying judgment is invalid as a matter of law.

B. Balsam's CLRA Cause of Action was Valid

The CAN-SPAM Act never preempts the Consumers Legal Remedies Act ("CLRA"), Civil Code § 1750 *et seq*., because the CLRA is not specific to commercial email. *See* 15 U.S.C. § 7707(b)(2).

So, to avoid liability under the CLRA, Respondents claim that Proposition 64 requires that a plaintiff suffer injury in fact and loss of money or property to have standing under the CLRA.

Proposition 64 changed standing requirements for claims under the Unfair Competition Law ("UCL"), Business & Professions Code § 17200 *et seq.*, but *not* the CLRA.

> To have standing to assert a claim under the UCL, a plaintiff must have "suffered injury in fact and [have] lost money or property as a result of such unfair competition." (*Bus. & Prof. Code, § 17204* []. To have standing to assert a claim under the CLRA, a plaintiff must have "suffer[ed] any damage as a result of the ... practice declared to be unlawful." (*§ 1780, subd. (a)*.)

Aron v. U-Haul Company of California, 143 Cal. App. 4th 796, 802 (2d Dist. 2006). Thus, *Aron* contrasted the "loss of money or property" standing requirement for the UCL with the "any damage" standing requirement for the CLRA. "Any" is broader.

Balsam alleged in the Verified First Amended Complaint that he had been damaged by receiving Defendants' spam (CT 51 and *see* Bus. & Prof. Code § 17529(d), (e), (g), (h)), and therefore had standing under the CLRA. The trial court below agreed, finding that that Balsam had been damaged. (CT 283.)

Respondents falsely describe the holding of *Buckland v. Threshold Enterprises Ltd.*, 155 Cal. App. 4th 798 (2d Dist 2007) in support of their Proposition 64 argument. *Buckland* does discuss injury in fact and loss of money or property, but *only* in the context of standing under the *Unfair Competition Law* on pages 814-819. The court's analysis of standing under the *CLRA* appears on pages 809-811.

Buckland actually supports Balsam's position that he has standing under the CLRA. Balsam received spams sent by Defendants. (CT 50.) The spams violated various provisions of the CLRA (CT 25-26, 29, 60, 71-72, 74-75.) Business & Professions Code § 17529(d), (e), (g), and (h) describes damages from receiving spam. Therefore, Balsam suffered damages from Defendants' unlawful actions, and has standing under the CLRA.

Additionally, *Buckland* was concerned with statutory damages in the context of a class action. 155 Cal. App. 4th at 809. Balsam is not seeking statutory damages under the CLRA, nor was this lawsuit a class action. Rather, Balsam was *only* seeking an injunction under the CLRA to ensure that Defendants would not return to their unlawful practices in the future.

Moreover, two years after *Buckland*, the California Supreme Court held that "a plaintiff has no standing to sue under the CLRA without some *allegation that he or she has been damaged by an alleged unlawful practice. . . .*" *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 638 (2009) (emphasis added). The Court then held that the CLRA does *not* require a showing of actual damages.

> [P]laintiffs contend that the phrase "any damage" is not synonymous with "actual damages," which generally refers to pecuniary damages. The language of *section 1780(a)* indicates that plaintiffs are correct. If "any damage" and "actual damages" were synonymous, then it seems likely only the latter phrase would have been used in the first part of *subdivision (a)*. The juxtaposition of the two phrases so close together indicates that the phrases have different meanings. Moreover, the breadth of the phrase "any damage" indicates a category that includes, but is greater than, "actual damages," i.e., those who are eligible for the remedy of "actual damages" are a subset of those who have suffered "any damage."

Id. at 640.

It is true that the CLRA itself does not state that spam causes damages, but the CLRA was enacted in 1970, long before there was a public Internet and email as we now know it. The California Legislature's most recent findings on spam are contained in Business & Professions Code § 17529, and the Legislature expressly said that *recipients* of spam are damaged, just like recipients of junk faxes, junk mail sent postage-due, and telemarketing calls to a pay-per-minute cellular phone. Bus. & Prof.

Code § 17529(e), (g), (h). The Legislature found that spam cost Californians $1.2 *billion* per year, and that was back in 2003. Bus. & Prof. Code § 17529(d). By all accounts, the volume of email, and the percentage of email that is spam, have both increased dramatically since then. This Court should accept the Legislative finding of damages in the Business & Professions Code and apply it to the CLRA.

Earlier this year, the Second District Court of Appeal followed *Meyer* and held that a CLRA action does *not* require actual damages. Defendant GNC made an

> assumption that the showing of "damage" required under the CLRA is governed by *Civil Code section 3343*, i.e., the measure of actual damages for persons defrauded in the purchase of property. That assumption is incorrect. The "damage" that a plaintiff in a CLRA action must show under *Civil Code section 1780, subdivision (a)* is "any damage," which "is not synonymous with 'actual damages'" and "may encompass harms other than pecuniary damages." (*Meyer v. Sprint Spectrum L.P. (2009) 45 Cal.4th 634, 640 [88 Cal. Rptr. 3d 859, 200 P.3d 295]*.)

Steroid Hormone Product Cases, 181 Cal. App. 4th 145, 156 (2d Dist. 2010).

Therefore, unlike a Business & Professions Code § 17200 action (after Proposition 64), the CLRA should not be interpreted so that only consumers who have spent money out of pocket have standing. The CLRA expressly applies to transactions *intended* to result in the sale or lease of goods or services, and "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices []." Civ. Code §§ 1770(a), 1760.

Advertisers must be held accountable for misleading advertising, even if the only persons who were fooled are not sophisticated enough to sue. *Any* damage is sufficient for CLRA standing, Civ. Code § 1780(a),

and the Legislature found that the *receipt* of spam causes damages… even without clicking through and purchasing anything. Bus. & Prof. Code § 17529(d), (e), (g), (h).

C. Amending the Judgment Does Not Violate Due Process

Respondents brought the Ninth Circuit authority *Katzir's Floor & Home Design Inc. v. M-MLS.com*, 394 F.3d 1143 (9th Cir. 2006) to the attention of the trial court below.

Katzir's states that amending a judgment on an alter ego theory does not violate due process because alter ego liability is premised on the fact that the named judgment debtor, and the entity against whom the plaintiff seeks to amend the judgment, were one and the same, so amending the judgment pursuant to Code of Civil Procedure § 187 is merely inserting the correct name of the real defendant. 394 F.3d at 1148. Respondents have cited no legal authority that supports their claim that *Katzir's* – their own authority – employs circular logic. (*See* ROB at *20.)

Respondents also attack *Gottlieb v. Kest* because of its ultimate holding – *Gottlieb* denied the motion to amend based on the particular facts before it. 141 Cal. App. 4th 110, 156 (2d Dist. 2006). (ROB at *20.) Balsam did not cite *Gottlieb* for the holding, but rather because *Gottlieb* provides a concise yet detailed summary of the law.

Gottlieb held that generally corporations are distinct legal entities and issues determined against corporations are not conclusive against directors, officers, and stockholders, and vice-versa… *as to corporations whose ownership is widely held*. But when a company is closely held, as in the instant case, the *presumption* is that the judgment against the company is conclusive upon the actively participating owner, *unless* the owner's interests are markedly different from the company's interests. *Id.* at 150-51. Respondents have not proven – or even alleged – that their interests

diverge from those of the Judgment Debtors. Indeed, all of the evidence – common officers, common addresses, common websites, commingled assets, the fact that they argue the merits of the underlying judgment – indicates that their interests are identical. Therefore, Respondents should have expected that they would be liable for the judgment against predecessor and/or alter ego companies. *Id.* at 156.

Respondents argue that the underlying judgment was uncontested. (ROB at *21.) Respondents are incorrect. Colquhoun hired an attorney (CT 33), filed a verified answer to the complaint (CT 34), and filed an answer (never actually verified) to the Verified First Amended Complaint (CT 88-93). Respondents partially responded to the first round of discovery, filed an Opposition to Balsam's Motion to Compel Responses and to Have Matters Deemed Admitted (CT 171-81), and filed a Case Management Statement (not included in the record, but referenced in the Register of Actions (CT 16)). The trial court expressly noted that its judgment was *not* a default. (Reporter's Transcript from September 1, 2009 hearing on Balsam's Motion to Amend Judgment 19-20.)

It is *not* necessary that persons sought to be added as judgment debtors must have actually participated in the trial, only that they had the *opportunity* to do so. *Dow Jones Company Inc. v. Avenel*, 151 Cal. App. 3d 144, 150-51 (1st Dist. 1984). *Jack Farenbaugh & Son v. Belmont Construction Inc.* found alter ego liability when a company went out of business and monies and assets were disbursed without satisfying its creditors. 194 Cal. App. 3d 1023, 1027, 1034 (2d Dist. 1987). Here, Respondents had the opportunity and obligation to defend the lawsuit (and in fact they did defend the lawsuit for a time), rather than shut down two companies and create a new company using the same assets.

In the 18-month period between Daniel Reinertsen's death and the trial, Judgment Debtors never once contacted Balsam, his attorney, or the trial court. Respondents should not be rewarded for Judgment Debtors negligence, when the Judgment Debtors were controlled by the same individual – Colquhoun – who controls Respondents.

III. RESPONDENTS STILL HAVE SUBMITTED NO ACTUAL EVIDENCE TO SUPPORT THEIR DEFENSES

Respondents have yet to submit *any* independent evidence in support of their defenses, much less any substantial evidence. The only "evidence" at all is the self-serving Declaration of Leigh-Ann Colquhoun, which contained legal conclusions with no factual bases, and attached no additional documents in support of the claims. (CT 360-61.)

Furthermore, Colquhoun's Declaration was undated and not signed under penalty of perjury under the laws of the State of California, thereby violating Code of Civil Procedure § 2015.5. This Court might infer from Respondents failure to submit a corrected Declaration that Colquhoun's claims are not true.

A. Daniel Reinertsen as the Purported "Key Employee"

Respondents claim that Daniel Reinertsen was the key employee of DSG Direct (ROB at *4, 5, 11 and CT 360-61), but they have never submitted any independent evidence to support this claim. Respondents have still not explained why, if Daniel Reinertsen were really the key employee at DSG Direct, he was never named as an officer in DSG Direct's corporate filings with the State of Florida. (CT 457-62.)

Nor do Respondents ever define what they mean by "key employee." (ROB at *4, 5, 11, and CT 360-61.) Perhaps Daniel Reinertsen was a shipping clerk who merely put address labels on goods sold by Judgment

Debtors and took packages to the post office. Balsam admits that Judgment Debtors probably could not have operated for long without this "key" function, but Colquhoun could have still controlled business strategy, negotiated prices with suppliers, designed the website, bought customer lists, and handled all other "higher" business functions. Respondents still have not provided any evidence or even allegations of what Daniel Reinertsen actually did for DSG Direct.

Furthermore, Respondents *only* claim that Daniel Reinertsen was the key employee of *DSG Direct*; Respondents never alleged that Daniel Reinertsen was the key employee of the other Judgment Debtor, Your-Info. (ROB at *4, 5, 11, and CT 360-61.) Colquhoun was the only person ever named as an officer of DSG Direct, and Colquhoun was the only person ever named as an officer of Your-Info. (CT 317, 320, 457-62.)

B. Respondents Make False Claims as to Judgment Debtors' Dates of Defaults and Last Corporate Filings

Respondents make additional false claims to this Court that Judgment Debtors were in default almost two years before entry of judgment, as their last filing with the Secretary of State was supposedly in April 2005. (ROB at *14.)

Both DSG Direct and Your-Info filed annual reports in 2006 and 2007. Because Respondents made facially false statements to this Court, Balsam concurrently files a [Second] Motion/Request for Judicial Notice to Supplement Record pursuant to Evidence Code §§ 459(a) and 452(h).

C. Datastream is an E-Commerce Company

Respondents falsely claim that Datastream is not an e-commerce company. (ROB at *5, 10.) By Respondents' own definition, that means Datastream was not involved in the selling of products or services online. *Id*. And yet, Respondents offer no explanation whatsoever for the

Michigan Consent Judgment, in which Datastream – *not* DSG Direct or Your-Info – admitted that *it* sent or caused e-mail advertisements to be sent, and admitted that *it* had the ability to control the email advertisements at issue. *Cox v. Data Stream Group Inc.*, No. 06-1007-CP (Mich. Circ. Ct. Cty. of Ingham Feb. 6, 2008) (consent judgment). *See* Appellant's Opening Brief at *29-32 and Appellant's [First] Motion/ Request for Judicial Notice, Attachment 2. Therefore, by Respondents' own admission, Datastream *is* an e-commerce company.

D. Claims that Eric Reinertsen Was an Officer of DSG Direct Do Not Help Respondents' Defenses

Respondents also claim that Colquhoun's husband Eric Reinertsen was an officer of DSG Direct (ROB at *17), even though he similarly was never named as an officer on filings with the Secretary of State (CT 317, 320, 457-62). But, assuming that Eric Reintersen was an officer, that only reinforces Balsam's claims that Judgment Debtors are spammers.

This Court should note that Eric Reinertsen was named as one of the Top 10 Spammers in the world by MSNBC in 2003, identified as the #10 "Top Spammer of the Month" by *Business Week* in September 2004, and listed on the ROKSO ("Register of Known Spam Operations") List in 2005. Balsam concurrently files a Second Motion/Request for Judicial Notice to Supplement Record pursuant to Evidence Code §§ 459(a) and 452(h).

E. Judgment Debtors Never Fully Responded to Discovery

Judgment Debtors never fully responded to Balsam's discovery. (*See* CT 270-71, order granting Balsam's motion for sanctions and ordering defendant to comply with the prior order.) However, since Datastream owns the *DSGDirect.com* website (CT 326, 347-48), it appears that DSG Direct was acting as Datastream's agent, in which case Datastream would also be liable under an agent-principal theory.

During discovery, Judgment Debtors agreed to provide documents showing insurance coverage, but they never did so, and the trial court below sanctioned them for their failure to provide such documents. (*See* CT 237 (plaintiff's separate statement showing defendants' agreement to provide insurance coverage documents and failure to do so), and CT 273-24 (order granting motion and issuing sanctions for failure to provide documents)). Respondents should not be allowed to evade liability due to Judgment Debtors' failure to respond to discovery.

IV. RESPONDENTS' LACHES DEFENSE IS UNSUPPORTED BY ANY FACTS

Respondents claim that Balsam made a strategic decision to seek to amend the judgment to name Colquhoun instead of naming her as a defendant earlier in the litigation (ROB at *20), but never explain what possible reason Balsam might have had for such a "strategic decision." Although Respondents' attorney may sue people with no good-faith basis for doing so, Balsam does not.

Defendants never fully responded to discovery; if they had, Balsam might well have had the information necessary to amend the complaint in good faith to add Colquhoun and Datastream earlier on. Of course, Balsam could not have added TropicInks prior to the trial, because TropicInks did not exist as a company at that time, even though Judgment Debtors and Respondents were using the TropicInks mark and the *TropicInks.com* website prior to trial. (CT 323-324, 339-343.)

Furthermore, Respondents never allege that Colquhoun would have done anything differently if Balsam had named her as a defendant prior to the trial. In fact, based on Respondents' extensive discussion of grief and bereavement (ROB at *12-14, 16), if Judgment Debtors could not even pick

up the telephone or send a letter to Balsam or his counsel in the year and a half between Daniel Reinertsen's death and the trial, it is difficult to conceive of how Colquhoun could or would have defended herself if she had been named as an individual defendant.

Finally, Respondents falsely claim that Balsam was on notice that the Judgment Debtors were having financial difficulties. (ROB at *19.) It is true that Judgment Debtors' attorney Doron Ohel filed a motion to withdraw as counsel for nonpayment (ROB at *15), but Ohel's motion never said that the reason for nonpayment was that Defendants could not pay his bills (CT 190). For all Balsam knew, Judgment Debtors were unsatisfied with Ohel's work product and refused to pay his bills for that reason.

V. RESPONDENTS' ALTER EGO DEFENSE IS UNCONVINCING

A. Respondents Attempt to Mislead this Court by Introducing Florida Law

Balsam argues that: 1) TropicInks is liable on the judgment as a successor to Defendants, 2) Datastream is liable on the judgment as alter ego of Defendants, 3) Colquhoun is liable on the judgment as alter ego of Defendants, and 4) Colquhoun is liable on the judgment as corporate officer of Defendants.

Respondents attempt to mislead this Court by citing to a section of the Corporations Code:

> The laws of the state or foreign country under which a *foreign limited liability company* is organized shall govern its organization and internal affairs and the liability and authority *of* its managers and members.

Cal. Corp. Code § 17450(a) (emphasis added).

While Respondents quote the statute correctly, it has no application to the instant dispute or this appeal, because *neither Judgment Debtor was a foreign limited liability company*. Both DSG Direct and Your-Info were *corporations*. Therefore, Respondents' discussion of Florida law (ROB at *8-9) is irrelevant.

Moreover, Corporations Code § 17450(a) only refers to liability *of* managers and members. It does not address alter ego liability (where the argument is that Colquhoun *is* DSG Direct, as opposed to a manager *of* DSG Direct). Nor does Corporations Code § 17450(a) address successor liability. Therefore:

Section 17450(a) does not introduce Florida law as to TropicInks's liability as *successor* to the Judgment Debtor *corporations*.

Section 17450(a) does not introduce Florida law as to Datastream's liability as *alter ego* of the Judgment Debtor *corporations*. Respondents never alleged that Datastream was an owner of either Judgment Debtor corporation, and in fact, Respondents have repeatedly alleged that the companies are all separate with no comingled assets. (CT 361.)

Section 17450(a) does not introduce Florida law as to Colquhoun's liability as *alter ego* of the Judgment Debtor *corporations*.

Section 17450(a) does not introduce Florida law as to Colquhoun's liability as *corporate officer* of the Judgment Debtor *corporations*.

Even assuming that Section 17450(a) applied to foreign corporations, which it does not, Florida law may be strict as to piercing the corporate veil to collect from a shareholder, but it is not in evidence that either Colquhoun or Datastream was a shareholder of Judgment Debtors DSG Direct or Your-Info. TropicInks could not have been a shareholder because TropicInks was created two weeks after Judgment Debtors dissolved.

At *most*, if this Court were to find that TropicInks – a foreign limited liability company – has successor liability for the judgment, then and only then would Section 17450(a) introduce Florida law as Colquhoun's liability as a manager or member of TropicInks LLC. But this is not an issue on appeal.

B. Defendants Make No Arguments as to Successor Liability

Even if Corporations Code § 17450(a) applied to foreign corporations, which it does not, Respondents' arguments still only apply to Colquhoun as "manager" or "member." Even if Respondents' corporate officer arguments were stretched into alter ego arguments, Respondents have made no arguments whatsoever why TropicInks should not be held liable as the *successor* to the Judgment Debtors.

It is undisputed that assets were transferred from Judgment Debtors to Respondents – including, for example, the websites and domain names – while Balsam's valid claims as a creditor were ignored. (CT 305-06, 333-48.)

DSG Direct and/or Datastream were doing business as *TropicInks.com* no later than March 24, 2008 based on the dates Balsam printed pages from the *TropicInks.com* website, and according to the copyright notices, as early as 2004. (CT 339-343.) I.e., DSG Direct and/or Datastream were doing business as *TropicInks.com* long before the creation of TropicInks on October 8, 2008. (CT 323-24). Therefore, TropicInks is an obvious successor.

C. Respondents Cite Cases Based on Distinguishable Facts

Respondents' citation to *Balsam v. Angeles Technology et al*, No. 5:06-cv-04114 JF (HRL) (N.D. Cal. Nov. 20, 2008) (order denying motion to honor writ of execution and motion to transfer domain names) is unavailing. (ROB at *10-11.) *Angeles* is based on entirely different facts.

Angeles held only that the mere receipt of revenues was not enough to find alter ego liability. Here, the issue is not just receipt of revenue. Datastream was the legal owner of the *DSGDirect.com* website, domain registrations were shared among Colquhoun's various companies, assets were transferred from Judgment Debtors to TropicInks, and Judgment Debtors and Respondents share common officers and addresses.

Jines v. Abarbanel, 77 Cal. App. 3d 702 (2d Dist. 1978) is also based on distinguishable facts. (ROB at *19-20.) In *Jines*, Dr. Abarbanel and Rose Medical Group Inc. had an employee-employer relationship. *Id.* at 717. Here, Colquhoun was an officer (and presumably an employee) of Judgment Debtors, but Respondents never proved or even alleged that Datastream was an employee of Judgment Debtors. Additionally, "Dr. Abarbanel and his professional corporation have been openly conducting themselves as employee and employer." *Id.* Here, the *EvoClix.com*, *TropicInks.com*, and *DSGDirect.com* websites *all* showed the copyright notice "© DSG Direct" (CT 334-43), with no reference whatsoever to Datastream.

D. Respondents' "Geography Defense" is Meritless

Respondents argue that Colquhoun should have no liability because she could not have controlled any of the Judgment Debtors or TropicInks from several hundred miles away. (ROB at *10, 17.)

Respondents' argument is ridiculous. Colquhoun could have easily controlled the companies, of which she is (was) the sole or one of but two officers, from across the state or even from across the planet via the Internet, telephone, fax, and FedEx.

CONCLUSION

Respondents argue the procedure and the substance of the underlying judgment. The judgment is valid and proper. Respondents' arguments are meritless, including citations to cases currently on appeal.

Respondents never submitted any evidence to support their claims.

Respondents make false statements of fact and attempt to mislead this Court as to matters of law.

Respondents make a transparent sympathy play, which has no legal merit, and still do not explain why – a year and a half after Daniel Reinertsen's death – they never alerted the trial Court, Balsam, or Balsam's attorney and asked for a continuance.

Respondents argue the details in an attempt to distract this Court from the big picture – that Colquhoun and her family, infamous spammers, continue to operate closely-held companies, some new and some preexisting, under substantially the same management, claiming the same addresses, and operating the same websites as did Judgment Debtors, all the while ignoring Balsam's valid judgment.

This Court should reverse and remand.

THE LAW OFFICES OF DANIEL BALSAM

Dated: 3-17-2010

By: Daniel L Balsam

Daniel L. Balsam
Attorneys for Appellant

CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 8.204(c)(1)

The text of this brief consists of 5,064 words, excluding tables, this certificate, and the Index of Non-California Authorities, as counted by the Microsoft Word 2003 word processing program used to generate the brief.

DATED: 3-17-2010

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COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT [DIVISION 3]

DANIEL L. BALSAM, Appellant and Plaintiff, v. DSG DIRECT INC. *et al*, Defendants, TROPICINKS LLC, DATASTREAM GROUP INC., and LEIGH-ANN COLQUHOUN, Respondents and Real Parties in Interest.	Case No.: A126680 **APPELLANT'S INDEX OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF REPLY TO RESPONDENTS' OPENING BRIEF**

Appellant Daniel L. Balsam hereby lodges the following non-California authorities cited in his Reply to Respondents' Opening Brief:

1. *Balsam v. SubscriberBase Inc. et al*, No. 1-06-CV-066258 (Super. Ct. Cal. Cty. of Santa Clara Oct. 24, 2008) (order re: motion for summary judgment or adjudication)
2. *Asis Internet Services v. ConsumerBargainGiveaways LLC*, 622 F. Supp. 2d 935 (N.D. Cal. 2009)
3. *Asis Internet Services v. SubscriberBase Inc. et al*, No. 09-3503 SC, 2009 U.S. Dist. LEXIS 112852 (N.D. Cal. Dec. 4, 2009) (order granting defendants' motion to dismiss)
4. *Kleffman v. Vonage Holdings Corp.*, No. 07-2406 GAF (JWJx), 2007 U.S. Dist. LEXIS 40487 (C.D. Cal. May 23, 2007) (order granting motion to dismiss)
5. *United States of America v. ValueClick Inc. et al*, No. CV08-01711 MMM (RZx) (C.D. Cal. Mar. 13, 2008) (complaint)
6. CAN-SPAM Act, 15 U.S.C. § 7701 *et seq.*

THE LAW OFFICES OF DANIEL BALSAM

Dated: 3-17-2010

By: Daniel L. Balsam

Daniel L. Balsam
Attorneys for Appellant

Attachment 1

***Balsam v. SubscriberBase Inc. et al*, No. 1-06-CV-066258 (Super. Ct. Cal. Cty. of Santa Clara Oct. 24, 2008) (order re: motion for summary judgment or adjudication)**

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

DANIEL L. BALSAM,

Plaintiff,

vs.

SUBSCRIBERBASE, INC., et al.,

Defendants.

Case No. 1-06-CV 066258

ORDER RE: MOTION FOR SUMMARY JUDGMENT OR ADJUDICATION

The motion for summary judgment or adjudication by defendants SubscriberBase, Inc., SubscriberBASE Holdings, Inc., Consumer Research Corporation, Inc., Free Slide, Inc., and Involve Media, Inc. to plaintiff's Second Amended Complaint came on for hearing before the Honorable Mary Jo Levinger on October 23, 2008, at 9:00 a.m. in Department 5. The matter having been submitted, the Court orders as follows:

Defendants' motion for summary judgment is DENIED, and the alternative motion for summary adjudication is GRANTED in part as set forth below.

1. Statute of Limitations Defense

Defendants argued that each and every email at issue dated before June 26, 2005 is barred by the one-year statute of limitations prescribed by Code of Civil Procedure § 340(a). Plaintiff

argued in response that § 340(a) is inapplicable, and that the statute of limitations is four years pursuant to Business & Professions Code § 17208.

Section 340(a) prescribes a one-year limitations period for bringing "[a]n action upon a statute for a penalty or forfeiture." This is an action upon Business & Professions Code §17529.5, which provides in relevant part that a plaintiff "may recover either or both of the following: (i) Actual damages. (ii) Liquidated damages of one thousand dollars ($1,000) for each unsolicited commercial e-mail advertisement transmitted in violation of this section..." It is undisputed that plaintiff is seeking liquidated damages in this action, and not actual damages. Defendants characterize the liquidated damages recoverable under § 17529.5 as penal in nature, and conclude that § 340(a) applies.

Defendants' characterization of the liquidated damages recoverable under § 17529.5 as a penalty is well taken. "By allowing a plaintiff to recover 'either or both' of actual damages and statutory damages, this section makes clear that the two kinds of damages are different and thus logically serve different purposes: compensatory in the case of the former and penal in the case of the latter." (*Phillips v. Netblue, Inc.* (N.D. Cal. 2006) 2006 U.S. Dist. LEXIS 92573, 16.) "The penal purpose of the statutory damages provision [in § 17529.5] is further emphasized by sections of the code which, like their federal counterparts, provide for a reduction of statutory damages upon a finding of mitigating factors based on a defendant's conduct." (*Id.* at p. 17.) Thus, the liquidated damages available under § 17529.5 are penalties. (*Id.* at p. 18.)

Furthermore, the conclusion that liquidated damages under § 17529.5 are penalties is consistent with the legal definition of the term "penalty," " 'which an individual is allowed to recover against a wrong-doer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained ...' [Citations.]" (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1104.) Liquidated damages under § 17529.5 are available without reference to actual damages.

Finally, the legislative history of § 17529.5, which was enacted by the passage of Senate Bill 186, supports the proposition that the statutory liquidated damages are penalties. First, the comments to an Assembly committee report indicate that the author of Senate Bill 186 sought by

the proposed legislation to "to get to the heart of the matter [unsolicited email advertisements] by *penalizing* the actual advertiser of the spam e-mails." (Assem. Com. On Judiciary Analysis of Sen. Bill. No. 186 (2003-2004 Reg. Sess.) as amended June 26, 2003, p. 5 (emphasis added).) In another Assembly committee report, the damages recoverable for violations of the proposed anti-spam law are specifically referred to as "penalties." (Assem. Com. On Business and Professions of Sen. Bill. No. 186 (2003-2004 Reg. Sess.) as amended June 26, 2003, p. 5.)

In consideration of the foregoing, this Court concludes that the liquidated damages recoverable under § 17529.5 are penalties. It does not necessarily follow, however, that § 340(a) is the governing statute of limitations in this case, as illustrated in *Menefee v. Ostawari* (1991) 228 Cal.App.3d 239.

In *Menefee*, the court had to determine whether the one-year statute of limitations prescribed by § 340, subdivision (1) (now subdivision (a)), applied to an action for violation of a rent control ordinance, which authorized recovery of actual damages and mandatory treble damages. The court held that the treble damages were penal in nature, and that §340(1) applied to the action. The court explained that "[c]ertain statutory schemes contain separate, independent statutory provisions for recovery of actual damages and treble damages. [Citation.] In such a case, a claim for actual damages under one statute will be governed by a different statute of limitations than section 340, subdivision (1), which will govern the claim for treble damages [Citation.] Where a statute vests the trial court with the discretionary option of awarding treble damages in addition to actual damages, a claim based upon such statute is not governed by section 340, subdivision (1). [Citation.] Where, however, the allowance of treble damages is, by the terms of the statute, mandatory, such statute provides for a penalty, and an action based thereon will be subject to section 340, subdivision (1)." (*Menefee v. Ostawari* (1991) 228 Cal.App.3d 239, 243.) Thus, *Menefee* stands for the proposition that an action for non-mandatory penalties is not governed by § 340(a), while an action for mandatory penalties is governed by that statute.

Upon first glance, the plain language of § 17529.5 does not mandate an award of liquidated damages because it states that a court "may" award "either or both" of actual damages

and statutory damages. As a practical matter, however, where a plaintiff seeks an award of liquidated damages under § 17529.5 and does not seek actual damages, an award of liquidated damages would necessarily be mandatory upon a finding of a statutory violation. Thus, where a person like plaintiff herein seeks an award of statutory liquidated damages only, § 340(a) would apply.

Our inquiry is not over, however. The law is settled that a specific statute takes precedence over a general statute of limitations. (*Estate of Mason* (1990) 224 Cal.App.3d 634, 638.) Plaintiff argued that the four-year statute of limitations prescribed by Business & Professions Code § 17208 applies to this action. Section 17208 is a specific statute of limitations, and if applicable, would take precedence over § 340(a).

Section 17208 provides that "[a]ny action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued." (emphasis added.) Section 17208 is found in Chapter 5 (Enforcement) of Part 2 (Preservation and Regulation of Competition) of Division 7 (General Business Regulations) of the Business & Professions Code. Chapter 5 authorizes a cause of action to be brought for injunctive relief and other remedies for "unfair competition," which is defined in § 17200 as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code." Although the definition of unfair competition includes untrue or misleading advertising prohibited in § 17529.5, which is found in Chapter 1 of Part 3 of Division 7 of the Business & Professions Code, plaintiff has not alleged a cause of action for unfair competition under Chapter 5. Instead, plaintiff alleged a direct cause of action for violation of § 17529.5 under Chapter 2. Thus, the four-year statute of limitations prescribed by § 17208 is inapplicable.

In conclusion, the case at bench is governed by the one-year statute of limitations prescribed by § 340(a). Plaintiff filed this action on June 27, 2006. Consequently, the claims for violation of § 17529.5 with respect to emails dated on or before June 26, 2005 are time-barred, and summary adjudication of those claims is therefore GRANTED.

This Court acknowledges plaintiff's argument that granting summary adjudication would be improper because all of the violations alleged are combined in a single cause of action, and granting summary adjudication would not dispose of the entirety of a cause of action since there are emails at issue dated after June 26 2005. (See Code Civ. Proc., § 437c, subd. (f)(1) (summary adjudication shall be granting "only if it completely disposes of a cause of action").) However, in *Lilienthal v. Fowler* (1993) 12 Cal.App.4th 1848, the court held "that under subdivision (f) of [C.C.P.] section 437c, a party may present a motion for summary adjudication challenging a separate and distinct wrongful act even though combined with other wrongful acts alleged in the same cause of action." (*Lilienthal v. Fowler* (1993) 12 Cal.App.4th 1848, 1854-1855.) Although subdivision (f) was subsequently amended to provide that a motion for summary adjudication shall only be granted if it "completely disposes" of a cause of action, the Sixth Appellate District has stated in effect that *Lilienthal* survived the amendment, asserting that where distinct claims are combined in a single cause of action, summary adjudication may be obtained on one of the claims if it would have formed a single cause of action if properly pleaded. (*Schmidlin v. City of Palo Alto* (2007) 157 Cal. App. 4th 728, 782, fn. 2; see also *Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1688, fn. 11.)

Here, there are thousands of emails that plaintiff claims were sent to him in violation of § 17529.5. A violation with respect to any given email would have formed a single and distinct cause of action. It is therefore proper to grant summary adjudication of any claim for violation of § 17529.5 with respect to a single email that defendants have established lacks merit.

2. Res Judicata Defense

Defendants failed to satisfy their initial burden as moving parties of establishing that any of the claims for violation of § 17259.5 are barred by the doctrine of res judicata.

3. Unclean Hands Defense

Defendants failed to satisfy their initial burden as moving parties of establishing that this action is barred by the doctrine of unclean hands.

//

//

4. Federal Preemption

Defendants failed to satisfy their initial burden as moving parties of establishing that all or any portion of this action is preempted under the CAN-SPAM Act.

5. Violations of § 17529.5

Defendants failed to satisfy their initial burden as moving parties of establishing that plaintiff cannot prove that they violated § 17529.5 with respect to all or any portion of the emails at issue.

Dated: Oct. 24, 2008

Mary Jo Levinger
Judge of the Superior Court

COPY

FILED

OCT 24 2008

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA, County of Santa Clara
BY _____ DEPUTY
Shelley Mitchell

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

DANIEL L. BALSAM., Plaintiff, vs. SUBSCRIBERBASE, INC., et al., Defendants.	Case No. 1-06-CV 066258 ORDER RE: DEMURRER TO FIRST AMENDED VERIFIED ANSWER

The demurrer by plaintiff Daniel L. Balsam to the First Amended Verified Answer of defendants SubscriberBASE, Inc., SubscriberBASE Holdings, Inc., Consumer Research Corporation, Inc., Free Slide, Inc., and Involve Media, Inc. came on for hearing before the Honorable Mary Jo Levinger on October 23, 2008, at 9:00 a.m. in Department 5. The matter having been submitted, the Court orders as follows:

The demurrer to the first, second, third, sixth, seventh, eighth, tenth, and eleventh affirmative defenses is OVERRULED.

The demurrer to the reservation of defenses allegation is OVERRULED.

The demurrer to the fourth affirmative defense is SUSTAINED with 5 days leave to amend. Defendants failed to allege any facts to support the proposition that they may be entitled to a setoff.

The demurrer to the fifth affirmative defense is SUSTAINED without leave to amend. Business and Professions Code § 17259.5 is not unconstitutional (See *People v. Morse* (1993) 21 Cal.App.4th 259, 265), and this action otherwise does not involve any government or state action designed to suppress plaintiff's right to free speech. Thus, the First Amendment is not implicated.

The demurrer to the ninth affirmative defense is SUSTAINED with 5 days leave to amend. As a matter of law, the conduct complained of (i.e. collecting emails, etc.) is insufficient to support an unclean hands defense.

Dated: Oct. 24, 2008

Mary Jo Levinger
Judge of the Superior Court

Attachment 2

***Asis Internet Services v. ConsumerBargainGiveaways LLC,* 622 F. Supp. 2d 935 (N.D. Cal. 2009)**

LexisNexis

LEXSEE 622 F.SUPP.2D 935

ASIS INTERNET SERVICES, a California corporation, and JOEL HOUSEHOLTER, d/b/a KNEEL AND ENGINEERING, d/b/a FOGGY.NET, Plaintiffs, v. CONSUMERBARGAINGIVEAWAYS, LLC, an Illinois Limited Liability Company, d/b/a OPINIONRESEARCHPANEL a/k/a OPINIONRESEARCHPANEL.COM, CONSUMER REVIEW NETWORK, LLC, a Delaware Limited Liability Company, d/b/a CONSUMERREVIEWNETWORK.COM, DIRECTGIFTCARDPROMOTIONS, LLC, an Illinois Limited Liability Company, d/b/a LAPTOPREVIEWPANEL, a/k/a LAPTOPREVIEWPANEL.COM, JEFF M. ZWEBEN, and DOES ONE through FIFTY, inclusive, Defendants.

No. C 08-04856 WHA

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

622 F. Supp. 2d 935; 2009 U.S. Dist. LEXIS 36523

April 17, 2009, Decided
April 17, 2009, Filed

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, email service providers, sued defendants companies alleging violations of *Cal. Bus. & Prof. Code § 17529.5* with regard to commercial email advertisements. The companies moved to dismiss.

OVERVIEW: The providers alleged that the companies sent subject lines or header information that was misleading. The court found that the providers clearly had an interest in protecting their customers from false advertisements and attempted fraud and thus had standing. The claims were not preempted merely because the complaint failed to plead, or *§ 17529.5* failed to require, reliance and/or damages. Under the discovery rule the providers had to establish not only that the emails were discovered within one year but that they could not reasonably have been discovered earlier. The providers failed to make such a showing and thus the claims were time barred under *Cal. Code Civ. Proc. § 340(a).* The complaint failed to satisfy *Fed. R. Civ. P. 9(b)* because it provided only general allegations and a few examples of the allegedly misleading advertisements. To satisfy the particularity requirement, the complaint must provide, at a minimum, the specifics regarding each type of allegedly false or misleading advertisement, the number of those advertisements and the date ranges of the emails in each category.

OUTCOME: The motion to dismiss was granted as to those emails received more than one year prior to the filing of this lawsuit, because the pleading and briefing to date failed to establish that those emails could not reasonably have been discovered earlier. The motion was denied in all other respects. The providers were granted leave to amend.

LexisNexis(R) Headnotes

Computer & Internet Law > Online Advertising > Spam Email
[HN1] See *Cal. Bus. & Prof. Code § 17529.5(a)*

Computer & Internet Law > Online Advertising > Spam Email
[HN2] *Cal. Bus. & Prof. Code § 17529.5(b)(1)(A)* delineates who may sue under the provision. the following may bring an action against a person or entity that violates any provision of this section: (i) the Attorney General; (ii) an electronic mail service provider; and (iii) a

recipient of an unsolicited commercial e-mail advertisement, as defined in *Cal. Bus. & Prof. Code § 17529.1*.

Computer & Internet Law > Online Advertising > Spam Email
Constitutional Law > Supremacy Clause > Federal Preemption
[HN3] The federal CAN-SPAM Act expressly preempts certain state-law claims while expressly exempting others from preemption via a "savings" clause. This chapter 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 to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto. *15 U.S.C.S. § 7707(b)(1)*. Thus, although this provision broadly preempts state laws governing commercial email, it expressly "saves" from preemption state laws that "prohibit falsity or deception" in commercial email messages.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation
Computer & Internet Law > Online Advertising > General Overview
[HN4] *Cal. Bus. & Prof. Code § 17529.5(a)* provides: (a) it is unlawful for any person or entity to advertise in a commercial e-mail advertisement under any of the following circumstances: (2) the e-mail advertisement contains or is accompanied by falsified, misrepresented, or forged header information; and (3) the e-mail advertisement has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview
Computer & Internet Law > Online Advertising > General Overview
[HN5] With regard to the CAN-SPAM Act, 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. The Act does not define the words "falsity" and "deception." Congress, however, is certainly familiar with the word "fraud" and choose not to use it; the words "falsity or deception" suggest broader application. In fact, as plaintiffs emphasize, Congress utilized the word "fraud" in the very next subsection but not in the savings clause. See *15 U.S.C.S. § 7707(b)(2)*.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview
Computer & Internet Law > Online Advertising > General Overview
[HN6] The CAN-SPAM Act refers to falsity and deception not only in its preemption provision but also in its substantive provisions governing commercial electronic mail. One of those provisions expressly directs that the word "deceptive," for its part, should be understood not as referencing common-law fraud (nor the tort of deception) but rather deception as utilized in the FTC Act. *15 U.S.C.S. 7704(a)(2)* prohibition on "deceptive subject headings" should be understood consistent with the criteria used in enforcement of *15 U.S.C.S. § 45*. A word used in different places within the same statute is generally given a consistent meaning. The subsection immediately thereafter contains the savings clause here at issue. The CAN-SPAM Act's repeated references to the FTC Act definition of "deceptive" practices strongly suggest that Congress intended the phrase "falsity or deception" in *§ 7707(b)(1)* to refer to, or at least encompass, that definition, not just state tort law.

Computer & Internet Law > Online Advertising > General Overview
[HN7] *15 U.S.C.S. § 7704(a)(1)* sets forth a prohibition of false or misleading transmission information; and (a)(2) sets forth a prohibition of deceptive subject headings.

Governments > Legislation > Interpretation
[HN8] Statutes should not be read as a series of unrelated and isolated provisions.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview
Computer & Internet Law > Online Advertising > General Overview
[HN9] CAN-SPAM specifically applies to the subject line of covered email messages the deception jurisprudence the Commission has developed under § 5(a) of the FTC Act.

Governments > Legislation > Statutes of Limitations > Time Limitations
[HN10] Actions brought for statutory penalties are subject to a one-year statute of limitations. *Cal. Code Civ. Proc. § 340(a)*.

Governments > Legislation > Statutes of Limitations > Time Limitations
Torts > Procedure > Statutes of Limitations > Accrual of Actions > Discovery Rule
[HN11] In cases involving latent injuries: courts have routinely applied the so-called discovery rule to toll the running of the statute of limitations. When the discovery rule applies, the plaintiff's claim does not accrue on the date the tortious act occurred but rather on the date the plaintiff discovers, or reasonably should have discovered, both the injury and its cause. Although the rule is ordinarily applied in tort cases, it has been applied to other claims including defamation and, on occasion, unfair competition claims.

COUNSEL: [**1] For Asis Internet Services, a California corporation, Joel Householter, doing business as Foggy Net doing business as Kneeland Engineering, Plaintiffs: Jason K. Singleton, Richard E. Grabowski, LEAD ATTORNEYS, Singleton Law Group, Eureka, CA.

For Consumerbargaingiveaways, LLC, an Illinois Limited Liability Company doing business as Opinionresearchpanel also known as Opinionresearchpanel.com, Consumer Review Network, LLC, a Delaware Limited Liability Company doing business as Consumerreviewnetwork.com, Directgiftcardpromotions, LLC, an Illinois Limited Liability Company doing business as Laptopreviewpanel also known as Laptopreviewpanel.com, Defendants: Richard J. Idell, LEAD ATTORNEY, Idell & Seitel LLP, San Francisco, CA; Richard Brian Newman, LEAD ATTORNEY, Klein Zelman Rothermel LLP, New York, NY.

For Jeff M. Zweben, Defendant: Richard Brian Newman, LEAD ATTORNEY, Klein Zelman Rothermel LLP, New York, NY; Richard J. Idell, Idell & Seitel LLP, San Francisco, CA.

JUDGES: WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

OPINION BY: WILLIAM ALSUP

OPINION

[*937] **ORDER RE RULE 12 MOTION**

INTRODUCTION

Plaintiffs bring this action under California's law defining unlawful activities relating to commercial email advertisements. Providers [**2] of internet and email services allege that defendants sent nearly one thousand unsolicited and misleading advertisements to email addresses serviced by them. They seek statutory damages. Defendants move to dismiss on multiple grounds including federal preemption, timeliness and standing. For the reasons that follow, defendants' motion to dismiss is **GRANTED IN PART** and **DENIED IN PART**.

STATEMENT

Plaintiffs Asis Internet Services, a California corporation located in Garberville, and Joel Householter d/b/a Foggy.net, a California sole proprietorship located in Eureka, have sued Consumerbargaingiveaways, Consumer Review Network, and Directgiftcardpromotions, all Illinois or Delaware limited liability corporations, asserting violations of a California law proscribing certain unlawful activities relating to commercial email advertisements. *Cal. Bus. & Prof. Code § 17529.5*. For the purposes of this motion, the following well-pled allegations are taken as true.

Plaintiffs Asis and Foggy both provide internet and email service. At the hearing, they explained that they provide dial-up internet service to a relatively small customer base in rural or remote areas where high-speed services such as [**3] DSL and cable are unavailable. Declarations attached to their briefing indicate that they have been in business since 1995 and 1998, respectively, and that they have 950 and 75 customers, respectively. Plaintiffs allege that, between August 22, 2007, and September 28, 2008, defendants advertised in hundreds of email promotions sent to their computers that either (a) contained falsified header information, or (b) contained a subject line that would be likely to mislead a recipient. Defendants allegedly advertised in 597 such emails sent to Asis' computers and 331 such emails sent to Foggy's computers.

The crux of the allegations is that defendants sent email advertisements with subject lines suggesting a free gift or prize. In fact the gifts were not free because the recipient had to, for example, make a purchase or open a new credit card in order to receive them. The actual requirements for participation were buried at the end of the email or on a separate internet page accessible only after the recipient provided certain personal information. Moreover, the email headers were falsified in order to conceal or misrepresent who the messages were actually from. More specifically, plaintiffs [**4] allege the following.

1. SUBJECT-LINE INFORMATION.

Plaintiffs allege that the emails contained subject lines that would be likely to mislead a recipient about a material fact of the contents of the message. The emails' subject lines contained statements such as "Your JCPenny 500 USD Gift Card!"; or [*938] "CONFIR-

MATION: We have your $ 100 Visa Gift Card ready to ship!"; or "[QUAR] You were chosen to receive a $ 500 JCPenney Gift Card!"; or "[QUAR] Your $ 500 JC Penney Holiday Gift Card Expiring Soon" (Compl. P 22). [1] These subject lines were allegedly intended to coax recipients to open the email by enticing them with free gifts. Plaintiffs allege, however, that the "free" gifts came with strings attached and the actual terms of the offer and requirements for participation were buried on the second page (in only summary form) or were not included in the email at all.

1 "[QUAR]" appears in the pleading and is unexplained.

To view the full terms and conditions, recipients were required to click on a link to another internet page, where they were required to provide their email address before being given an opportunity to review the terms and conditions of, and the privacy policies attached to, the [**5] free gifts. After entering that information, recipients were taken to a second page where they were required to enter detailed personal information and told that, in order to receive the free gift, they had to undertake other steps including, for example, completing a registration and/or activating a new credit card either by making a purchase, transferring a balance or taking a cash advance. Plaintiffs allege that the subject lines were therefore likely to mislead recipients.

2. HEADER INFORMATION.

Plaintiffs also allege that the emails' headers contained information that was falsified, misrepresented or forged in order to conceal the true identities of the senders. The complaint avers that the vast majority (891 of the 928) of the email messages contained headers with allegedly false "from" names that were similar to the names or email accounts of the email *recipients*. The "sender ID" field of the headers was also allegedly false -- it contained a different email address, one allegedly stolen or that did not exist. For example, one email allegedly sent *to* "'catskinner' &t;catskinner@asis.com&t;" indicated that it was *from* "'catskinner@asis.com' &t;mejnryhopw@amazon.com&t;" (Compl. Exh. F).

Moreover, [**6] the IP addresses in all but one of the email headers indicated that the emails were sent from a Verizon Internet IP address (the final one contained an IP address from PenTeleData, Inc., a provider of DSL). In other words, plaintiffs allege that, under scrutiny, the emails now appear to have come from consumer IP addresses, but the sending domain names indicated to recipients that the emails were instead from well-known companies such as "Dell.com" or "sun.com" or "microsoft.com" or "google.com." These companies, however, had (and have) their own IP address blocks that do not coincide with the Verizon or PenTeleData blocks. Therefore, plaintiffs allege, the "sending" email accounts were either stolen or forged and the true sender of the emails cannot be identified by the header information.

* * *

Plaintiffs aver that various aspects of these email advertisements evidenced an intent to deceive: concealing the actual sender's name and email address; utilizing stolen domain names; burying the offer notification on the second page of the emails; omitting the full terms and conditions from the emails themselves; and sending the same misrepresentations to multiple email accounts.

Plaintiffs [**7] filed this lawsuit in October 2008 and amended the complaint in December 2008. They assert one claim for violations of California's law defining unlawful [*939] activities relating to commercial email advertisements. *Cal. Bus. & Prof. Code § 17529.5*. They seek liquidated damages under *Section 17529.5(b)(1)(B)(ii)* in the amount of $ 1,000 for each unsolicited commercial email which violated these provisions, as well as attorney's fees. Defendants now move to dismiss. [2]

2 Unless otherwise stated, all references to "complaint" or citations to "compl." are to the first amended complaint. The complaint named Jeff M. Zweben as a defendant, and defendants' motion addressed the claims against him, but plaintiffs subsequently stipulated to dismissal of Mr. Zweben from this action without prejudice. Defendants' contentions regarding Mr. Zweben are therefore moot.

ANALYSIS

Plaintiffs sue under *Section 17529.5(a)*, which provides (emphasis added):

> [HN1] (a) It is unlawful for any person or entity to advertise in a commercial e-mail advertisement either sent from California or sent to a California electronic mail address under any of the following circumstances:
>
> (1) The e-mail advertisement contains or is accompanied [**8] by a third-party's domain name without the permission of the third party.
>
> (2) The e-mail advertisement contains or is accompanied by *falsified, misrepresented, or forged header information . . . .*
>
> (3) The e-mail advertisement has a *subject line* that a person knows would be

> *likely to mislead a recipient*, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

Defendants move to dismiss on the grounds that (1) plaintiffs lack standing; (2) plaintiffs' *Section 17529.5* claims are preempted by the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act"); and that (3) the claims are barred in part by the applicable state statute of limitations. Defendants also move for (4) a more definite statement under *Rule 12(e)*, arguing that the allegations are too vague and ambiguous. [3]

> 3 Although defendants mentioned Proposition 64 at the hearing, they did not raise a Proposition 64 argument in their motion.

1. PLAINTIFF HAS STANDING.

Defendants contend that "plaintiffs lack standing to bring a claim under *Section 17529.5*." Defendants' contentions are not entirely clear, but their briefing might [**9] be read to argue that plaintiffs lack Article III standing and/or that *Section 17529.5* creates no private cause of action for plaintiffs.

Defendants' Article III argument is without merit. Plaintiffs, as email service providers, clearly have an interest in protecting their customers from false advertisements and attempted fraud. In the analogous federal CAN-SPAM Act, Congress specifically concluded that spam injures internet service providers: "[t]he growth in unsolicited commercial electronic mail imposes significant monetary costs on providers of Internet access services, businesses, and educational and nonprofit institutions that carry and receive such mail . . . ." *15 U.S.C. 7701(a)(6)*. This is not a CAN-SPAM case, of course, but for *Article III* purposes the point is the same. Plaintiffs, as internet service providers, certainly suffer Article III injury from false or misleading advertising in spam email messages: spam annoys their customers, thus hurting business, and forces them to expend resources to filter and combat the spam. Here, plaintiffs have specifically alleged such injury -- they aver, for example, that as internet service providers [*940] they expend approximately $ 3,000 [**10] and $ 1,200 per month, respectively, to process and fight spam. Insofar as defendants raise an Article III argument, it is unavailing.

Plaintiffs, moreover, certainly have a claim under California's statute governing commercial email advertisements. [HN2] *Section 17529.5(b)(1)(A)* delineates who may sue under the provision (emphasis added):

> the following may bring an action against a person or entity that violates any provision of this section:
>
> (i) The Attorney General.
>
> (ii) *An electronic mail service provider*.
>
> (iii) A recipient of an unsolicited commercial e-mail advertisement, as defined in Section 17529.1.

Plaintiffs bring this lawsuit as electronic mail service providers. Therefore, insofar as defendants contend that plaintiffs have no claim under the provision, they are mistaken. Defendants further insist that plaintiffs failed adequately to plead that they *are* in fact email service providers or that they were acting in that capacity when they received the emails. They claim that some of the email addresses that received the emails are were not actually used by customers or that Asis and Foggy were really just sites to collect emails for litigation. [4]

> 4 Defendants' arguments that plaintiffs [**11] were not "recipients" under *Section 17529.5*, or that plaintiffs lack standing under the *federal* CAN-SPAM, are irrelevant because plaintiffs' claims are based on their alleged status as email service providers under state law.

Asis and Foggy have alleged, albeit in somewhat conclusory fashion, that they provide internet and email service and received the emails at issue while providing such services. In declarations, plaintiffs further explain that Asis and Foggy have been in business since 1995 and 1998, respectively; that they have 950 and 75 customers, respectively, and approximately 1,500 and 180 email accounts, respectively; and that they expend approximately $ 3,000 and $ 1,200 per month, respectively, to process spam. Plaintiffs request the opportunity to amend in order to include these allegations in the complaint if need be. Leave to amend will be granted.

Implausible allegations of internet service provider activity or bare conclusions, alone, may not suffice, but (with the statements in their declarations) plaintiffs have provided more. Defendants arguments are essentially factual challenges; defendants provide no authority suggesting that plaintiffs must, at the pleading stage, [**12] allege some specific threshold degree of internet service provider activity in order to survive a motion to dismiss. *See ASIS Internet Services v. Active Response Group, 2008 U.S. Dist. LEXIS 60535, 2008 WL 2952809 at *6 & n.4 (N.D. Cal. 2008)* (discussing analogous pleading issues in the context of a federal CAN-SPAM claim).

2. FEDERAL PREEMPTION.

[HN3] The federal CAN-SPAM Act expressly preempts certain state-law claims while expressly exempting others from preemption via a "savings" clause:

> This chapter 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 to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto*.

15 U.S.C. 7707(b)(1) (emphasis added). Thus, although this provision broadly preempts state laws governing commercial email, it expressly "saves" from preemption state laws that "prohibit[] *falsity or deception*" in commercial email messages. [*941] The issue is whether California's *Section 17529.5(a)* "prohibits falsity or deception," in which case plaintiffs' claims are saved from [**13] preemption.

As stated, plaintiffs' claims arise under California's *Section 17529.5(a)*. For the purposes of this motion, the meaning of this statute is not in dispute. To reiterate, [HN4] *Section 17529.5(a)* provides:

> (a) It is unlawful for any person or entity to advertise in a commercial e-mail advertisement . . . under any of the following circumstances:
>
> * * *
>
> (2) The e-mail advertisement contains or is accompanied by *falsified, misrepresented, or forged header information* . . . .
>
> (3) The e-mail advertisement has a *subject line* that a person knows would be *likely to mislead a recipient*, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

True, California courts have yet to decide the precise scope of these provisions. [5] For present purposes, however, it is sufficient that the statute's prohibitions are broader than common-law fraud -- a matter on which both sides agree. Defendant's preemption argument is as follows: the CAN-SPAM Act's preemption provision saves from preemption only state laws that prohibit "falsity or deception;" the phrase "falsity or deception" in the savings clause refers only to common-law fraud; therefore, [**14] for a state claim to escape preemption the state law must require (or the claim must satisfy) *all* elements of common-law fraud. That is, under defendant's theory, the phrase "falsity or deception" in the savings clause actually means common-law fraud. Both sides agree that California's *Section 17529.5(a)* and plaintiff's claims thereunder would not satisfy that standard. *Section 17529.5(a)* does not, for example, purport to require reliance or actual damages, and plaintiffs essentially concede that they would be unable to establish reliance.

> 5 The Ninth Circuit recently certified to the California Supreme Court the meaning of "falsified, misrepresented, or forged" under *Section 17529.5(a)(2)*. *Kleffman v. Vonage Holdings Corp., 551 F.3d 847, 848 (9th Cir. 2008)*. The California Supreme Court has yet to answer.

Plaintiffs dispute the entire premise of the attack. They argue that the phrase "falsity or deception" in the savings clause encompasses not only common-law fraud claims but also false-advertising claims with different elements. *Section 17529.5* proscribes not only fraudulent statements on which a plaintiff *actually* relied to his or her detriment but also advertisements that are "*likely* [**15] *to mislead a recipient*." Although California courts have yet to interpret the provision, under the analogous FTC Act, "[a]n act or practice is deceptive if first, there is a representation, omission, or practice that, second, is *likely to mislead* consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material. Deception may be found based on the 'net impression' created by a representation." *F.T.C. v. Stefanchik, 2009 WL 636510 at *3-4 (9th Cir. 2009)* (emphasis added; citations omitted). Actual reliance and injury are not required. [6] Plaintiffs argue that the phrase "falsity or deception" in the CAN-SPAM Act's savings clause encompasses such false-advertising claims.

> 6 *See, e.g., Freeman v. Time, Inc., 68 F.3d 285, 288-290 (9th Cir. 1995)*; *F.T.C. v. Direct Marketing Concepts, 569 F. Supp. 2d 285, 297-98 (D. Mass. 2008)* (both further discussing the FTC Act standards).

No appellate decision has yet decided whether, as defendants argue, the phrase "falsity or deception" must be narrowed to [*942] common-law fraud such that the CAN-SPAM Act saves from preemption only state claims sounding in fraud. District courts to have addressed the issue [**16] have reached differing results. [7]

7 *Compare Gordon v. Virtumundo, Inc., 2007 U.S. Dist. LEXIS 35544, 2007 WL 1459395 (W.D. Wash. 2007)* (declining to limit the savings clause only to fraud claims); *Beyond Systems, Inc. v. Keynetics, Inc., 422 F. Supp. 2d 523, (D. Md. 2006)* (same); *Gordon v. Impulse Marketing Group, 375 F. Supp. 2d 1040 (E.D. Wash. 2005)* (same); *with Kleffman v. Vonage Holdings Corp., 2007 U.S. Dist. LEXIS 40487, 2007 WL 1518650, *3 (C.D. Cal. 2007)* ("[t]hough Congress did not define the terms 'falsity' or 'deception,' it is clear that it meant these terms to refer to traditional, tort-type concepts"); *Hoang v. Reunion.Com, 2008 U.S. Dist. LEXIS 103659, 2008 WL 4542418, *2 (N.D. Cal. 2008)* (similar); *Hoang v. Reunion.com, 2008 U.S. Dist. LEXIS 85187, 2008 WL 5423226 (N.D. Cal. 2008)* (similar).

This order rejects the preemption challenge. The text and structure of the provision indicate that defendants interpret the savings clause too narrowly: "falsity or deception" is not limited *just* to common-law fraud and other similar torts. Statutory interpretation begins with the text of the statute. [HN5] 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. The Act does not define the words [**17] "falsity" and "deception." Congress, however, is certainly familiar with the word "fraud" and choose not to use it; the words "falsity *or* deception" suggest broader application. In fact, as plaintiffs emphasize, Congress utilized the word "fraud" in the very next subsection but not in the savings clause. *See 15 U.S.C. 7707(b)(2)*.

The structure of the Act also indicates that the phrase "falsity or deception" does not refer *just* to common-law fraud. [HN6] The CAN-SPAM Act refers to falsity and deception not only in its preemption provision but also in its substantive provisions governing commercial electronic mail. [8] One of those provisions expressly directs that the word "deceptive," for its part, should be understood not as referencing common-law fraud (nor the *tort* of deception) but rather deception as utilized in the FTC Act. *U.S.C. 7704(a)(2)* (prohibition on "deceptive subject headings" therein should be understood "consistent with the criteria used in enforcement of *section 45* of this title [*i.e.*, the FTC Act]"). A word used in different places within the same statute is generally given a consistent meaning. [9] In fact, the section containing the preemption provision itself similarly references [**18] the FTC Act: "[n]othing in this chapter shall be construed to affect in any way the Commission's authority to bring enforcement actions under FTC Act for materially *false or deceptive representations* or unfair practices in commercial electronic mail messages." *15 U.S.C. 7707(a)(2)*. The subsection immediately thereafter contains the savings clause here at issue. The CAN-SPAM Act's repeated references to the FTC Act definition of "deceptive" practices strongly suggest that Congress intended the phrase "falsity or deception" in *Section 7707(b)(1)* to refer to, or at least encompass, that definition, not *just* state tort law.

8 *See*[HN7] *15 U.S.C. 7704(a)(1)* (setting forth a "[p]rohibition of false or misleading transmission information"); (a)(2) (setting forth a "[p]rohibition of deceptive subject headings").

9 *See, e.g., Household Credit Services, Inc. v. Pfennig, 541 U.S. 232, 239, 124 S. Ct. 1741, 158 L. Ed. 2d 450 (2004)*; *Gonzalez v. Oregon, 546 U.S. 243, 273, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006)* ("[HN8] statutes should not be read as a series of unrelated and isolated provisions"). *See also FTC Notice of Proposed Rulemaking, 69 FR 50091*-01 at 50095 & n.32 (Aug. 13, 2004) ("[HN9] CAN-SPAM specifically applies to the subject line of covered email messages the deception jurisprudence [**19] the Commission has developed under § 5(a) of the FTC Act").

[*943] Admittedly, some decisions lend support to defendants' proposition. Defendants rely on the only appellate decision to have addressed the scope of CAN-SPAM's preemption provision. *Omega World Travel v. Mummagraphics, 469 F.3d 348, 349 (4th Cir. 2006)*. Most or all of the district court decisions that have equated "falsity or deception" with fraud have relied on this decision (*see* note 5 above). *Omega*, however, merely held that state laws were preempted insofar as they permitted claims for *immaterial* errors. *Id. at 353-54*. It did not hold, at least not expressly, that *all* elements of common-law fraud were required or that any particular element other than materiality was required to survive preemption. False advertising claims (at least under the FTC Act) also require materiality, and plaintiff has pled materiality (Compl. PP 11-18, 21-22).

Granted, as defendants emphasize, *Omega* did look to tort law for its materiality requirement:

> while "falsity" can be defined as merely "the character or quality of not conforming to the truth or facts," it also can convey an element of tortiousness or wrongfulness, as in "deceitfulness, untrustworthiness, [**20] faithlessness." . . . . Here, the pre-emption clause links "falsity" with "deception"-one of the several tort actions based upon misrepresentations [citing, *inter alia*, tort of "deceit," *Restatement (Second) of Torts § 525*]. *This pairing*

> *suggests that Congress was operating in the vein of tort when it drafted the pre-emption clause's exceptions*, and intended falsity to refer to other torts involving misrepresentations, rather than to sweep up errors that do not sound in tort.

469 F.3d at 354 (emphasis added). District courts limiting the savings clause to fraud claims have generally relied on this passage. This order disagrees. The savings clause refers to "falsity or deception." This order finds no reason to define *deception* differently from how it is used in other subsections of the CAN-SPAM Act such as *Sections 7704(a)(2)* and *7707(a)(2)*. Nor do *Omega's* policy rationales for the materiality requirement extend to all elements of fraud. The decision found it inconsistent with congressional intent to allow states to proscribe otherwise innocent actions which may create a patchwork of state standards and excessively inhibit the use of commercial email. *Id. at 355-56*. Such concerns are [**21] inapplicable, however, to conduct proscribed by other national laws -- as the below-discussed legislative history recognized. In all respects, this order declines to interpret "falsity or deception" *only* in accordance with state tort law.

Defendants also point to legislative history in support of their fraud requirement. The report of the Senate's Committee on Commerce, Science and Transportation described CAN-SPAM's preemption provision as follows:

> Thus, a State law requiring some or all commercial e-mail to carry specific types of labels, or to follow a certain format or contain specified content, would be preempted. By contrast, a State law *prohibiting fraudulent or deceptive headers*, subject lines, or content in commercial e-mail would not be preempted. Given the inherently interstate nature of e-mail communications, the Committee believes that this bill's creation of one national standard is a proper exercise of the Congress's power to regulate interstate commerce . . . . This is particularly true because, in contrast to telephone numbers, e-mail addresses do not reveal the State where the holder is located. As a result, a sender of e-mail has no easy way to determine with which [**22] State law to comply. Statutes that prohibit *fraud and deception* in e-mail do not raise the same concern, because they [*944] target behavior that a legitimate business trying to comply with relevant laws would not be engaging in anyway.

Senate Rpt. No. 108-102, 108th Cong., 1st Sess. 2003, 2003 WL 21680759 (emphasis added). True, the report referred to "*fraudulent* or deceptive" conduct rather than "falsity or deception." Although this arguably suggested that the Senate intended to equate "falsity" with "fraud," as some district courts have suggested, it does not account for the additional reference (in the disjunctive) to "deception." Nor do the report's policy concerns necessitate limiting the phrase to fraud alone: a "legitimate business trying to comply with relevant laws" would not be engaged in "deceptive" practices in contravention of the FTC Act or state law.

For these reasons, this order will not confine the phrase "falsity or deception" to strict common-law fraud such that anti-deception state actions not insisting on every element of common-law fraud are preempted. Plaintiffs' claims are not preempted merely because the complaint fails to plead, or *Section 17529.5* fails to require, [**23] reliance and/or damages. Defendants' motion to dismiss the complaint on preemption grounds is denied. [10]

> 10 This order, therefore, need not address plaintiffs' alternate contention that the complaint *does* in fact adequately plead the elements of fraud under *Rule 9(b)*.

3. STATUTE OF LIMITATIONS.

As both sides agree, this case is subject to a one-year statute of limitations applicable to [HN10] actions brought for statutory penalties. *Cal. Civ. Proc. Code § 340(a)*. The complaint alleges that the emails at issue were received between August 22, 2007, and September 28, 2008. Plaintiffs filed the original complaint (later amended) October 23, 2008. The limitations period, to the extent applicable, would limit plaintiff's claims to those emails received within one year of that date. [11]

> 11 Contrary to plaintiffs' assertion, the complaint was *filed* October 23, although it was dated October 17.

Plaintiffs seek refuge in the "discovery rule." [HN11] In cases involving latent injuries: "courts have routinely applied the so-called discovery rule to toll the running of the statute of limitations. When the discovery rule applies, the plaintiff's [claim] does not accrue on the date the tortious act occurred but rather [**24] on the date the plaintiff discovers, or reasonably should have discovered, both the injury and its cause." *Wagner v. Apex Marine Ship Management Corp., 83 Cal. App. 4th*

1444, 1449, 100 Cal. Rptr. 2d 533 (2000). Although the rule is ordinarily applied in tort cases, it has been applied to claims arguably analogous to those here at issue -- including defamation and, on occasion, unfair competition claims. [12] Even assuming the rule applies, however, plaintiffs offer no persuasive reason why the messages could not reasonably have been discovered within one year. Plaintiffs argue that discovery of the emails "required collection, processing, and detailed investigations by experienced technicians" and that "[p]laintiffs' investigators are prepared to declare that the emails were not discovered until September 2008" (Opp. at 24-25). Plaintiffs are prepared to amend the complaint accordingly.

> 12 *Burdette v. Carrier Corp., 158 Cal. App. 4th 1668, 1679, 71 Cal. Rptr. 3d 185 (2008)* (defamation); *Grisham v. Philip Morris U.S.A., 40 Cal. 4th 623, 634 n.7, 54 Cal. Rptr. 3d 735, 151 P.3d 1151 (2007)* (rule has been applied to unfair competition claims, albeit inconsistently).

Under the rule, plaintiffs must establish not only that the emails *were* discovered within one year but that [**25] they should not reasonably have been discovered earlier. Plaintiffs fail to make such a showing. [*945] Therefore, defendants' motion to dismiss in part on this basis is granted. As explained below, however, plaintiffs may bring a motion seeking leave to amend. The motion must specifically point out how the new pleading would overcome these deficiencies.

4. RULE 12(E).

Finally, defendants move for a more definite statement under *Rule 12(e)*. Defendants contend that plaintiffs should be required actually to provide the emails at issue, or at least to provide certain basic information for each: the precise number of emails sent within the limitations period; the precise manner in which each allegedly violated the law and the factual basis for the claim; facts regarding which emails were sent by or on behalf of which defendant; whether any of the emails were merely copies; and the specific email addresses to which each was allegedly sent.

At least one court has granted a Rule 12(e) motion seeking similar information. *Gordon v. Ascentive, 2007 U.S. Dist. LEXIS 44207, 2007 WL 1795334, at *5-6 (E.D. Wash. 2007)*. The decision required the plaintiff to provide in the pleadings: "1) The address to which it was sent; 2) The date on [**26] which it was sent; 3) The basis upon which the Plaintiff claims it violates a statute; and 4) The basis upon which the Plaintiff claims the Defendants sent it." *Ibid.* It reasoned that, without this information, the plaintiffs could not know whether they should "admit" or "deny" sending the emails at issue in a responsive pleading. It further reasoned that "[e]ven if the Defendants have been provided with the emails through discovery, a more definite statement is necessary to prevent the Plaintiff from presenting a moving target." *2007 U.S. Dist. LEXIS 44207, [WL] at *6*.

This order agrees that the complaint fails to satisfy *Rule 9(b)*. The complaint specifies the number of emails at issue and the time frame in which they were sent, but beyond that it provides only general allegations and a few examples of the allegedly misleading advertisements. This order declines to require plaintiff actually to attach each email; such a requirement could create a prohibitive burden. Also, plaintiff need not include in the pleading each email address to which the advertisements were sent -- that information can be readily obtained in discovery under a protective agreement, to alleviate privacy concerns. Plaintiff must, however, [**27] provide more than general allegations regarding the false advertisements and examples. At the hearing plaintiff indicated that the false advertisements fall into categories -- *i.e.*, that a discrete number of scams or false-advertisement templates were utilized. To satisfy the particularity requirement, the complaint must provide, at a minimum, the specifics regarding (including an example of) each type of allegedly false or misleading advertisement, the number of those advertisements and the date ranges of the emails in each category. Defendants' motion for a more definite statement is therefore granted.

CONCLUSION

For all of the above-stated reasons, defendant's motion to dismiss is **GRANTED IN PART** and **DENIED IN PART**. The motion is granted as to those emails received more than one year prior to the filing of this lawsuit, because the pleading and briefing to date fail to establish that those emails could not reasonably have been discovered earlier. As explained, plaintiffs also should plead the facts indicating that they are internet service providers. The motion is in all other respects **DENIED**. The motion for a more definite statement is **GRANTED**, for the above-stated reasons. Plaintiff [**28] may move for leave to amend by **MAY 7, 2009**. Any such motion should be accompanied by a proposed pleading and the motion should explain why the foregoing [*946] problems are overcome by the proposed pleading. Plaintiff must plead its best case. Failing such a motion, all inadequately pled claims will be dismissed with prejudice.

IT IS SO ORDERED.

Dated: April 17, 2009.

/s/ William Alsup

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE

Attachment 3

***Asis Internet Services v. SubscriberBase Inc. et al*, No. 09-3503 SC, 2009 U.S. Dist. LEXIS 112852 (N.D. Cal. Dec. 4, 2009) (order granting defendants' motion to dismiss)**

1 of 1 DOCUMENT

ASIS INTERNET SERVICES, a California corporation, and JOEL HOUSEHOLTER, dba KNEELAND ENGINEERING, dba FOGGY.NET, Plaintiffs, v. SUBSCRIBERBASE INC., et al., Defendants.

Case No. 09-3503 SC

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2009 U.S. Dist. LEXIS 112852

December 4, 2009, Decided
December 4, 2009, Filed

COUNSEL: [*1] For Asis Internet Services, a California corporation, Joel Householter, doing business as Kneeland Engineering, doing business as Foggy.net, Plaintiffs: Jason K. Singleton, LEAD ATTORNEY, Richard E. Grabowski, Singleton Law Group, Eureka, CA.

For Suscriberbase Inc, a South Carolina Corporation, Suscriberbase Holdings Inc, a South Carolina Corporation, Consumer Research Corporation, Inc, a South Carolina Corporation, doing business as Brand Apparel Rewards, also known as Brandapparelrewards.com, doing business as Brand Reward Panel, also known as Brandrewardpanel.com, doing business as Brand Reward Zone, also known as Brandrewardzone.com, doing business as Choice Dealz, also known as Choicedealz.com, doing business as Choose Your Color, also known as Chooseyourcolor.com, doing business as Choose Your Skin, also known as Chooseyourskin.com, doing business as Get Your Smart Phone, also known as Getyoursmartphone.com, doing business as Go Green Offers, also known as Gogreenoffers.com, doing business as Handbag Test Panel, also known as Handbagtestpanel.com, doing business as HD Test Panel, also known as Hdtestpanel.com, doing business as His and Her Laptop, also known as Hisandherlaptop.com, [*2] doing business as His and Her Smart Phones, also known as Hisandhersmartphones.com, doing business as Laptop Report Card, also known as Laptopreportcard.com, doing business as My Career Advantage, also known as, Mycareeradvantage.com, doing business as My Home Promotions, also known as Myhomepromotions.com, doing business as Mystery Mall Shopper, also known as Mysterymallshopper.com, doing business as One Stop Rewards, also known as Onestoprewards.com, doing business as Product Test Panel, also known as Producttestpanel.com, doing business as Retail Report Card, also known as Retailreportcard.com, Defendants: Henry M. Burgoyne, III, Karl Stephen Kronenberger, Kronenberger Burgoyne, LLP, San Francisco, CA.

JUDGES: Samuel Conti, UNITED STATES DISTRICT JUDGE.

OPINION BY: Samuel Conti

OPINION

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

I. *INTRODUCTION*

Plaintiffs Asis Internet Services ("Asis") and Joel Householter, dba Foggy.Net ("Foggy") (collectively, "Plaintiffs"), brought this suit against Defendants Subscriberbase, Inc., et al. ("Defendants"), for alleged violations of *section 17529.5 of the California Business & Professions Code*. Docket No. 1 ("Compl."). This matter comes before the Court on Defendants' Motion [*3] to Dismiss ("Motion"). Docket No. 6. Plaintiffs have submitted an Opposition, Docket No. 7, and Defendants have submitted a Reply, Docket No. 12. Having considered the papers submitted by all parties, the Court GRANTS Defendants' Motion to Dismiss.

II. *BACKGROUND*

Asis and Foggy allege that they are providers of internet and email services. Compl. P 11-12. Asis provides services to about 950 customers, and provides about 1500 email accounts (as of 2008); Foggy has roughly 75 customers and 180 email accounts (as of 2007). *Id*. Both claim that they employ filtering software to process and store unsolicited commercial email advertisements ("spam emails") that are sent to their customers' email addresses. *Id*.

According to Plaintiffs, Defendants have sent large volumes of spam emails to Plaintiffs' customers. *Id*. P 2. Asis claims that between August 2, 2008 through July 7, 2009, Defendants sent a total of 1534 spam emails to "Asis' protected computers . . . with a subject line that a person would know would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents and subject matter of the message." *Id*. P 13. Foggy claims that from [*4] July 31, 2008, through July 7, 2009, it received 922 similar spam emails. *Id*. P 14. Plaintiffs explain that the emails "contained subject lines that were false and misleading in that they made an offer for a free product and did not provide anywhere in the email the terms and conditions for that offer." *Id*. P 17. Plaintiffs have provided a list of the offending email subject lines, as well as a number of sample emails. *See* Compl. Exs. H ("First Email Samples"), I ("Second Email Samples"), J ("First Subject List"); Opp'n Ex. A ("Second Subject List"). Plaintiffs identify a total of 117 subject lines in emails collected by Asis and 116 subject lines in emails collected by Foggy. *See* Second Subject List at 1-6.

Examples of the offending subject lines include: "Go shop at Old Navy Stores loaded with $ 1000 Cash for Free!"; "Let us buy you a 1080p HDTV;" "Test & Keep the 2 New Blackberry Storms;" "Free Blackberry Storm," and similar subject lines suggesting that the recipient could "test and keep" particular products or otherwise get them for "free," "on us," or "on our tab." *Id*. The body of the sample emails provided by Plaintiffs typically includes a disclaimer stating that the email is [*5] an advertisement, and indicating that the "[p]romotion . . . is subject to terms and conditions. See website for complete details." *See, e.g*., Second Email Samples at 6. Should the recipient click on the hyperlink included in the email, the recipient's web browser will load a "landing page[] where they must submit information to continue. Only at this point are they given any information of the actual terms of the offer . . . ." Compl. P 20. The terms "contain the following or a similar statement:"

> 1) Must be a legal US resident; 2) must be at least 18 years old or older; 3) must have a valid email and shipping address; 4) Eligible members can receive the incentive gift package by completing two reward offers from each of the Top, Prime and Premium reward offer page options. Various types of reward offers are available. Completion of reward offers most often requires a purchase or filing a credit application and being accepted for a financial product such as a credit card or consumer loan. The following link illustrates a Representative Sample of reward offers by group along with monetary and nonmonetary obligations. Failure to submit accurate registration information will result in [*6] loss of eligibility.

Id.

Plaintiffs allege that, in sending the above-described emails, Defendants have violated *section 17529.5 of the California Business & Professions Code* ("*section 17529.5*"), part of the California False Advertising Law ("FAL"). *Id*. PP 16-30. Plaintiffs seek statutory damages totaling $ 2,456,000. *Id*. at 13-14. Defendants have moved to dismiss Plaintiffs' Complaint.

III. *LEGAL STANDARD*

A motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* "tests the legal sufficiency of a claim." *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. Allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. Although well-pleaded factual allegations are taken as true, a motion to dismiss should be granted if the plaintiff fails to proffer "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. [*7] The court need not accept as true legal conclusions couched as factual allegations. *Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009)*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id. at 1949*.

Where plaintiffs allege fraud, or conduct that is sufficiently "grounded in fraud," they must plead their claim with particularity as required by *Rule 9(b) of the Federal Rules of Civil Procedure*. *See Edwards v. Marin Park, Inc., 356 F.3d 1058, 1065-66 (9th Cir. 2004)*; *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir.*

2003). Plaintiffs must include "the who, what, when, where, and how" of the fraud. *Vess, 317 F.3d at 1106* (citations omitted). A plaintiff satisfies the particularity requirement only if his or her allegations are "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)* (citation and internal quotation marks omitted).

IV. *DISCUSSION*

A. *Preemption Under the CAN-SPAM* [1] Act

1 "CAN-SPAM" [*8] stands for "Controlling the Assault of Non-Solicited Pornography and Marketing."

Defendants argue that Plaintiffs' cause of action is expressly preempted by the CAN-SPAM Act, *15 U.S.C. § 7707(b)(1)*. Mot. at 5-8. The savings provision of the CAN-SPAM Act states that it "supersedes any statute . . . except to the extent that any such statute . . . prohibits falsity or deception in any portion of a commercial electronic mail message . . . ." *Id*. Defendants argue that this provision only saves common law fraud claims, and that Plaintiffs must therefore plead every element of common-law fraud, or their cause of action will be preempted by the CAN-SPAM Act. Mot. at 6. This would require Plaintiffs to establish both reliance and damages -- something that they are apparently not in a strong position to plead.

District courts in California are split on the question of whether this savings clause only exempts state laws that are based on common law fraud. In particular, the courts have disagreed over whether *section 17529.5* can avoid preemption without requiring plaintiffs to show each element of common law fraud, including reliance and damages. *Compare Asis Internet Servs. v. Vistaprint USA, Inc., 617 F. Supp. 2d 989 (N.D. Cal. 2009)* [*9] (*section 17529.5* is not preempted, even though it does not require showing of reliance or damages) *and Asis Internet Servs. v. Consumerbargaingiveaways, LLC, 622 F. Supp. 2d 935, 940-44 (N.D. Cal. 2009)* (same) *with Hoang v. Reunion.Com, Inc., No. 08-3518, 2008 U.S. Dist. LEXIS 85187, *4-6 (N.D. Cal. Oct. 6, 2008)* (finding that CAN-SPAM only allows state causes of action based on common law fraud and dismissing *section 17529.5* complaint that does not allege reliance and damages). This Court agrees with those courts that have read the terms "falsity or deception" broadly, thereby saving more than just common law fraud claims and narrowing the preemptive effects of the CAN-SPAM Act. In particular, this Court agrees that Congress's use of the word "fraud" elsewhere in the section, and the CAN-SPAM Act's references to the word "deception" as used in the FTC Act, invite this broader reading. *See Consumerbargaingiveaways, 622 F. Supp. 2d at 942*. Plaintiffs therefore do not need to plead reliance and damages in order to avoid preemption of their claims.

B. *Pleading with Particularity*

As a threshold matter, the Court finds that Plaintiffs must plead their claim for violations of *section 17529.5* [*10] with particularity, in accordance with *Rule 9(b) of the Federal Rules of Civil Procedure*. Plaintiffs argue that they need only meet the requirements of *Rule 8(a)*, instead of the heightened pleading requirements of *Rule 9(b)*. Opp'n at 12. However, *Rule 9(b)* applies to all claims that are "grounded in fraud," i.e., where plaintiffs allege a unified course of fraudulent conduct and rely entirely on that conduct to form their claim. *Vess, 317 F.3d at 1104*. Plaintiffs have alleged that Defendants intended to mislead the recipients of their emails, and induce reliance upon the subject lines. Compl. P 20. Although *section 17529.5* only requires Plaintiffs to plead knowledge of a likelihood of misleading a reasonable person, thereby eliminating the elements of reliance and damages that would be present in a common law fraud claim, the Court finds that the absence of these elements is not enough to eliminate the need for specificity. In most cases, pleading reliance and damages with specificity is not likely to be of much use in helping a defendant to prepare an adequate response; rather, it is the specific description of the other aspects of the fraud, "the who, what, when, where, and how," [*11] that will be most important in allowing a defendant to prepare its answer. *C.f. Vess, 317 F.3d at 1106*.

Defendants first argue that, because Plaintiffs name multiple defendants, Plaintiffs must identify the role that each defendant played in the alleged fraudulent schemes. Mot. at 10-11. Defendants go on to claim that they did not send the emails, or draft the emails, or register the domain names to send the emails. *Id*. at 10. However, the Court finds that the Complaint adequately alleges that Defendants "advertised in a commercial e-mail advertisement," and it describes, with particularity, sufficient ties between Defendants and the emails in question. In particular, Plaintiffs identify the various domain names for the landing sites that the emails provide links to, and state that the registrant for these landing sites is Subscriberbase Holdings, Inc., or a related entity with an identical address. *See* Compl. P 7, Ex. D. Not only does Subscriberbase Holdings, Inc., allegedly have an identical address with Defendants Consumer Research Corporation Inc. and Subscriberbase, Inc., but its services are touted on the website of Defendant Subscriberbase, Inc. *Id*. Ex. E. This is sufficient [*12] to support Plaintiffs' contention that "SUBSCRIBERBASE HOLDINGS and [Consumer Research Corporation] are in fact agents,

partners, subsidiaries or employees of Defendant Subscriberbase." Compl. P 8.

Plaintiffs have gone to great lengths to establish that the Defendants mentioned in the Complaint are related, and are connected with the email advertisements by the creation and maintenance of landing sites. Although it is possible that Defendants' involvement is greater than this, Plaintiffs have alleged with particularity at least one concrete role that Defendants have played. Additionally, Plaintiffs have alleged that Defendants are sufficiently interrelated (for the purpose of a motion to dismiss) to eschew the need to plead the specific role of each closely-related entity. Further details can be uncovered in discovery.

Defendants also fault Plaintiffs for alleging 2456 separate violations of *section 17529.5*, but only including a handful of (i.e., twenty-one) sample emails that specifically show the subject line, date, sender, and contents of the emails. [2] Mot. at 9; First Email Samples; Second Email Samples. This argument has merit. Although Plaintiffs attach an appendix that apparently [*13] lists every email subject line, *see* First Subject List, this lacks important information about the sender, date, and content of the emails, and does not indicate how many copies of each email were received. Plaintiffs claim that the 2,456 emails are redundant, but they still contain roughly 230 different subject lines. *Id*. The Court recognizes that it would be impractical to require the submission of 2,456 emails, or even 230 sample emails. However, Plaintiffs can, at the very least, submit an appendix that contains each subject line, the total number of emails that bore it, and specific information about each email that bore it, including the sender, the date it was sent, and the landing site to which the email directs the recipient. As it is still useful to have a small number of sample emails, Plaintiffs should include with the amended complaint the sample emails that they included with their original Complaint; they need not include full samples of all 230 types of Defendants' emails.

> 2 The samples redact the recipients' email addresses for privacy reasons. The Court finds this to be appropriate at this stage of the litigation. If these email addresses turn out to be relevant, Defendants [*14] may discover them at a later date, subject to a protective order. *See Consumerbargaingiveaways, 622 F. Supp. 2d at 945*.

In its current form, the Complaint states with particularity only twenty-one violations of *section 17529.5*, i.e., those violations that are based upon the twenty-one emails for which samples were attached. Plaintiffs do not state with particularity that they received multiple copies of these. Rather than attempt to sever and save these claims, the Court will DISMISS the Complaint in its entirety and allow Plaintiffs LEAVE TO AMEND so that they can plead each alleged violation with particularity, as outlined above.

C. *Whether the Subject Lines were Likely to Mislead*

Defendants argue that Plaintiffs fail to allege that the subject lines were misleading because they do not "allege that the recipients of the Emails were not entitled to these gifts." Mot. at 10. Plaintiffs' arguments do not rest upon charges that Defendants failed to send or offer the gifts in question; rather, Plaintiffs argue that the subject lines are misleading because they purport to provide "free" gifts (or gifts subject to additional language such as "on us," "review and keep," or "let us get you a [*15] . . ."), when the emails and associated web pages in fact offer gifts only to those who perform additional affirmative acts, such as signing up for a credit card or submitting a loan application. Compl. P 20. [3] The Complaint alleges that the subject lines are deceitful because they falsely characterize the "gifts" as "free." As Plaintiffs characterize these "gifts," they are not "free," and the terms and conditions are too far removed from the subject lines to render the description accurate. *See* Compl. PP 18-21. Defendants have not seriously attempted to challenge Plaintiffs' characterization. Read in a light most favorable to Plaintiffs, the Complaint sufficiently describes subject lines that are likely to mislead a recipient, acting reasonably under the circumstances.

> 3 Defendants also argue that some of the subject lines do not include "free" or an equivalent term. Mot. at 10. They cite a number of subject lines which, according to Plaintiffs, were accidentally cropped from the appendices attached to the Complaint, such that the use of the word "free" or equivalent statements did not appear. Plaintiffs have attempted to correct this by submitting an appendix to their Opposition, [*16] which does not crop the subject lines. Second Subject List. For example, Defendants fault Plaintiffs for claiming that the following subject line is deceptive: "Be the first to get Blackberry's newest phone-The Blackberry Storm." Mot. at 10. Plaintiffs' appended list shows that the subject line was actually "Be the first to get Blackberry's newest phone-The Blackberry Storm get two now- No cost to you." Second Subject List at 1. The Court notes that Plaintiffs cannot amend their Complaint by their opposition; however, because the Court is already dismissing all claims based on the subject lines listed solely in Plaintiffs' appendices, Plaintiffs may easily remedy this by submitting a list of complete subject lines with their amended complaint.

D. *Standing*

Defendants do not argue in their Motion that Plaintiffs lack standing, except to argue that Plaintiffs must plead damages and reliance in their Complaint. As this Court previously noted, *section 17529.5*. does not require that Defendants plead damages and reliance in order to state a claim. *See* Part IV.A, *supra*. Further, the section specifically states that claims may be brought by "electronic mail service provider[s]." *Cal. Bus. & Prof. Code § 17529.5(b)(1)(A)(ii)*. [*17] There is no suggestion that Plaintiffs may lack Article III standing. *See Consumerbargaingiveaways, 622 F. Supp. 2d at 939-40* (finding that internet service providers have Article III standing to bring *section 17529.5* claim). Although Defendants have raised a separate standing argument based on Proposition 64, Reply at 9-10, they did not make this argument in their opening memorandum, and this Court therefore declines to consider it. [4]

4 Consideration of this issue would not likely change the outcome of this Order, as Proposition 64 expressly applies only to standing for plaintiffs who seek injunctive relief, and Plaintiffs here seek statutory damages. *Cal. Bus. & Prof. Code § 17535*.

V. *CONCLUSION*

The Court hereby GRANTS Defendants' Motion to Dismiss. Although the Complaint alleges with particularity twenty-one violations of *section 17529.5*, Plaintiffs attempted to allege 2456 violations. The Court therefore DISMISSES the Complaint in its entirety, but allows Plaintiffs leave to amend so that it can plead each of these violations with particularity. Plaintiffs may submit an amended complaint within thirty (30) days of the date of this Order.

IT IS SO ORDERED.

Dated: December 4, 2009

/s/ [*18] Samuel Conti

UNITED STATES DISTRICT JUDGE

Attachment 4

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

1 of 1 DOCUMENT

Kleffman v. Vonage Holdings Corp., et al.

Case No. CV 07-2406 GAF (JWJx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2007 U.S. Dist. LEXIS 40487

May 22, 2007, Decided
May 22, 2007, Filed; May 23, 2007, Entered

COUNSEL: [*1] Attorneys Present for Plaintiffs: None.

Attorneys Present for Defendants: None.

For Craig E Kleffman, individually and on behalf of all others similarly situated, Plaintiff: Elaine T Byszewski, LEAD ATTORNEY, Hagens Berman Sobol Shapiro, Los Angeles, CA; Reed R Kathrein, LEAD ATTORNEY, Hagen Berman Sobol Shapiro, San Francisco, CA; Steve W Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro, Seattle, WA.

For Vonage Holdings Corp, a New Jersey corporation, Vonage America Inc, a wholly owned subsidiary, Vonage Marketing Inc, a wholly owned subsidiary, Defendants: Elizabeth L McDougall, LEAD ATTORNEY, Perkins Cole, Seattle, WA; Judith B Gitterman, LEAD ATTORNEY, Perkins Coie, Santa Monica, CA; Rebecca S Engray, LEAD ATTORNEY, Perkins Cole, Seattle, WA.

JUDGES: Present: The Honorable GARY ALLEN FEESS.

OPINION BY: GARY ALLEN FEESS

OPINION:

CIVIL MINUTES - GENERAL

Proceedings: (In Chambers)

ORDER GRANTING MOTION TO DISMISS

I. INTRODUCTION & BACKGROUND

Plaintiff Craig Kleffman received eleven different emails, each of which clearly and unequivocally presented an advertisement for Vonage telephone service and hot links to Vonage's website. The advertisements [*2] contained differing headers, each with some variation on the words "GreatCallRates" in the subject line and each sent from a different domain name.

Kleffman contends that Vonage used the multiple domain names for the purpose of avoiding anti-spam mechanisms, and that the failure to identify Vonage in the domain name and to send mail from a single address constituted a misrepresentation. Specifically, he alleges that Vonage intended to mislead internet service providers that flag high volume senders and to make it more difficult for individual users to block unwanted emails. He contends that Vonage's tactic violates *section 17529.5 of the California Business and Professions Code*, which provides:

> It is unlawful for any person or entity to advertise in a commercial e-mail advertisement either sent from California or sent to a California electronic mail address under any of the following circumstances:
> . . .
> (2) The e-mail advertisement contains or is accompanied by falsified, misrepresented, or forged header information. . . .

Kleffman also brings a claim for violation of the California Consumer Legal Remedies Act ("CRLA"), which creates a cause of action for consumers [*3] that suffer damage due to a misrepresentation of the source of goods or services. *Cal. Civ. Code §§ 1770(a)(2)-(3), 1780(a)*. He also styled his Complaint as a putative class action.

Vonage properly removed the case from state court pursuant to the Class Action Fairness Act, and now moves to dismiss it pursuant to *Rule 12(b)(6) of the Fed-*

eral Rules of Civil Procedure. In general, Vonage contends that the *section 17529.5* claim is preempted by the Federal "CAN-SPAM" Act, and that even if it were not preempted, the facts alleged do not state the claim because its emails contained only truthful information. Further, Vonage contends that Kleffman lacks standing to bring the CRLA claim because he is not a "consumer" within the meaning of the statute, as he does not allege that he acquired or sought to acquire Vonage's broadband phone services.

The Court agrees with Vonage. As to the *section 17529.5* claim, Kleffman does not actually allege that the ***content*** of Vonage's email was false, misrepresented or forged, and indeed points to nothing misleading about any single given email. Moreover, while he might characterize [*4] an email as containing the implicit misrepresentation "I am not from the same source as the others," the Court concludes this is more than the plain language of the statute would bear. And even if the statute did create such an innovative cause of action, it would be preempted because, the Court concludes, the CAN-SPAM Act left states room only to extend ***traditional*** fraud and deception prohibitions into cyberspace.

Regarding the CRLA claim, Kleffman lacks standing to bring the claim because he is not a "consumer," as he did not seek Vonage's phone services and cannot claim the emails themselves constituted a service. Accordingly, the motion to dismiss both claims is **GRANTED.**

II. DISCUSSION

A. THE LEGAL STANDARD

A court may not dismiss a complaint for failure to state a claim upon which relief can be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*; *Fed. R. Civ. P. 12(b)(6)*. The Court accepts all factual allegations in the complaint as true; it then [*5] construes those facts, and draws all reasonable inferences therefrom, "in the light most favorable to the nonmoving party." *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996).*

B. ANALYSIS

1. First Cause of Action: *Section 17529.5* Claim

As noted above, Kleffman claims Vonages messages constituted "commercial e-mail advertisement[s] . . . [that are] accompanied by falsified, misrepresented, or forged header information." *Cal. Bus. & Prof. Code § 17529.5(a)(2)*. The headers are allegedly falsified because, though they literally and truthfully identify the sender, they are part of a mechanism to avoid anti-spam legislation and therefore imply that they originate from different sources. However, under the plain language of the statute, which requires that an email message contain a falsified, misrepresented or forged header, the claim fails. The failure to send mail from a single domain name that includes the word "Vonage" is simply not a misrepresentation in any ordinary sense of the word. Rather, these are simply Kleffman's theories as to what would be required in order for spam filters to work effectively. [*6] But if the legislature had intended to draft legislation requiring the adoption of procedures that would allow for the effective operation of spam filters, it surely could have said so in plain English. The Court cannot attribute that legislative purpose to *Section 17529.5* on the basis of its broad prohibition against falsified or misrepresented headers.

Moreover, the Court declines Kleffman's invitation to rely on a post-adoption letter from the enactment's sponsor, which speculated that violations of *section 17529.5* "could" include "[t]he use of multiple email addresses and/or domain names created for the sole purpose of bypassing spam-filters and blacklists." (Compl. Ex. A [Murray Letter].) California courts refuse to consider such letters when they are written after legislation is adopted. See *Delaney v. Superior Court, 50 Cal. 3d 785, 801 n.12, 268 Cal. Rptr. 753, 789 P.2d 934 (Ct. App. 1990)*. Accordingly, left with only the statute's plain language, the Court holds it does not encompass Kleffman's theory.

And even if it did, the statute would be preempted by the federal CAN-SPAM Act. Though a federal statute supersedes state law only where that is the "clear and manifest purpose of Congress, [*7] " *Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)*, the purpose of Congress is the "touchstone" in every preemption case and the courts are to construe statutory language not in a narrow or restrictive sense but with the objective of seeking a fair understanding of Congress's purpose in light of the structure and purpose of the statute as a whole. *Id. at 485-86*.

Here, Congress plainly intended to preempt state laws purporting to regulate certain aspects of electronic mail communications. In addition to creating a limited federal cause of action for materially false emails, *15 U.S.C. § 7704(a)*, the CAN-SPAM Act expressly:

> 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 to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a***

> ***commercial electronic mail message or information attached thereto.***

Id. *§ 7707(b)(1)* (emphasis added). Though Congress did not define the terms "falsity" or "deception," it is clear that it meant [*8] these terms to refer to traditional, tort-type concepts and not to innovative theories such as Kleffman's. First, Congress's legislative findings indicate a reluctance to force "law-abiding" businesses to conform to a patchwork of state laws. See *15 U.S.C. § 7701(a)(11)*. The concern is stated even more clearly in the Senate Committee Report:

> [A] State law requiring some or all commercial e-mail to carry specific types of labels, or to follow a certain format or contain specified content, would be preempted. By contrast, a State law prohibiting fraudulent or deceptive headers, subject lines, or content in commercial e-mail would not be preempted. . . . [I]n contrast to telephone numbers, e-mail addresses do not reveal the State where the holder is located. As a result, a sender of e-mail has no easy way to determine with which State law to comply. Statutes that prohibit fraud and deception in e-mail do not raise the same concern, because they target behavior that a legitimate business trying to comply with relevant laws would not be engaging in anyway.

S. Rep. No. 108-102, at 21-22. In short, Congress intended that legitimate businesses [*9] would not have to guess at the meaning of various state laws when their advertising campaigns ventured into cyberspace. It thus left states room only to extend their ***traditional*** fraud prohibitions to the realm of commercial emails because it was confident that legitimate businesses would not unwittingly transgress such well-established prohibitions.

Viewed in this light, Kleffman's claims are clearly preempted. He does not allege a traditional tort theory at all, or even that he was at any point mislead by any of the eleven Vonage emails. Cf. *Manderville v. PCG & S Group, Inc., 146 Cal. App. 4th 1486, 1498, 55 Cal. Rptr. 3d 59 & n.4 (Ct. App. 2007)* (listing elements of fraud and deceit under California law). Indeed, the claim that the failure to include Vonage's name in the email is clearly preempted, as it would amount to a "State law requiring some or all commercial e-mail to . . . contain specified content." S. Rep. No. 108-102, at 21-22. And the complaints as to Vonage's multiple domain names simply have no analogue outside the virtual world, because spam filters are a uniquely internet-based concept. Thus, these claims fall squarely into the realm of regulation that Congress [*10] intended to preempt. n1

> n1 Vonage overrelies on *Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F.3d 348 (4th Cir. 2006)*, which stands for the simple and separate propositions that (1) the CAN-SPAM preemption clause does not allow states to create strict liability for inaccuracies in commercial email; and (2) CAN-SPAM's federal right of action for misleading headers does not lie if the message text contains ways to identify the sender. *Id. at 355-56, 358*. The case is distinguishable because there, the claimant apparently did not allege that the discrepancy in the defendant's email addresses had any effect whatsoever, thus leading the court to regard the claim as one for "immaterial error." See *id. at 351*. Kleffman's authorities are equally unpersuasive, as they merely compared the language of the statutes at issue to the savings clause, as opposed to examining the nature of the plaintiffs' theory of liability. See *Gordon v. Impulse Mktg. Group, 375 F. Supp. 2d 1040, 1045-46 (E.D. Wash. 2005)*; *Beyond Sys. v. Keynetics, Inc., 422 F. Supp. 2d 523, 535 (D. Md. 2006)*. The Supreme Court has indicated that this method is improper. See *Cipollone v. Liggett Group, 505 U.S. 504, 523-24, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)*.

[*11]

2. Second Cause of Action: Consumers Legal Remedies Act Claim

The second cause of action fails quickly because only a "consumer" may bring CRLA claims. *Von Grabe v. Sprint PCS, 312 F. Supp. 2d 1285, 1303 (S.D. Cal. 2003)*; *Cal. Civ. Code § 1780(a)*. "'Consumer' means an individual who seeks or acquires by purchase or lease, any goods or services for personal, family, or household purposes." *Cal. Civ. Code § 1761(d)*. It is not enough that the plaintiff is a consumer of just ***any*** goods or services; rather, the plaintiff must have acquired or attempted to acquire the goods or services in the transaction at issue. See *Schauer v. Mandarin Gems of Cal., Inc., 125 Cal. App. 4th 949, 960, 23 Cal. Rptr. 3d 233 (Ct. App. 2005)*.

Here, Kleffman is not a "consumer" because he specifically alleges that he and the class members have not acquired or sought any products or services offered by Vonage. (Compl. P 57.) Moreover, the emails clearly are not goods, and Kleffman offers only a conclusory argu-

ment that they constituted a "service." "Service" means "[t]he act of doing something useful for a person or company for a fee. [*12] " Black's Law Dictionary at 1372 (2004 ed.). This excludes spam emails, which are essentially advertisements for which the recipient pays no fee. See also *Cal. Bus. & Prof. Code § 17500* (distinguishing between advertisements and services). Therefore, the Court holds he lacks standing and cannot state a CRLA claim.

III. CONCLUSION

For the foregoing reasons, the motion to dismiss is **GRANTED WITHOUT LEAVE TO AMEND** and the claims are **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED.

Attachment 5

***United States of America v. ValueClick Inc. et al*, No. CV08-01711 MMM (RZx) (C.D. Cal. Mar. 13, 2008) (complaint)**

FILED

2008 MAR 13 PM 12:43

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

VALUECLICK, INC., HI-SPEED MEDIA, INC., and E-BABYLON, INC.,

Defendants.

Case No. CV08-01711 MMM (RZx)

COMPLAINT FOR CIVIL PENALTIES, PERMANENT INJUNCTION, AND OTHER EQUITABLE RELIEF

Plaintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission ("FTC" or "Commission"), pursuant to Section 16(a)(1) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 56(a)(1), for its complaint alleges:

1. Plaintiff brings this action under Sections 5(a), 5(m)(1)(A), 13(b), 16(a) and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), 56(a), and 57b, and under Section 7(a) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM" or the "CAN-SPAM Act"),

15 U.S.C. § 7706(a), to obtain monetary civil penalties, a permanent injunction, and other equitable relief for defendants' violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and Section 5(a) of CAN-SPAM, 15 U.S.C. § 7704(a).

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355 and 15 U.S.C. §§ 45(m)(1)(A), 53(b), 56(a) and 57b. This action arises under 15 U.S.C. §§ 45(a) and 7706(a).

3. Venue is proper in this District under 28 U.S.C. §§ 1391(b) and (c), 1395(a), and 15 U.S.C. § 53(b).

DEFENDANTS

4. Defendant ValueClick, Inc. ("ValueClick") is a Delaware corporation with its principal office or place of business at 30699 Russell Ranch Road, Suite 250, Westlake Village, CA 91361. ValueClick resides in the Central District of California and transacts business within this District and throughout the United States. ValueClick directs, formulates and controls the practices of, and shares common officership with, the other named Defendants, which are wholly-owned subsidiaries of ValueClick.

5. Defendant Hi-Speed Media, Inc. ("Hi-Speed Media") is a California corporation with its principal office or place of business at 30699 Russell Ranch Road, Suite 250, Westlake Village, CA 91361. Hi-Speed Media resides in the Central District of California and transacts business within this District and throughout the United States.

6. Defendant E-Babylon, Inc. ("E-Babylon") is a California corporation with its principal office or place of business at 30699 Russell Ranch Road, Suite 250, Westlake Village, CA 91361.

E-Babylon resides in the Central District of California and transacts business within this District and throughout the United States.

7. Defendant ValueClick operates its lead generation business through its wholly-owned subsidiary Hi-Speed Media. Lead generation is the process by which ValueClick connects consumers to advertisers seeking to sell goods or services. Hi-Speed Media operates or controls, either directly or through other subsidiaries, a variety of websites including GenerousGenie.com and GiveAwayCafe.com. Defendant ValueClick also operates under the names ValueClick Media and PriceRunner USA.

8. Since July 2004, Defendants have formulated, directed, controlled, or participated in the acts and practices set forth in this complaint.

DEFINITIONS

9. "**Electronic mail message**" (or "**email**") means a message sent to a unique email address. 15 U.S.C. § 7702(6).

10. "**Electronic mail address**" means a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox (commonly referred to as the "local part") and a reference to an Internet domain (commonly referred to as the "domain part"), whether or not displayed, to which an email message can be sent or delivered. 15 U.S.C. § 7702(5).

11. "**Commercial electronic mail message**" means any email message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including the content on an Internet website operated for commercial purposes). 15 U.S.C. § 7702(2).

12. "**Initiate**," when used with respect to a commercial email

message, means to originate or transmit such message or to procure the origination or transmission of such message. 15 U.S.C. § 7702(9).

13. "**Landing page**" means, in online marketing, a specific web page that a visitor reaches after clicking a link or advertisement. This page usually showcases content that is an extension of the link or ad.

14. "**Procure**," when used with respect to the initiation of a commercial email message, means intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one's behalf. 15 U.S.C. § 7702(12).

15. "**Protected computer**" means a computer which is used in interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States. 15 U.S.C. § 7702(13); 18 U.S.C. § 1030(e)(2)(B).

16. "**Sender**" means a person who initiates a commercial email message and whose product, service, or Internet website is advertised or promoted by the message. 15 U.S.C. § 7702(16).

DEFENDANTS VALUECLICK'S AND HI-SPEED MEDIA'S MARKETING PRACTICES

17. Since January 2005, and continuing to the present, Defendants ValueClick and Hi-Speed Media (hereinafter, "the lead generation Defendants"), in connection with promotions and advertisements on their websites, have offered consumers purportedly free merchandise, such as iPods, laptop computers, and Visa gift cards.

18. The lead generation Defendants advertise and market their offers through email and Web-based ads. The lead generation

Defendants' emails contain subject lines such as: "Free PS3 for survey"; "let us buy you a 42 inch plasma tv! Just type in your zip code"; "we're giving away a Visa gift card pending participation in our presidential survey"; and "Free Apple iPhone for Daniel." The lead generation Defendants' Web-based ads contain similar representations: "CONGRATULATIONS! Select your FREE Plasma TV." (Such products and items are referred to herein as "promised free merchandise.")

19. Many of the lead generation Defendants' emails and Web-based ads represent, expressly or by implication, that the consumer viewing the message has won a contest, or has been specially selected to receive a gift or prize.

20. The lead generation Defendants' emails and Web-based ads contain links that, when clicked on, take one to a "landing page" operated by the lead generation Defendants or their affiliates. Each landing page recapitulates and expands upon the lead generation Defendants' initial promised free merchandise offer.

21. The lead generation Defendants do not clearly and conspicuously disclose that to obtain the promised free merchandise one must incur expenses or other obligations. A consumer must accept (and often pay for) – in the lead generation Defendants' parlance, "complete" or "participate in" – a certain number of goods or services promoted by third-parties to qualify for the promised free merchandise that the lead generation Defendants promote in their emails and Web-based ads. Moreover, the lead generation Defendants do not clearly and conspicuously disclose the costs and obligations associated with participating in third-party promotions, such as applying and qualifying for credit cards or automobile loans.

22. On each landing page, the lead generation Defendants request the consumer to enter his or her email address, followed by his or her name and mailing address. Once the consumer has submitted his or her personal information, the lead generation Defendants lead the consumer through a series of web pages containing advertisements for various goods and services from third parties. Unbeknownst to the consumer, this is only an introductory tier of "optional" advertisements and offers, after which are three additional tiers of offers that the consumer will have to navigate before he or she can qualify for the promised free merchandise. "Optional" offers do not qualify the consumer for the promised free merchandise.

23. After the consumer navigates the lead generation Defendants' "optional promotions" – often so multitudinous as to take up scores of consecutive computer screens, each with multiple offers – he or she eventually reaches a link that, when clicked, takes the consumer to the first of three tiers of offers in which the consumer must participate to obtain the promised free merchandise.

24. The lead generation Defendants group the tiers of offers that qualify the consumer for the promised free merchandise into three categories: Silver, Gold, and Platinum. In each category, there are numerous offers. The lead generation Defendants require the consumer to "participate in" multiple offers from each category to obtain the promised free merchandise.

25. Clicking on each offer reveals what the consumer must do to "participate in" the offer. In some cases, "participating in" an offer entails paying money or incurring some other detriment, such as qualifying and applying for credit cards. The lead

generation Defendants require the consumer to participate in multiple offers before he or she can progress to the next tier of offers.

26. Some of the offers have free-trial periods, but require the consumer to participate for a minimum period of time to qualify for the lead generation Defendants' promised free merchandise thereby causing consumers to incur costs they cannot recover. In some instances, the minimum period is longer than the free-trial period. Moreover, many such offers contain negative option components in which the consumer who does not cancel within the free trial period will be billed automatically.

27. In some instances, the lead generation Defendants require the consumer to solicit up to five friends to participate in the lead generation Defendants' program as a condition to awarding the consumer with the promised free merchandise. If all the friends do not complete all of their required offers, the lead generation Defendants do not award the consumer with the promised free merchandise.

28. In many instances, the consumer stops trying to qualify for the lead generation Defendants' promised free merchandise, either because of the cost involved or the time and effort required. Although the consumer has expended money or incurred other obligations in pursuit of the lead generation Defendants' promised free merchandise, because he or she has not completed all of the lead generation Defendants' required third-party promotions, the consumer does not receive the promised free merchandise.

29. In most instances, it is impossible for the consumer to qualify for the lead generation Defendants' promised free

merchandise without spending money.

DEFENDANTS VALUECLICK'S AND HI-SPEED MEDIA'S EMAIL PRACTICES

30. Since at least January 1, 2005, and continuing to the present, the lead generation Defendants have initiated the transmission of commercial email messages to protected computers. The primary purpose of these commercial email messages has been the commercial advertisement or promotion of Internet websites operated for a commercial purpose by the lead generation Defendants.

31. The lead generation Defendants are "initiators" with respect to an email message when they have either originated or transmitted a message themselves or have procured the origination or transmission of a message through payments or other consideration, or inducements, to others.

32. The lead generation Defendants are "senders" with respect to an email message when they have initiated a message and it is the lead generation Defendants' websites that are being advertised or promoted by such message.

33. In numerous instances, to induce consumers to open and read their commercial emails, the lead generation Defendants have initiated commercial email messages that contain subject headers that misrepresent the content or subject matter of the message, including, but not limited to, false representations that consumers have been specially selected to receive free products or services.

DEFENDANTS VALUECLICK'S, HI-SPEED MEDIA'S, AND E-BABYLON'S PRACTICES REGARDING INFORMATION SECURITY AND SENSITIVE CUSTOMER FINANCIAL INFORMATION

34. Since at least 2004, Defendant ValueClick, and its wholly-owned subsidiary, Defendant Hi-Speed Media, have marketed and sold consumer products through the Internet at the following sites ("HSM sites"), which together form the ValueClick E-Commerce Network: HotProductOutlet.com, InkBlvd.com, Jevene.com (now known as Oasiderm.com), Life-visage.com, and Yourinkstation.com.

35. In June 2005, in order to expand its online business, Defendant ValueClick acquired as a wholly-owned subsidiary Defendant E-Babylon, an e-commerce company that marketed and sold printer accessories such as ink jet and toner cartridges. Defendant ValueClick added E-Babylon's e-commerce business to the existing Hi-Speed Media business and the associated websites to the ValueClick E-Commerce Network. As a result, Defendants ValueClick, Hi-Speed Media, and E-Babylon marketed and sold consumer products through the following additional sites acquired with Defendant E-Babylon ("E-Babylon sites"): 00InkJet.com, 007inkjets.com, 111inkjets.com, 123digitalpcs.com, 123inkjets.com, 123LaserToner.com, 411InkJets.com, 4YourInkPrinter.com, 911InkJets.com, ABCInkJets.com, DiscoverInk.com, FreeCartridges.com, HappyInks.com, IdirectShopping.com, Ink2All.com, InkJet4Sale.com, InkJetBroker.com, InkJetOrder.com, MaxInkJets.com, OrderMyInk.com, OutofInk.com, PetersInkJets.com, ProInkJets.com, SpectrumInks.com, and WhenUPrint.com.

36. In order to make purchases from any of these websites, consumers must pay using a credit or debit card. To complete these transactions, consumers must provide personal information, including the consumer's first and last name, billing address, shipping address, phone number, fax number, email address, password, order identification number, credit card number, and

credit card expiration date. Defendants ValueClick, Hi-Speed Media, and E-Babylon store this information within databases that support or connect to the websites.

37. In addition to these types of information, Defendants' HSM sites and some of the E-Babylon sites also collected and retained in databases the three-digit credit card verification codes ("CVV2 codes") provided by consumers in order to complete transactions on these websites. CVV2 codes, which are printed on the back of the cards, are particularly sensitive because they are used to verify credit card transactions when the cards are not present, such as in online or telephone transactions. Possession of CVV2 code information would make it significantly easier for identity thieves to use stolen credit card information for fraudulent purchases.

38. Since July 2004, Defendants ValueClick and Hi-Speed Media have disseminated or have caused to be disseminated a privacy policy on the HSM sites, including but not necessarily limited to the attached Exhibit A, containing the following statements:

> The ValueClick Network employs industry standard security measures to ensure the security of all data. Any data that is stored on ValueClick's servers is treated as proprietary and confidential and is not available to the public. ValueClick also encrypts sensitive information such as passwords and financial data. ValueClick has an internal security policy with respect to the confidentiality of customer and other data, allowing access only to those employees or third parties who need to know such information for the purpose of effectively delivering ValueClick products and services by means of user login and password requirements. The ValueClick Network routinely evaluates its data security practices to identify security threats or opportunities for improvement. (Exhibit A, www.inkblvd.com Privacy Policy, July 7, 2004)

39. From the time of the acquisition of Defendant E-Babylon

until July 26, 2006, Defendants ValueClick, Hi-Speed Media, and E-Babylon disseminated or caused to be disseminated a privacy policy on the E-Babylon sites, including but not necessarily limited to the attached Exhibit B, containing the following statements:

> At our site you can be assured that your Personally Identifiable Information is secure, consistent with current industry standards. ... In addition, your Personally Identifiable Information resides on a secure server that only selected key personnel and contractors have access to via password. We encrypt your Personally Identifiable Information and thereby prevent unauthorized parties from viewing such information when it is transmitted to us. (Exhibit B, www.123inkjets.com Privacy Policy)

40. On July 26, 2006, Defendants ValueClick, Hi-Speed Media, and E-Babylon amended the privacy policies on the E-Babylon sites to make them identical to the privacy policies on the HSM sites, with the same statements regarding security and encryption as are described in Paragraph 39.

41. From at least July 2004 to November 2006 for the HSM sites, and from the acquisition of E-Babylon to November 2006 for the E-Babylon sites, Defendants ValueClick, Hi-Speed Media, and E-Babylon did not encrypt sensitive information consistent with industry standards. Instead, Defendants stored sensitive customer information collected through the HSM sites in a database without any encryption, and Defendants stored sensitive customer information collected through the E-Babylon sites in a database using a nonstandard, proprietary form of encryption. This latter form of encryption did not use the type of extensively-tested algorithms found in industry-standard systems, but instead utilized a simple alphabetic substitution system that was subject to significant vulnerabilities.

42. Between at least June 2005 and late 2006, the E-Babylon

sites were vulnerable to commonly known or reasonably foreseeable attacks from third parties attempting to obtain access to customer information stored in Defendants' databases, including but not limited to, web-based application attacks such as "Structured Query Language" (SQL) injection attacks. Such attacks occur when an attacker enters certain characters or commands in the address (or URL) bar of a standard web browser in order to manipulate a web application and thereby gain access to information contained in databases supporting the application. Here, the vulnerability affected databases containing consumer credit card information submitted to E-Babylon sites, which was maintained in a nonsecure form. During the relevant period, SQL injection attacks were a well-known and well-publicized form of hacking attack, and solutions to prevent such attacks were readily-available and inexpensive.

VIOLATIONS OF THE FTC ACT

43. As set forth below, Defendants have violated Section 5(a) of the FTC Act in connection with advertising, offering, marketing, and promoting of advertised offers.

COUNT I

44. Through the means described in Paragraphs 17-29, Defendants ValueClick and Hi-Speed Media have represented, expressly or by implication, that Defendants ValueClick's and Hi-Speed Media's advertised offers are without cost or obligation.

45. Defendants ValueClick and Hi-Speed Media have failed to disclose or to disclose adequately to consumers the material terms and conditions of their program, including:

a. that consumers must pay money or other consideration to participate in Defendants

ValueClick's and Hi-Speed Media's program; and

b. the costs and obligations for participating in Defendants ValueClick's and Hi-Speed Media's program.

46. As a result of the representation set forth in Paragraph 44, Defendants ValueClick's and Hi-Speed Media's failure to disclose or to disclose adequately the material information set forth in Paragraph 45 is deceptive, and violates Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT II

47. Through the means described in Paragraphs 38-40, Defendants ValueClick, Hi-Speed Media, and E-Babylon have represented, expressly or by implication, that they encrypt the sensitive information they collect through their websites consistent with industry standards.

48. In truth and in fact, these Defendants have not encrypted the sensitive information they collect through their websites consistent with industry standards. In particular, Defendants ValueClick and Hi-Speed Media did not encrypt sensitive customer information for customers making purchases on HSM sites, and Defendants ValueClick, Hi-Speed Media, and E-Babylon encrypted sensitive customer information for customers making purchases on E-Babylon sites using only an insecure form of alphabetic substitution that is not consistent with, and less protective than, industry-standard encryption. Therefore, the representation set forth in Paragraph 47 was false or misleading and constituted a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT III

49. Through the means described in Paragraphs 38-40, Defendants ValueClick, Hi-Speed Media, and E-Babylon have represented, expressly or by implication, that they implemented reasonable and appropriate measures to protect against unauthorized access to the sensitive personal information they obtained from customers.

50. In truth and in fact, these Defendants did not implement reasonable and appropriate measures to protect against unauthorized access to the sensitive personal information they obtained from customers. In particular, the E-Babylon sites of Defendants ValueClick, Hi-Speed Media, and E-Babylon and the associated databases were vulnerable to a commonly known and reasonably foreseeable type of attack known as an SQL injection, which, if exploited, would have allowed access by unauthorized individuals to sensitive customer financial information. Moreover, because this information was stored without effective encryption, it was particularly vulnerable to compromise. Therefore, the representation set forth in Paragraph 49 was false or misleading and constituted a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

VIOLATION OF THE CAN-SPAM ACT

51. The CAN-SPAM Act, 15 U.S.C. § 7701 et seq., became effective on January 1, 2004, and has since remained in full force and effect.

52. Section 5(a)(2) of CAN-SPAM, 15 U.S.C. § 7704(a)(2), states:

> It is unlawful for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message, if such person has actual knowledge, or knowledge fairly implied on the basis of objective

> circumstances, that a subject heading of the message would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message (consistent with the criteria used in enforcement of section 5 of the Federal Trade Commission Act (15 U.S.C. 45)).

53. Section 7(e) of CAN-SPAM, 15 U.S.C. § 7706(e), states that in any action to enforce compliance through an injunction with Section 5(a)(2) and other specified sections of CAN-SPAM, the FTC need not allege or prove the state of mind required by such sections.

54. Section 7(a) of the CAN-SPAM Act states:

> [T]his Act shall be enforced by the [FTC] as if the violation of this Act were an unfair or deceptive act or practice proscribed under section 18(a)(1)(B) of the [FTC Act] (15 U.S.C. 57a(a)(1)(B)).

COUNT IV

55. Through the means described in Paragraphs 30-33, Defendants ValueClick and Hi-Speed Media have initiated the transmission, to protected computers, of commercial email messages that contained subject headings that would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

56. Therefore, Defendants ValueClick's and Hi-Speed Media's acts or practices violate Section 5(a)(2) of CAN-SPAM, 15 U.S.C. § 7704(a)(2).

CONSUMER INJURY

57. Consumers throughout the United States have been injured as a result of Defendants' unlawful acts or practices. Absent injunctive relief by this Court, Defendants are likely to continue

to injure consumers and to harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

58. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and other ancillary relief to prevent and remedy any violation of any provision of law enforced by the FTC.

59. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), as modified by Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended, and as implemented by 16 C.F.R. § 1.98(d) (2007), authorizes this Court to award monetary civil penalties of not more than $11,000 for each violation of CAN-SPAM. Defendants ValueClick's and Hi-Speed Media's violations of CAN-SPAM were committed with the knowledge required by Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A).

60. This Court, in the exercise of its equitable jurisdiction, may award ancillary relief to remedy injury caused by Defendants' violations of CAN-SPAM and the FTC Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court, as authorized by Sections 5(a), 5(m)(1)(A), 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), and 57b, and pursuant to its own equitable powers:

1. Enter judgment against Defendants and in favor of Plaintiff for each violation alleged in this complaint;

2. Award Plaintiff monetary civil penalties from Defendants ValueClick and Hi-Speed Media for every violation of CAN-SPAM;

3. Award Plaintiff such relief as the Court finds necessary to redress injury to consumers resulting from Defendants'

violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), including, but not limited to, rescission of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies;

4. Enter a permanent injunction to prevent future violations of the FTC Act and CAN-SPAM by Defendants;

5. Order Defendants to pay the costs of this action; and

6. Award Plaintiff such other and additional relief as the Court may determine to be just and proper.

Dated: _____, 2008

Respectfully submitted,

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Attachment 6

CAN-SPAM Act, 15 U.S.C. § 7701 *et seq.*

*** CURRENT THROUGH P.L. 110-199, APPROVED 4/9/2008 ***

TITLE 15. COMMERCE AND TRADE
CHAPTER 103. CONTROLLING THE ASSAULT OF NON-SOLICITED PORNOGRAPHY AND MARKETING

Go to the United States Code Service Archive Directory

15 USCS § 7701

§ 7701. Congressional findings and policy

(a) Findings. The Congress finds the following:

(1) Electronic mail has become an extremely important and popular means of communication, relied on by millions of Americans on a daily basis for personal and commercial purposes. Its low cost and global reach make it extremely convenient and efficient, and offer unique opportunities for the development and growth of frictionless commerce.

(2) The convenience and efficiency of electronic mail are threatened by the extremely rapid growth in the volume of unsolicited commercial electronic mail. Unsolicited commercial electronic mail is currently estimated to account for over half of all electronic mail traffic, up from an estimated 7 percent in 2001, and the volume continues to rise. Most of these messages are fraudulent or deceptive in one or more respects.

(3) The receipt of unsolicited commercial electronic mail may result in costs to recipients who cannot refuse to accept such mail and who incur costs for the storage of such mail, or for the time spent accessing, reviewing, and discarding such mail, or for both.

(4) The receipt of a large number of unwanted messages also decreases the convenience of electronic mail and creates a risk that wanted electronic mail messages, both commercial and noncommercial, will be lost, overlooked, or discarded amidst the larger volume of unwanted messages, thus reducing the reliability and usefulness of electronic mail to the recipient.

(5) Some commercial electronic mail contains material that many recipients may consider vulgar or pornographic in nature.

(6) The growth in unsolicited commercial electronic mail imposes significant monetary costs on providers of Internet access services, businesses, and educational and nonprofit institutions that carry and receive such mail, as there is a finite volume of mail that such providers, businesses, and institutions can handle without further investment in infrastructure.

(7) Many senders of unsolicited commercial electronic mail purposefully disguise the source of such mail.

(8) Many senders of unsolicited commercial electronic mail purposefully include misleading information in the messages' subject lines in order to induce the recipients to view the messages.

(9) While some senders of commercial electronic mail messages provide simple and reliable ways for recipients to reject (or "opt-out" of) receipt of commercial electronic mail from such senders in the future, other senders provide no such "opt-out" mechanism, or refuse to honor the requests of recipients not to receive electronic mail from such senders in the future, or both.

(10) Many senders of bulk unsolicited commercial electronic mail use computer programs to gather large numbers of electronic mail addresses on an automated basis from Internet websites or online services where users must post their addresses in order to make full use of the website or service.

(11) Many States have enacted legislation intended to regulate or reduce unsolicited commercial electronic mail, but these statutes impose different standards and requirements. As a result, they do not appear to have been successful in addressing the problems associated with unsolicited commercial electronic mail, in part because, since an electronic mail address does not specify a geographic location, it can be extremely difficult for law-abiding businesses to know with which of these disparate statutes they are required to comply.

(12) The problems associated with the rapid growth and abuse of unsolicited commercial electronic mail cannot be solved by Federal legislation alone. The development and adoption of technological approaches and the pursuit of cooperative efforts with other countries will be necessary as well.

(b) Congressional determination of public policy. On the basis of the findings in subsection (a), the Congress determines that--

(1) there is a substantial government interest in regulation of commercial electronic mail on a nationwide basis;

(2) senders of commercial electronic mail should not mislead recipients as to the source or content of such mail; and

(3) recipients of commercial electronic mail have a right to decline to receive additional commercial electronic mail from the same source.

15 USCS § 7702

§ 7702. Definitions

In this Act:

(1) Affirmative consent. The term "affirmative consent", when used with respect to a commercial electronic mail message, means that--

(A) the recipient expressly consented to receive the message, either in response to a clear and conspicuous request for such consent or at the recipient's own initiative; and

(B) if the message is from a party other than the party to which the recipient communicated such consent, the recipient was given clear and conspicuous notice at the time the consent was communicated that the recipient's electronic mail address could be transferred to such other party for the purpose of initiating commercial electronic mail messages.

(2) Commercial electronic mail message.

(A) In general. The term "commercial electronic mail message" means any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).

(B) Transactional or relationship messages. The term "commercial electronic mail message" does not include a transactional or relationship message.

(C) Regulations regarding primary purpose. Not later than 12 months after the date of the enactment of this Act [enacted Dec. 16, 2003], the Commission shall issue regulations pursuant to section 13 [*15 USCS § 7711*] defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message.

(D) Reference to company or website. The inclusion of a reference to a commercial entity or a link to the website of a commercial entity in an electronic mail message does not, by itself, cause such message to be treated as a commercial electronic mail message for purposes of this Act if the contents or circumstances of the message indicate a primary purpose other than commercial advertisement or promotion of a commercial product or service.

(3) Commission. The term "Commission" means the Federal Trade Commission.

(4) Domain name. The term "domain name" means any alphanumeric designation which is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the Internet.

(5) Electronic mail address. The term "electronic mail address" means a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox (commonly referred to as the "local part") and a reference to an Internet domain (commonly referred to as the "domain part"), whether or not displayed, to which an electronic mail message can be sent or delivered.

(6) Electronic mail message. The term "electronic mail message" means a message sent to a unique electronic mail address.

(7) FTC Act. The term "FTC Act" means the Federal Trade Commission Act (*15 U.S.C. 41* et seq.).

(8) Header information. The term "header information" means the source, destination, and routing information attached to an electronic mail message, including the originating domain name and originating electronic mail address, and any other information that appears in the line identifying, or purporting to identify, a person initiating the message.

(9) Initiate. The term "initiate", when used with respect to a commercial electronic mail message, means to originate or transmit such message or to procure the origination or transmission of such message, but shall not include actions that constitute routine conveyance of such message. For purposes of this paragraph, more than one person may be considered to have initiated a message.

(10) Internet. The term "Internet" has the meaning given that term in the Internet Tax Freedom Act (*47 U.S.C. 151* nt).

(11) Internet access service. The term "Internet access service" has the meaning given that term in section 231(e)(4) of the Communications Act of 1934 (*47 U.S.C. 231(e)(4)*).

(12) Procure. The term "procure", when used with respect to the initiation of a commercial electronic mail message, means intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one's behalf.

(13) Protected computer. The term "protected computer" has the meaning given that term in *section 1030(e)(2)(B) of title 18, United States Code*.

(14) Recipient. The term "recipient", when used with respect to a commercial electronic mail message, means an authorized user of the electronic mail address to which the message was sent or delivered. If a recipient of a commercial electronic mail message has one or more electronic mail addresses in addition to the address to which the message was sent or delivered, the recipient shall be treated as a separate recipient with respect to each such address. If an electronic mail address is reassigned to a new user, the new user shall not be treated as a recipient of any commercial electronic mail message sent or delivered to that address before it was reassigned.

(15) Routine conveyance. The term "routine conveyance" means the transmission, routing, relaying, handling, or storing, through an automatic technical process, of an electronic mail message for which another person has identified the recipients or provided the recipient addresses.

(16) Sender.

(A) In general. Except as provided in subparagraph (B), the term "sender", when used with respect to a commercial electronic mail message, means a person who initiates such a message and whose product, service, or Internet web site is advertised or promoted by the message.

(B) Separate lines of business or divisions. If an entity operates through separate lines of business or divisions and holds itself out to the recipient throughout the message as that particular line of business or division rather than as the entity of which such line of business or division is a part, then the line of business or the division shall be treated as the sender of such message for purposes of this Act.

(17) Transactional or relationship message.

(A) In general. The term "transactional or relationship message" means an electronic mail message the primary purpose of which is--

(i) to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;

(ii) to provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;

(iii) to provide--

(I) notification concerning a change in the terms or features of;

(II) notification of a change in the recipient's standing or status with respect to; or

(III) at regular periodic intervals, account balance information or other type of account statement with respect to,

a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender;

(iv) to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or

(v) to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.

(B) Modification of definition. The Commission by regulation pursuant to section 13 [*15 USCS § 7711*] may modify the definition in subparagraph (A) to expand or contract the categories of messages that are treated as transactional or relationship messages for purposes of this Act to the extent that such modification is necessary to accommodate changes in electronic mail technology or practices and accomplish the purposes of this Act.

15 USCS § 7703

§ 7703. Prohibition against predatory and abusive commercial e-mail

(a) [Omitted]

(b) United States Sentencing Commission.

(1) Directive. Pursuant to its authority under *section 994(p) of title 28, United States Code*, and in accordance with this section, the United States Sentencing Commission shall review and, as appropriate, amend the sentencing guidelines and policy statements to provide appropriate penalties for violations of *section 1037 of title 18, United States Code*, as added by this section, and other offenses that may be facilitated by the sending of large quantities of unsolicited electronic mail.

(2) Requirements. In carrying out this subsection, the Sentencing Commission shall consider providing sentencing enhancements for--

(A) those convicted under *section 1037 of title 18, United States Code*, who--

(i) obtained electronic mail addresses through improper means, including--

(I) harvesting electronic mail addresses of the users of a website, proprietary service, or other online public forum operated by another person, without the authorization of such person; and

(II) randomly generating electronic mail addresses by computer; or

(ii) knew that the commercial electronic mail messages involved in the offense contained or advertised an Internet domain for which the registrant of the domain had provided false registration information; and

(B) those convicted of other offenses, including offenses involving fraud, identity theft, obscenity, child pornography, and the sexual exploitation of children, if such offenses involved the sending of large quantities of electronic mail.

(c) Sense of Congress. It is the sense of Congress that--

(1) Spam has become the method of choice for those who distribute pornography, perpetrate fraudulent schemes, and introduce viruses, worms, and Trojan horses into personal and business computer systems; and

(2) the Department of Justice should use all existing law enforcement tools to investigate and prosecute those who send bulk commercial e-mail to facilitate the commission of Federal crimes, including the tools contained in chapters 47 and 63 of *title 18, United States Code [18* USCS §§ 1001 et seq., 1341 et seq.] (relating to fraud and false statements); chapter 71 of *title 18, United States Code [18* USCS §§ 1460 et seq.] (relating to obscenity); chapter 110 of *title 18, United States Code [18* USCS §§ 2251 et seq.] (relating to the sexual exploitation of children); and chapter 95 of *title 18, United States Code [18* USCS §§ 1951 et seq.] (relating to racketeering), as appropriate.

15 USCS § 7704

§ 7704. Other protections for users of commercial electronic mail

(a) Requirements for transmission of messages.

(1) Prohibition of false or misleading transmission information. It is unlawful for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message, or a transactional or relationship message, that contains, or is accompanied by, header information that is materially false or materially misleading. For purposes of this paragraph--

(A) header information that is technically accurate but includes an originating electronic mail address, domain name, or Internet Protocol address the access to which for purposes of initiating the message was obtained by means of false or fraudulent pretenses or representations shall be considered materially misleading;

(B) a "from" line (the line identifying or purporting to identify a person initiating the message) that accurately identifies any person who initiated the message shall not be considered materially false or materially misleading; and

(C) header information shall be considered materially misleading if it fails to identify accurately a protected computer used to initiate the message because the person initiating the message knowingly uses another protected computer to relay or retransmit the message for purposes of disguising its origin.

(2) Prohibition of deceptive subject headings. It is unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message if such person has actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that a subject heading of the message would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message (consistent with the criteria used in enforcement of section 5 of the Federal Trade Commission Act (*15 U.S.C. 45*)).

(3) Inclusion of return address or comparable mechanism in commercial electronic mail.

(A) In general. It is unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message that does not contain a functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that--

(i) a recipient may use to submit, in a manner specified in the message, a reply electronic mail message or other form of Internet-based communication requesting not to receive future commercial electronic mail messages from that sender at the electronic mail address where the message was received; and

(ii) remains capable of receiving such messages or communications for no less than 30 days after the transmission of the original message.

(B) More detailed options possible. The person initiating a commercial electronic mail message may comply with subparagraph (A)(i) by providing the recipient a list or menu from which the recipient may choose the specific types of commercial electronic mail messages the recipient wants to receive or does not want to receive from the sender, if the list or menu includes an option under which the recipient may choose not to receive any commercial electronic mail messages from the sender.

(C) Temporary inability to receive messages or process requests. A return electronic mail address or other mechanism does not fail to satisfy the requirements of subparagraph (A) if it is unexpectedly and temporarily unable to receive messages or process requests due to a technical problem beyond the control of the sender if the problem is corrected within a reasonable time period.

(4) Prohibition of transmission of commercial electronic mail after objection.

(A) In general. If a recipient makes a request using a mechanism provided pursuant to paragraph (3) not to receive some or any commercial electronic mail messages from such sender, then it is unlawful--

(i) for the sender to initiate the transmission to the recipient, more than 10 business days after the receipt of such request, of a commercial electronic mail message that falls within the scope of the request;

(ii) for any person acting on behalf of the sender to initiate the transmission to the recipient, more than 10 business days after the receipt of such request, of a commercial electronic mail message with actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such message falls within the scope of the request;

(iii) for any person acting on behalf of the sender to assist in initiating the transmission to the recipient, through the provision or selection of addresses to which the message will be sent, of a commercial electronic mail message with actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such message would violate clause (i) or (ii); or

(iv) for the sender, or any other person who knows that the recipient has made such a request, to sell, lease, exchange, or otherwise transfer or release the electronic mail address of the recipient (including through any transaction or other transfer involving mailing lists bearing the electronic mail address of the recipient) for any purpose other than compliance with this Act or other provision of law.

(B) Subsequent affirmative consent. A prohibition in subparagraph (A) does not apply if there is affirmative consent by the recipient subsequent to the request under subparagraph (A).

(5) Inclusion of identifier, opt-out, and physical address in commercial electronic mail.

(A) It is unlawful for any person to initiate the transmission of any commercial electronic mail message to a protected computer unless the message provides--

(i) clear and conspicuous identification that the message is an advertisement or solicitation;

(ii) clear and conspicuous notice of the opportunity under paragraph (3) to decline to receive further commercial electronic mail messages from the sender; and

(iii) a valid physical postal address of the sender.

(B) Subparagraph (A)(i) does not apply to the transmission of a commercial electronic mail message if the recipient has given prior affirmative consent to receipt of the message.

(6) Materially. For purposes of paragraph (1), the term "materially", when used with respect to false or misleading header information, includes the alteration or concealment of header information in a manner that would impair the ability of an Internet access service processing the message on behalf of a recipient, a person alleging a violation of this section, or a law enforcement agency to identify, locate, or respond to a person who initiated the electronic mail message or to investigate the alleged violation, or the ability of a recipient of the message to respond to a person who initiated the electronic message.

(b) Aggravated violations relating to commercial electronic mail.

(1) Address harvesting and dictionary attacks.

(A) In general. It is unlawful for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message that is unlawful under subsection (a), or to assist in the origination of such message through the provision or selection of addresses to which the message will be transmitted, if such person had actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that--

(i) the electronic mail address of the recipient was obtained using an automated means from an Internet website or proprietary online service operated by another person, and such website or online service included, at the time the address was obtained, a notice stating that the operator of such website or online service will not give, sell, or otherwise transfer addresses maintained by such website or online service to any other party for the purposes of initiating, or enabling others to initiate, electronic mail messages; or

(ii) the electronic mail address of the recipient was obtained using an automated means that generates possible electronic mail addresses by combining names, letters, or numbers into numerous permutations.

(B) Disclaimer. Nothing in this paragraph creates an ownership or proprietary interest in such electronic mail addresses.

(2) Automated creation of multiple electronic mail accounts. It is unlawful for any person to use scripts or other automated means to register for multiple electronic mail accounts or online user accounts from which to transmit to a protected computer, or enable another person to transmit to a protected computer, a commercial electronic mail message that is unlawful under subsection (a).

(3) Relay or retransmission through unauthorized access. It is unlawful for any person knowingly to relay or retransmit a commercial electronic mail message that is unlawful under subsection (a) from a protected computer or computer network that such person has accessed without authorization.

(c) Supplementary rulemaking authority. The Commission shall by regulation, pursuant to section 13 [*15 USCS § 7711*]--

(1) modify the 10-business-day period under subsection (a)(4)(A) or subsection (a)(4)(B), or both, if the Commission determines that a different period would be more reasonable after taking into account--

(A) the purposes of subsection (a);

(B) the interests of recipients of commercial electronic mail; and

(C) the burdens imposed on senders of lawful commercial electronic mail; and

(2) specify additional activities or practices to which subsection (b) applies if the Commission determines that those activities or practices are contributing substantially to the proliferation of commercial electronic mail messages that are unlawful under subsection (a).

(d) Requirement to place warning labels on commercial electronic mail containing sexually oriented material.

(1) In general. No person may initiate in or affecting interstate commerce the transmission, to a protected computer, of any commercial electronic mail message that includes sexually oriented material and--

(A) fail to include in subject heading for the electronic mail message the marks or notices prescribed by the Commission under this subsection; or

(B) fail to provide that the matter in the message that is initially viewable to the recipient, when the message is opened by any recipient and absent any further actions by the recipient, includes only--

(i) to the extent required or authorized pursuant to paragraph (2), any such marks or notices;

(ii) the information required to be included in the message pursuant to subsection (a)(5); and

(iii) instructions on how to access, or a mechanism to access, the sexually oriented material.

(2) Prior affirmative consent. Paragraph (1) does not apply to the transmission of an electronic mail message if the recipient has given prior affirmative consent to receipt of the message.

(3) Prescription of marks and notices. Not later than 120 days after the date of the enactment of this Act [enacted Dec. 16, 2003], the Commission in consultation with the Attorney General shall prescribe clearly identifiable marks or notices to be included in or associated with commercial electronic mail that contains sexually oriented material, in order to inform the recipient of that fact and to facilitate filtering of such electronic mail. The Commission shall publish in the Federal Register and provide notice to the public of the marks or notices prescribed under this paragraph.

(4) Definition. In this subsection, the term "sexually oriented material" means any material that depicts sexually explicit conduct (as that term is defined in *section 2256 of title 18, United States Code*), unless the depiction constitutes a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters.

(5) Penalty. Whoever knowingly violates paragraph (1) shall be fined under title 18, United States Code, or imprisoned not more than 5 years, or both.

15 USCS § 7705

§ 7705. Businesses knowingly promoted by electronic mail with false or misleading transmission information

(a) In general. It is unlawful for a person to promote, or allow the promotion of, that person's trade or business, or goods, products, property, or services sold, offered for sale, leased or offered for lease, or otherwise made available through that trade or business, in a commercial electronic mail message the transmission of which is in violation of section 5(a)(1) [*15 USCS § 7704(A)(1)*] if that person--

(1) knows, or should have known in the ordinary course of that person's trade or business, that the goods, products, property, or services sold, offered for sale, leased or offered for lease, or otherwise made available through that trade or business were being promoted in such a message;

(2) received or expected to receive an economic benefit from such promotion; and

(3) took no reasonable action--

(A) to prevent the transmission; or

(B) to detect the transmission and report it to the Commission.

(b) Limited enforcement against third parties.

(1) In general. Except as provided in paragraph (2), a person (hereinafter referred to as the "third party") that provides goods, products, property, or services to another person that violates subsection (a) shall not be held liable for such violation.

(2) Exception. Liability for a violation of subsection (a) shall be imputed to a third party that provides goods, products, property, or services to another person that violates subsection (a) if that third party--

(A) owns, or has a greater than 50 percent ownership or economic interest in, the trade or business of the person that violated subsection (a); or

(B) (i) has actual knowledge that goods, products, property, or services are promoted in a commercial electronic mail message the transmission of which is in violation of section 5(a)(1) [*15 USCS § 7704(a)(1)*]; and

(ii) receives, or expects to receive, an economic benefit from such promotion.

(c) Exclusive enforcement by FTC. Subsections (f) and (g) of section 7 [*15 USCS § 7706*] do not apply to violations of this section.

(d) Savings provision. Except as provided in section 7(f)(8) [*15 USCS § 7706(f)(8)*], nothing in this section may be construed to limit or prevent any action that may be taken under this Act with respect to any violation of any other section of this Act.

15 USCS § 7706

§ 7706. Enforcement generally

(a) Violation is unfair or deceptive act or practice. Except as provided in subsection (b), this Act shall be enforced by the Commission as if the violation of this Act were an unfair or deceptive act or practice proscribed under section 18(a)(1)(B) of the Federal Trade Commission Act (*15 U.S.C. 57a(a)(1)(B)*).

(b) Enforcement by certain other agencies. Compliance with this Act shall be enforced--

(1) under section 8 of the Federal Deposit Insurance Act (*12 U.S.C. 1818*), in the case of--

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, organizations operating under section 25 or 25A of the Federal Reserve Act (*12 U.S.C. 601* and *611*), and bank holding companies, by the Board;

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation; and

(D) savings associations the deposits of which are insured by the Federal Deposit Insurance Corporation, by the Director of the Office of Thrift Supervision;

(2) under the Federal Credit Union Act (*12 U.S.C. 1751* et seq.) by the Board of the National Credit Union Administration with respect to any Federally insured credit union;
(3) under the Securities Exchange Act of 1934 (*15 U.S.C. 78a* et seq.) by the Securities and Exchange Commission with respect to any broker or dealer;
(4) under the Investment Company Act of 1940 (*15 U.S.C. 80a-1* et seq.) by the Securities and Exchange Commission with respect to investment companies;
(5) under the Investment Advisers Act of 1940 (*15 U.S.C. 80b-1* et seq.) by the Securities and Exchange Commission with respect to investment advisers registered under that Act;
(6) under State insurance law in the case of any person engaged in providing insurance, by the applicable State insurance authority of the State in which the person is domiciled, subject to section 104 of the Gramm-Bliley-Leach Act (*15 U.S.C. 6701*), except that in any State in which the State insurance authority elects not to exercise this power, the enforcement authority pursuant to this Act shall be exercised by the Commission in accordance with subsection (a);
(7) under part A of subtitle VII of title 49, United States Code [*49 USCS §§ 40101* et seq.], by the Secretary of Transportation with respect to any air carrier or foreign air carrier subject to that part;
(8) under the Packers and Stockyards Act, 1921 (*7 U.S.C. 181* et seq.) (except as provided in section 406 of that Act (*7 U.S.C. 226, 227*)), by the Secretary of Agriculture with respect to any activities subject to that Act;
(9) under the Farm Credit Act of 1971 (*12 U.S.C. 2001* et seq.) by the Farm Credit Administration with respect to any Federal land bank, Federal land bank association, Federal intermediate credit bank, or production credit association; and
(10) under the Communications Act of 1934 (*47 U.S.C. 151* et seq.) by the Federal Communications Commission with respect to any person subject to the provisions of that Act.

(c) Exercise of certain powers. For the purpose of the exercise by any agency referred to in subsection (b) of its powers under any Act referred to in that subsection, a violation of this Act is deemed to be a violation of a Federal Trade Commission trade regulation rule. In addition to its powers under any provision of law specifically referred to in subsection (b), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this Act, any other authority conferred on it by law.

(d) Actions by the Commission. The Commission shall prevent any person from violating this Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (*15 U.S.C. 41* et seq.) were incorporated into and made a part of this Act. Any entity that violates any provision of that subtitle is subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of that subtitle.

(e) Availability of cease-and-desist orders and injunctive relief without showing of knowledge. Notwithstanding any other provision of this Act, in any proceeding or action pursuant to subsection (a), (b), (c), or (d) of this section to enforce compliance, through an order to cease and desist or an injunction, with section 5(a)(1)(C), section 5(a)(2), clause (ii), (iii), or (iv) of section 5(a)(4)(A), section 5(b)(1)(A), or section 5(b)(3) [*15 USCS § 7704(a)(1)(C), § 7704(a)(2), § 7704(a)(4)(A)(ii)*, (iii), or (iv), § 7704(b)(1)(A), or § 7704(b)(3)], neither the Commission nor the Federal Communications Commission shall be required to allege or prove the state of mind required by such section or subparagraph.

(f) Enforcement by States.
(1) Civil action. In any case in which the attorney general of a State, or an official or agency of a State, has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any person who violates paragraph (1) or (2) of section 5(a) [*15 USCS § 7704(a)*], who violates section 5(d) [*15 USCS § 7704(d)*], or who engages in a pattern or practice that violates paragraph (3), (4), or (5) of section 5(a) [*15 USCS § 7704(a)*], of this Act, the attorney general, official, or agency of the State, as parens patriae, may bring a civil action on behalf of the residents of the State in a district court of the United States of appropriate jurisdiction--
(A) to enjoin further violation of section 5 of this Act [*15 USCS § 7704*] by the defendant; or
(B) to obtain damages on behalf of residents of the State, in an amount equal to the greater of--
(i) the actual monetary loss suffered by such residents; or
(ii) the amount determined under paragraph (3).
(2) Availability of injunctive relief without showing of knowledge. Notwithstanding any other provision of this Act, in a civil action under paragraph (1)(A) of this subsection, the attorney general, official, or agency of the State shall not

be required to allege or prove the state of mind required by section 5(a)(1)(C), section 5(a)(2), clause (ii), (iii), or (iv) of section 5(a)(4)(A), section 5(b)(1)(A), or section 5(b)(3) [*15 USCS § 7704(a)(1)(C), § 7704(a)(2), § 7704(a)(4)(A)(ii),* (iii), or (iv), § 7704(b)(1)(A), or § 7704(b)(3)].

(3) Statutory damages.

(A) In general. For purposes of paragraph (1)(B)(ii), the amount determined under this paragraph is the amount calculated by multiplying the number of violations (with each separately addressed unlawful message received by or addressed to such residents treated as a separate violation) by up to $ 250.

(B) Limitation. For any violation of section 5 [*15 USCS § 7704*] (other than section 5(a)(1) [*15 USCS § 7704(a)(1)*]), the amount determined under subparagraph (A) may not exceed $ 2,000,000.

(C) Aggravated damages. The court may increase a damage award to an amount equal to not more than three times the amount otherwise available under this paragraph if--

(i) the court determines that the defendant committed the violation willfully and knowingly; or

(ii) the defendant's unlawful activity included one or more of the aggravating violations set forth in section 5(b) [*15 USCS § 7704(b)*].

(D) Reduction of damages. In assessing damages under subparagraph (A), the court may consider whether--

(i) the defendant has established and implemented, with due care, commercially reasonable practices and procedures designed to effectively prevent such violations; or

(ii) the violation occurred despite commercially reasonable efforts to maintain compliance the practices and procedures to which reference is made in clause (i).

(4) Attorney fees. In the case of any successful action under paragraph (1), the court, in its discretion, may award the costs of the action and reasonable attorney fees to the State.

(5) Rights of Federal regulators. The State shall serve prior written notice of any action under paragraph (1) upon the Federal Trade Commission or the appropriate Federal regulator determined under subsection (b) and provide the Commission or appropriate Federal regulator with a copy of its complaint, except in any case in which such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Federal Trade Commission or appropriate Federal regulator shall have the right--

(A) to intervene in the action;

(B) upon so intervening, to be heard on all matters arising therein;

(C) to remove the action to the appropriate United States district court; and

(D) to file petitions for appeal.

(6) Construction. For purposes of bringing any civil action under paragraph (1), nothing in this Act shall be construed to prevent an attorney general of a State from exercising the powers conferred on the attorney general by the laws of that State to--

(A) conduct investigations;

(B) administer oaths or affirmations; or

(C) compel the attendance of witnesses or the production of documentary and other evidence.

(7) Venue; service of process.

(A) Venue. Any action brought under paragraph (1) may be brought in the district court of the United States that meets applicable requirements relating to venue under *section 1391 of title 28, United States Code*.

(B) Service of process. In an action brought under paragraph (1), process may be served in any district in which the defendant--

(i) is an inhabitant; or

(ii) maintains a physical place of business.

(8) Limitation on State action while Federal action is pending. If the Commission, or other appropriate Federal agency under subsection (b), has instituted a civil action or an administrative action for violation of this Act, no State attorney general, or official or agency of a State, may bring an action under this subsection during the pendency of that action against any defendant named in the complaint of the Commission or the other agency for any violation of this Act alleged in the complaint.

(9) Requisite scienter for certain civil actions. Except as provided in section 5(a)(1)(C), section 5(a)(2), clause (ii), (iii), or (iv) of section 5(a)(4)(A), section 5(b)(1)(A), or section 5(b)(3) [*15 USCS § 7704(a)(1)(C), § 7704(a)(2), § 7704(a)(4)(A)(ii),* (iii), or (iv), § 7704(b)(1)(A), or § 7704(b)(3)], in a civil action brought by a State attorney general, or an official or agency of a State, to recover monetary damages for a violation of this Act, the court shall not grant the relief sought unless the attorney general, official, or agency establishes that the defendant acted with actual knowledge, or knowledge fairly implied on the basis of objective circumstances, of the act or omission that constitutes the violation.

(g) Action by provider of Internet access service.

(1) Action authorized. A provider of Internet access service adversely affected by a violation of section 5(a)(1), 5(b), or 5(d) [*15 USCS § 7704(a)(1), 7704(b)* or *7704(d)*], or a pattern or practice that violates paragraph (2), (3), (4), or (5) of section 5(a) [*15 USCS § 7704(a)*], may bring a civil action in any district court of the United States with jurisdiction over the defendant--

(A) to enjoin further violation by the defendant; or

(B) to recover damages in an amount equal to the greater of--

(i) actual monetary loss incurred by the provider of Internet access service as a result of such violation; or

(ii) the amount determined under paragraph (3).

(2) Special definition of "procure". In any action brought under paragraph (1), this Act shall be applied as if the definition of the term "procure" in section 3(12) [*15 USCS § 7702(12)*] contained, after "behalf" the words "with actual knowledge, or by consciously avoiding knowing, whether such person is engaging, or will engage, in a pattern or practice that violates this Act".

(3) Statutory damages.

(A) In general. For purposes of paragraph (1)(B)(ii), the amount determined under this paragraph is the amount calculated by multiplying the number of violations (with each separately addressed unlawful message that is transmitted or attempted to be transmitted over the facilities of the provider of Internet access service, or that is transmitted or attempted to be transmitted to an electronic mail address obtained from the provider of Internet access service in violation of section 5(b)(1)(A)(i) [*15 USCS § 7704(b)(1)(A)(i)*], treated as a separate violation) by--

(i) up to $ 100, in the case of a violation of section 5(a)(1) [*15 USCS § 7704(a)(1)*]; or

(ii) up to $ 25, in the case of any other violation of section 5 [*15 USCS § 7704*].

(B) Limitation. For any violation of section 5 [*15 USCS § 7704*] (other than section 5(a)(1) [*15 USCS § 7704(a)(1)*]), the amount determined under subparagraph (A) may not exceed $ 1,000,000.

(C) Aggravated damages. The court may increase a damage award to an amount equal to not more than three times the amount otherwise available under this paragraph if--

(i) the court determines that the defendant committed the violation willfully and knowingly; or

(ii) the defendant's unlawful activity included one or more of the aggravated violations set forth in section 5(b) [*15 USCS § 7704(b)*].

(D) Reduction of damages. In assessing damages under subparagraph (A), the court may consider whether--

(i) the defendant has established and implemented, with due care, commercially reasonable practices and procedures designed to effectively prevent such violations; or

(ii) the violation occurred despite commercially reasonable efforts to maintain compliance with the practices and procedures to which reference is made in clause (i).

(4) Attorney fees. In any action brought pursuant to paragraph (1), the court may, in its discretion, require an undertaking for the payment of the costs of such action, and assess reasonable costs, including reasonable attorneys' fees, against any party.

15 USCS § 7707

§ 7707. Effect on other laws

(a) Federal law.

(1) Nothing in this Act shall be construed to impair the enforcement of section 223 or 231 of the Communications Act of 1934 (*47 U.S.C. 223* or *231*, respectively), chapter 71 [*18 USCS §§ 1460* et seq.] (relating to obscenity) or 110 [*18 USCS §§ 2251* et seq.] (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

(2) Nothing in this Act shall be construed to affect in any way the Commission's authority to bring enforcement actions under FTC Act for materially false or deceptive representations or unfair practices in commercial electronic mail messages.

(b) State law.

(1) In general. This 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 to the extent that any such statute,

regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.

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

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

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

(c) No effect on policies of providers of internet access service. Nothing in this Act shall be construed to have any effect on the lawfulness or unlawfulness, under any other provision of law, of the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail messages.

15 USCS § 7708

§ 7708. Do-Not-E-Mail registry

(a) In general. Not later than 6 months after the date of enactment of this Act [enacted Dec. 16, 2003], the Commission shall transmit to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce a report that--

(1) sets forth a plan and timetable for establishing a nationwide marketing Do-Not-E-Mail registry;

(2) includes an explanation of any practical, technical, security, privacy, enforceability, or other concerns that the Commission has regarding such a registry; and

(3) includes an explanation of how the registry would be applied with respect to children with e-mail accounts.

(b) Authorization to implement. The Commission may establish and implement the plan, but not earlier than 9 months after the date of enactment of this Act [enacted Dec. 16, 2003].

15 USCS § 7709

§ 7709. Study of effects of commercial electronic mail

(a) In general. Not later than 24 months after the date of the enactment of this Act [enacted Dec. 16, 2003], the Commission, in consultation with the Department of Justice and other appropriate agencies, shall submit a report to the Congress that provides a detailed analysis of the effectiveness and enforcement of the provisions of this Act and the need (if any) for the Congress to modify such provisions.

(b) Required analysis. The Commission shall include in the report required by subsection (a)--

(1) an analysis of the extent to which technological and marketplace developments, including changes in the nature of the devices through which consumers access their electronic mail messages, may affect the practicality and effectiveness of the provisions of this Act;

(2) analysis and recommendations concerning how to address commercial electronic mail that originates in or is transmitted through or to facilities or computers in other nations, including initiatives or policy positions that the Federal Government could pursue through international negotiations, fora, organizations, or institutions; and

(3) analysis and recommendations concerning options for protecting consumers, including children, from the receipt and viewing of commercial electronic mail that is obscene or pornographic.

15 USCS § 7710

§ 7710. Improving enforcement by providing rewards for information about violations; labeling

The Commission shall transmit to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce--

(1) a report, within 9 months after the date of enactment of this Act [enacted Dec. 16, 2003], that sets forth a system for rewarding those who supply information about violations of this Act, including--

(A) procedures for the Commission to grant a reward of not less than 20 percent of the total civil penalty collected for a violation of this Act to the first person that--

(i) identifies the person in violation of this Act; and

(ii) supplies information that leads to the successful collection of a civil penalty by the Commission; and

(B) procedures to minimize the burden of submitting a complaint to the Commission concerning violations of this Act, including procedures to allow the electronic submission of complaints to the Commission; and

(2) a report, within 18 months after the date of enactment of this Act [enacted Dec. 16, 2003], that sets forth a plan for requiring commercial electronic mail to be identifiable from its subject line, by means of compliance with Internet Engineering Task Force Standards, the use of the characters "ADV" in the subject line, or other comparable identifier, or an explanation of any concerns the Commission has that cause the Commission to recommend against the plan.

15 USCS § 7711

§ 7711. Regulations

(a) In general. The Commission may issue regulations to implement the provisions of this Act (not including the amendments made by sections 4 and 12). Any such regulations shall be issued in accordance with *section 553 of title 5, United States Code*.

(b) Limitation. Subsection (a) may not be construed to authorize the Commission to establish a requirement pursuant to section 5(a)(5)(A) [*15 USCS § 7704(a)(5)(A)*] to include any specific words, characters, marks, or labels in a commercial electronic mail message, or to include the identification required by section 5(a)(5)(A) [*15 USCS § 7704(a)(5)(A)*] in any particular part of such a mail message (such as the subject line or body).

15 USCS § 7712

§ 7712. Application to wireless

(a) Effect on other law. Nothing in this Act shall be interpreted to preclude or override the applicability of section 227 of the Communications Act of 1934 (*47 U.S.C. 227*) or the rules prescribed under section 3 of the Telemarketing and Consumer Fraud and Abuse Prevention Act (*15 U.S.C. 6102*).

(b) FCC rulemaking. The Federal Communications Commission, in consultation with the Federal Trade Commission, shall promulgate rules within 270 days to protect consumers from unwanted mobile service commercial messages. The Federal Communications Commission, in promulgating the rules, shall, to the extent consistent with subsection (c)--

(1) provide subscribers to commercial mobile services the ability to avoid receiving mobile service commercial messages unless the subscriber has provided express prior authorization to the sender, except as provided in paragraph (3);

(2) allow recipients of mobile service commercial messages to indicate electronically a desire not to receive future mobile service commercial messages from the sender;

(3) take into consideration, in determining whether to subject providers of commercial mobile services to paragraph (1), the relationship that exists between providers of such services and their subscribers, but if the Commission determines that such providers should not be subject to paragraph (1), the rules shall require such providers, in addition to complying with the other provisions of this Act, to allow subscribers to indicate a desire not to receive future mobile service commercial messages from the provider--

(A) at the time of subscribing to such service; and

(B) in any billing mechanism; and

(4) determine how a sender of mobile service commercial messages may comply with the provisions of this Act, considering the unique technical aspects, including the functional and character limitations, of devices that receive such messages.

(c) Other factors considered. The Federal Communications Commission shall consider the ability of a sender of a commercial electronic mail message to reasonably determine that the message is a mobile service commercial message.

(d) Mobile service commercial message defined. In this section, the term "mobile service commercial message" means a commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile service (as such term is defined in section 332(d) of the Communications Act of 1934 (*47 U.S.C. 332(d)*)) in connection with such service.

15 USCS § 7713

§ 7713. Separability

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected.

18 USC § 1037

§ 1037. Fraud and related activity in connection with electronic mail

(a) In general. Whoever, in or affecting interstate or foreign commerce, knowingly--
(1) accesses a protected computer without authorization, and intentionally initiates the transmission of multiple commercial electronic mail messages from or through such computer,
(2) uses a protected computer to relay or retransmit multiple commercial electronic mail messages, with the intent to deceive or mislead recipients, or any Internet access service, as to the origin of such messages,
(3) materially falsifies header information in multiple commercial electronic mail messages and intentionally initiates the transmission of such 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 such accounts or domain names, or
(5) falsely represents oneself to be the registrant or the legitimate successor in interest to the registrant of 5 or more Internet Protocol addresses, and intentionally initiates the transmission of multiple commercial electronic mail messages from such addresses,or conspires to do so, shall be punished as provided in subsection (b).

(b) Penalties. The punishment for an offense under subsection (a) is--
(1) a fine under this title, imprisonment for not more than 5 years, or both, if--
(A) the offense is committed in furtherance of any felony under the laws of the United States or of any State; or
(B) the defendant has previously been convicted under this section or section 1030 [*18 USCS § 1030*], or under the law of any State for conduct involving the transmission of multiple commercial electronic mail messages or unauthorized access to a computer system;
(2) a fine under this title, imprisonment for not more than 3 years, or both, if--
(A) the offense is an offense under subsection (a)(1);
(B) the offense is an offense under subsection (a)(4) and involved 20 or more falsified electronic mail or online user account registrations, or 10 or more falsified domain name registrations;
(C) the volume of electronic mail messages transmitted in furtherance of the offense exceeded 2,500 during any 24-hour period, 25,000 during any 30-day period, or 250,000 during any 1-year period;
(D) the offense caused loss to one or more persons aggregating $ 5,000 or more in value during any 1-year period;
(E) as a result of the offense any individual committing the offense obtained anything of value aggregating $ 5,000 or more during any 1-year period; or
(F) the offense was undertaken by the defendant in concert with three or more other persons with respect to whom the defendant occupied a position of organizer or leader; and
(3) a fine under this title or imprisonment for not more than 1 year, or both, in any other case.

(c) Forfeiture.

(1) In general. The court, in imposing sentence on a person who is convicted of an offense under this section, shall order that the defendant forfeit to the United States--

(A) any property, real or personal, constituting or traceable to gross proceeds obtained from such offense; and

(B) any equipment, software, or other technology used or intended to be used to commit or to facilitate the commission of such offense.

(2) Procedures. The procedures set forth in section 413 of the Controlled Substances Act (*21 U.S.C. 853*), other than subsection (d) of that section, and in *Rule 32.2 of the Federal Rules of Criminal Procedure*, shall apply to all stages of a criminal forfeiture proceeding under this section.

(d) Definitions. In this section:

(1) Loss. The term "loss" has the meaning given that term in section 1030(e) of this *title [18 USCS § 1030(e)*].

(2) Materially. For purposes of paragraphs (3) and (4) of subsection (a), header information or registration information is materially falsified if it is altered or concealed in a manner that would impair the ability of a recipient of the message, an Internet access service processing the message on behalf of a recipient, a person alleging a violation of this section, or a law enforcement agency to identify, locate, or respond to a person who initiated the electronic mail message or to investigate the alleged violation.

(3) Multiple. The term "multiple" means more than 100 electronic mail messages during a 24-hour period, more than 1,000 electronic mail messages during a 30-day period, or more than 10,000 electronic mail messages during a 1-year period.

(4) Other terms. Any other term has the meaning given that term by section 3 of the CAN-SPAM Act of 2003 [*15 USCS § 7702*].

PROOF OF SERVICE AND DELIVERY

I, Timothy J. Walton, declare that:

I am at least 18 years of age and not a party to the above-entitled action. My business address is Law Offices of Timothy Walton, 801 Woodside Road, Suite 11, Redwood City, CA 94061.

I served the foregoing APPELLANT'S REPLY TO RESPONDENTS' OPENING BRIEF, including Index of Non-California Authorities, on March 24, 2010 by depositing a copy thereof in the United States mail in Redwood City, California, enclosed in a sealed envelope, with postage fully prepaid, addressed to the persons listed below:

Bennet Kelley
Internet Law Center
100 Wilshire Blvd., Suite 950
Santa Monica, CA 90401

I served a copy of the brief on the clerk of the Superior Court of California, County of San Francisco by U.S. mail on March 24, 2010.

I served a text-searchable PDF copy of such brief on the California Supreme Court by uploading the brief to the Supreme Court's website on March 24, 2010.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 24th day of March, 2010 at Redwood City, California.

_____

Timothy J. Walton