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Greenberg v. Digital Media Solutions, LLC

Court of Appeal of California, First Appellate District, Division One

June 21, 2021, Opinion Filed

A158854

Reporter

2021 Cal. App. LEXIS 519 *; 2021 WL 2525645

MARTA GREENBERG et al., Plaintiffs and Appellants, v.
DIGITAL MEDIA SOLUTIONS, LLC, Defendant and
Respondent.

Notice: CERTIFIED FOR PARTIAL PUBLICATION*

Prior History: [*1] Superior Court of San Francisco County,
No. CGC-18-572010, Ethan P. Schulman, Judge.

the sender, advertisers could be liable for marketing agents' misconduct even when an advertiser was sufficiently identified, and the existence of an agency relationship was a fact issue; [2]-The recipients had no cause of action based on generic phrases in the "from" field because such phrases made no representations as to the source and thus were not misrepresentations, nor could they be regulated under state law without raising significant federal preemption problems.

Outcome

Reversed in part and affirmed in part.

LexisNexis® Headnotes

Core Terms

e-mail, recipients, advertiser, domain name, sender, spam, subject line, misrepresented, marketing, traceable, entity, header, Warranty, third party, allegations, demurrer, trial court, misleading, falsified, cause of action, circumstances, unsolicited, registered, preempted, generic, message

Case Summary

Overview

HOLDINGS: [1]-Recipients of unsolicited commercial emails could maintain a claim under *Bus. & Prof. Code, § 17529.5, subd. (a)(2)*, against an advertiser based on allegations that its marketing partners had concealed their identities by using untraceable domain names because header information in a commercial e-mail was falsified or misrepresented when the domain name neither identified nor was readily traceable to

Business & Corporate Compliance > ... > Internet
Business > Online Advertising > Spam Email

Communications Law > ... > Regulated
Practices > Content Regulation > Advertising

Business & Corporate Compliance > ... > Computer &
Internet Law > Privacy & Security > State Regulation

HN1 [+] Online Advertising, Spam Email

A recipient of a commercial email advertisement sent by a third party is not precluded as a matter of law from stating a cause of action under *Bus. & Prof. Code, § 17529.5*, against the advertiser for the third party's failure to provide sufficient information disclosing or making traceable the third party's own identity. Further, such a cause is not precluded simply because such an email sufficiently identifies the advertiser.

* Pursuant to *California Rules of Court, rules 8.1105(b)* and *8.1110*, this opinion is certified for publication with the exception of part II.B.

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Business & Corporate Compliance > ... > Internet
Business > Online Advertising > Spam Email

Constitutional Law > ... > Freedom of Speech > Commercial Speech > Advertising

Business & Corporate Compliance > ... > Computer & Internet Law > Privacy & Security > State Regulation

HN2 [+] **Online Advertising, Spam Email**

The [CAN-SPAM Act, 15 U.S.C. § 7701 et seq.](#), does not ban spam outright, but rather provides a code of conduct to regulate commercial e-mail messaging practices. Stated in general terms, the act prohibits such practices as transmitting messages with deceptive subject headings or header information that is materially false or materially misleading. The act also imposes requirements regarding content, format, and labeling. For instance, unsolicited e-mail messages must include the sender's physical postal address, indicate they are advertisements or solicitations, and notify recipients of their ability to decline further mailings.

Business & Corporate Compliance > ... > Internet
Business > Online Advertising > Spam Email

Communications Law > ... > Regulated Practices > Content Regulation > Advertising

Constitutional Law > Supremacy Clause > Federal Preemption

Business & Corporate Compliance > ... > Computer & Internet Law > Privacy & Security > State Regulation

HN3 [+] **Online Advertising, Spam Email**

The [CAN-SPAM Act, 15 U.S.C. § 7701 et seq.](#), includes one exception to preemption: A state statute is not preempted to the extent that any such statute prohibits falsity or deception in any portion of a commercial email message or information attached thereto. [15 U.S.C. § 7707\(b\)\(1\)](#). [Bus. & Prof. Code, § 17529.5](#), falls within this exception.

Business & Corporate Compliance > ... > Internet
Business > Online Advertising > Spam Email

Communications Law > ... > Regulated Practices > Content Regulation > Advertising

Constitutional Law > Supremacy Clause > Federal

Preemption

Business & Corporate Compliance > ... > Computer & Internet Law > Privacy & Security > State Regulation

HN4 [+] **Online Advertising, Spam Email**

[Bus. & Prof. Code, § 17529.5, subd. \(a\)\(2\)](#), makes it illegal to advertise with email that has header information that is falsified, misrepresented, or forged, and [§ 17529.5, subd. \(a\)\(3\)](#), makes it illegal to advertise with email that has a subject line that is reasonably likely to mislead a recipient about a material fact. If the representation in the header information or subject line is not material, its regulation is preempted by the [CAN-SPAM Act, 15 U.S.C. § 7701 et seq.](#)

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN5 [+] **Standards of Review, De Novo Review**

An appellate court reviews de novo a claim that a demurrer was improperly sustained. In doing so, the appellate court gives the complaint a reasonable interpretation, reading it as a whole and its parts in their context. Further, the appellate court treats the demurrer as admitting all material facts properly pleaded, but does not assume the truth of contentions, deductions, or conclusions of law. The appellate court is not bound by the trial court's analysis of questions of law and independently construes statutory law.

Business & Corporate Compliance > ... > Internet
Business > Online Advertising > Spam Email

HN6 [+] **Online Advertising, Spam Email**

An e-mail with an accurate and traceable domain name makes no affirmative representation or statement of fact that is false and cannot reasonably be understood to be an implied assertion that the source of that e-mail is different from the source of another e-mail containing a different domain name.

Business & Corporate Compliance > ... > Internet

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Business > Online Advertising > Spam Email

Communications Law > ... > Regulated Practices > Content Regulation > Advertising

Business & Corporate Compliance > ... > Computer & Internet Law > Privacy & Security > State Regulation

HN7 [blue square] Online Advertising, Spam Email

Header information in a commercial e-mail is falsified or misrepresented for purposes of [Bus. & Prof. Code, § 17529.5, subd. \(a\)\(2\)](#), when it uses a sender domain name that neither identifies the actual sender on its face nor is readily traceable to the sender using a publicly available online database such as WHOIS. A commercial e-mailer's deliberate use of untraceable, privately registered domain names to conceal its identity violates [§ 17529.5, subd. \(a\)\(2\)](#).

Business & Corporate Compliance > ... > Internet Business > Online Advertising > Spam Email

Constitutional Law > Supremacy Clause > Federal Preemption

Business & Corporate Compliance > ... > Computer & Internet Law > Privacy & Security > State Regulation

HN8 [blue square] Online Advertising, Spam Email

A domain name is not required to explicitly state the name of the sender, and any state law so requiring would likely be preempted. But while an e-mail with an accurate and traceable domain name makes no affirmative representation or statement of fact that is false, an e-mail with a made-up and untraceable domain name affirmatively and falsely represents the sender has no connection to the actual sender.

Business & Corporate Compliance > ... > Internet Business > Online Advertising > Spam Email

Communications Law > ... > Regulated Practices > Content Regulation > Advertising

Business & Corporate Compliance > ... > Computer & Internet Law > Privacy & Security > State Regulation

HN9 [blue square] Online Advertising, Spam Email

[Bus. & Prof. Code, § 17529.5](#), is specifically aimed at advertisers so that advertisers can be held liable for abuses

perpetrated by their marketing agents. By its plain terms, the statute is not limited to entities that actually send or initiate a deceptive commercial e-mail, but applies more broadly to any entity that advertises in those e-mails.

Business & Corporate Law > ... > Establishment > Proof of Agency > Questions of Fact & Law

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN10 [blue square] Proof of Agency, Questions of Fact & Law

The existence of an agency relationship is usually a question of fact.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court sustained an advertiser's demurrer to a claim brought under [Bus. & Prof. Code, § 17529.5, subd. \(a\)\(2\)](#), by recipients of unsolicited commercial e-mails who alleged false or misleading header information. (Superior Court of the City and County of San Francisco, No. CGC-18-572010, Ethan P. Schulman, Judge.)

The Court of Appeal reversed in part and affirmed in part. The court held that the complaint stated a claim based on allegations that the advertiser's marketing partners had concealed their identities by using untraceable domain names, because header information in a commercial e-mail is falsified or misrepresented when the domain name neither identifies nor is readily traceable to the sender. Advertisers can be liable for marketing agents' misconduct even when an advertiser is sufficiently identified, and the existence of an agency relationship is a fact issue. The recipients had no cause of action based on generic phrases in the "from" field, because such phrases make no representations as to the source and thus are not misrepresentations, nor can they be regulated under state law without raising significant federal preemption problems. (Opinion by Humes, P. J., with Margulies and Sanchez, JJ., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] (1)**Advertising § 7—Spam E-mail—Concealing Identity of Agent.**

A recipient of a commercial e-mail advertisement sent by a third party is not precluded as a matter of law from stating a cause of action under [Bus. & Prof. Code, § 17529.5](#), against the advertiser for the third party's failure to provide sufficient information disclosing or making traceable the third party's own identity. Further, such a cause is not precluded simply because such an e-mail sufficiently identifies the advertiser.

CA(2)[] (2)**Advertising § 7—Spam E-mail—Federal Prohibitions and Requirements.**

[The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 \(CAN-SPAM Act\) \(15 U.S.C. § 7701 et seq.\)](#) does not ban unsolicited commercial e-mail advertisements outright, but rather provides a code of conduct to regulate commercial e-mail messaging practices. Stated in general terms, the CAN-SPAM Act prohibits such practices as transmitting messages with deceptive subject headings or header information that is materially false or materially misleading. The CAN-SPAM Act also imposes requirements regarding content, format, and labeling. For instance, unsolicited e-mail messages must include the sender's physical postal address, indicate they are advertisements or solicitations, and notify recipients of their ability to decline further mailings.

CA(3)[] (3)**Advertising § 7—Spam E-mail—Federal Preemption—Falsity Exception.**

[The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 \(15 U.S.C. § 7701 et seq.\)](#) includes one exception to preemption: A state statute is not preempted to the extent that any such statute prohibits falsity or deception in any portion of a commercial e-mail message or information attached thereto ([15 U.S.C. § 7707\(b\)\(1\)](#)). [Bus. & Prof. Code, § 17529.5](#), falls within this exception.

CA(4)[] (4)**Advertising § 7—Spam E-mail—Material Misrepresentations.**

[Bus. & Prof. Code, § 17529.5, subd. \(a\)\(2\)](#), makes it illegal to advertise with e-mail that has header information that is

falsified, misrepresented, or forged, and [§ 17529.5, subd. \(a\)\(3\)](#), makes it illegal to advertise with e-mail that has a subject line that is reasonably likely to mislead a recipient about a material fact. If the representation in the header information or subject line is not material, its regulation is preempted by the [Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 \(15 U.S.C. § 7701 et seq.\)](#).

CA(5)[] (5)**Appellate Review § 128—Scope—Rulings on Demurrs—De Novo Review.**

An appellate court reviews de novo a claim that a demurrer was improperly sustained. In doing so, the appellate court gives the complaint a reasonable interpretation, reading it as a whole and its parts in their context. Further, the appellate court treats the demurrer as admitting all material facts properly pleaded, but does not assume the truth of contentions, deductions, or conclusions of law. The appellate court is not bound by the trial court's analysis of questions of law and independently construes statutory law.

CA(6)[] (6)**Advertising § 7—Spam E-mail—Material Misrepresentations—Domain Name—Identity and Traceability of Sender.**

An e-mail with an accurate and traceable domain name makes no affirmative representation or statement of fact that is false and cannot reasonably be understood to be an implied assertion that the source of that e-mail is different from the source of another e-mail containing a different domain name.

CA(7)[] (7)**Advertising § 7—Spam E-mail—Material Misrepresentations—Domain Name—Identity and Traceability of Sender.**

Header information in a commercial e-mail is falsified or misrepresented for purposes of [Bus. & Prof. Code, § 17529.5, subd. \(a\)\(2\)](#), when it uses a sender domain name that neither identifies the actual sender on its face nor is readily traceable to the sender using a publicly available online database such as WHOIS. A commercial e-mailer's deliberate use of untraceable, privately registered domain names to conceal its identity violates [§ 17529.5, subd. \(a\)\(2\)](#).

[CA\(8\)](#)[] (8)

Advertising § 7—Spam E-mail—Material Misrepresentations—Domain Name—Identity and Traceability of Sender.

A domain name is not required to explicitly state the name of the sender, and any state law so requiring would likely be preempted. But while an e-mail with an accurate and traceable domain name makes no affirmative representation or statement of fact that is false, an e-mail with a made-up and untraceable domain name affirmatively and falsely represents the sender has no connection to the actual sender.

[CA\(9\)](#)[] (9)

Advertising § 7—Spam Email—Material Misrepresentations—Liability of Advertising Entities.

[Bus. & Prof. Code, § 17529.5](#), is specifically aimed at advertisers so that advertisers can be held liable for abuses perpetrated by their marketing agents. By its plain terms, the statute is not limited to entities that actually send or initiate a deceptive commercial e-mail, but applies more broadly to any entity that advertises in those e-mails.

[CA\(10\)](#)[] (10)

Agency § 3—Existence of Relationship—Question of Fact.

The existence of an agency relationship is usually a question of fact.

[CA\(11\)](#)[] (11)

Advertising § 7—Spam E-mail—Material Misrepresentations—Domain Name—Identity and Traceability of Sender—Liability of Advertiser for Conduct of Marketing Partners.

Recipients of unsolicited commercial emails were not precluded as a matter of law from stating a cause of action against the advertiser under [Bus. & Prof. Code, § 17529.5, subd. \(a\)\(2\)](#), based on allegations that the marketing partners who sent the emails deliberately used untraceable, privately registered domain names to conceal their identities. Accordingly, the trial court incorrectly sustained a demurrer as to those allegations.

[Advertising, § 14.15.\]](#)

Counsel: The Law Offices of Daniel Balsam, Daniel Balsam; Law Offices of Jacob Harker, Jacob Harker; Pacific Legal Group, Douglas A. Applegate for Plaintiffs and Appellants.

Sheppard, Mullin, Richter & Hampton, Jay Ramsey; Klein Moynihan Turco and Neil Asnen for Defendants and Respondents.

Judges: Opinion by Humes, P. J., with Margulies and Sanchez, JJ., concurring.

Opinion by: Humes, P. J.

Opinion

HUMES, P. J.—Plaintiffs Marta Greenberg, John Judge, Karen Mandel, Andrew Monroe, and Katie Van Cleave (collectively, the recipients) received unsolicited e-mails that advertised products sold by defendant Digital Media Solutions, LLC (DMS), which does business as Platinum Auto Warranty. The e-mails were not sent by DMS itself, but instead by third party “marketing partners” of DMS. The recipients sued DMS under [Business and Professions Code section 17529.5](#), which makes it unlawful to advertise in commercial e-mails under specified circumstances.

[CA\(1\)](#)[] (1) The trial court sustained DMS's demurrer and entered a judgment dismissing the case. We affirm in part and reverse in part. In the unpublished portion of this opinion, we conclude that the court correctly [*2] dismissed the recipients' challenge to the e-mails' subject lines. In the published portion, we conclude that the court erred by dismissing the recipients' challenge to the e-mails' domain names. [HNI](#)[] In doing so, we hold that a recipient of a commercial e-mail advertisement sent by a third party is not precluded as a matter of law from stating a cause of action under [section 17529.5](#) against the advertiser for the third party's failure to provide sufficient information disclosing or making traceable the third party's own identity. We further hold that such a cause is not precluded simply because such an e-mail sufficiently identifies the advertiser.

I.

FACTUAL AND PROCEDURAL BACKGROUND

¹All subsequent statutory references are to the Business and Professions Code.

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The recipients initiated this action in late 2018. Their complaint alleged that they received at least 282 unsolicited commercial e-mail advertisements (spam). (See [§ 17529.1, subd. \(o\)](#).) The spam was allegedly from “third-party spam networks and publishers ([m]arketing [p]artners),” including defendant “Bilco Media Inc.,” which was alleged to be “an unknown entity of unknown organization with an unknown primary place of business”; defendant Allan Hughes; and other defendant marketing partners identified as Does one through five.² The recipients alleged [*3] that DMS contracted with these marketing partners to send e-mail advertisements on its behalf, and these partners sent “some, if not all,” of the 282 unsolicited e-mails.

The complaint contained one cause of action under [section 17529.5, subdivision \(a\)\(2\) \(subdivision \(a\)\(2\)\)](#). Specifically, the complaint alleged that the e-mails the recipients received contained “materially false and deceptive information” pertaining to the e-mails’ domain names, “From Names,” and “Subject Lines.”³

As to the domain names, the complaint alleged that the 282 e-mails included dozens of different ones, most of which neither identified the actual sender on their faces nor were readily traceable. The complaint reproduced a “representative sample” of an e-mail received by plaintiff Greenberg, which was purportedly sent by “Vehicle.Service.Plan@badealz.com.” The complaint alleged that “81% [of the e-mails at issue] were sent from domain names,” like badealz.com, “that were registered to [defendant Bilco Media Inc.], an entity that does not exist, and that claims an address at a commercial mail receiving agency without specifying the box number.”

As to the from names, the complaint alleged that they often consisted of the phrase “‘Vehicle Service Plan[,]’ which [was] [*4] generic text that misrepresent[ed] who[m] the spam [was] really from.” Other times, the from names consisted of the similarly generic phrase of “Vehicle Protection Info.” According to the complaint, the e-mails “[did] not identify the sender in [their bodies], so the only way a recipient could even attempt to identify the [m]arketing

² The only defendant that appeared below was DMS, and the liability of the other named defendants is not at issue in this appeal.

³ “Domain name” is statutorily defined as “any alphanumeric designation that is registered with or assigned by any domain name registrar as part of an electronic address on the Internet.” ([§ 17529.1, subd. \(e\)](#).) The complaint defines “From Name” as the part of an e-mail’s “From Line” that does not include the sender’s e-mail address. “So, for example, if an e-mail’s From Line says: ‘John Doe <johndoe@yahoo.com>’, the From Name is just ‘John Doe.’” The complaint does not define “Subject Line.”

[p]artner responsible for the spam [was] to click on a link contained in the spam or search the source code of the email.”

Finally, as to the subject lines, the complaint alleged that they contained “falsified and/or misrepresented information.” The subject line of the sample e-mail to Greenberg included her e-mail address as follows: “[username]@yahoo.com, please confirm your extended warranty plan.” According to the complaint, subject lines containing the recipient’s e-mail address and referring to an existing warranty plan “falsely reference[d] a preexisting business relationship that does not in fact exist, for the purpose of inducing the recipient into believing that the e-mail [was] from an entity with whom the recipient has done business, which [was] designed to lure the recipient into clicking and opening the spam, and ultimately, sending money to” DMS. [*5]

The body of the sample e-mail stated:

“:: Your Vehicle’s Warranty May Be Expiring Within 28 Days ::

“View your warranty options below and see how you can prevent car trouble from breaking your bank.

“Protect yourself from costly vehicle repairs. Without protection, auto issues could lead to severe financial hardship.”

A box below this text read, “View Your Warranty Options Here.” This box was a hyperlink to platinumautowarranty.com, a website operated by DMS. The body of the e-mail closed with an unsubscribe notice and the following business name and address: “Transparent Auto Warranty, 7000 W. Palmetto Park Rd. Suite 210, Boca Raton, FL 33433.”

DMS demurred to the complaint, arguing that the recipients could not state a claim for a violation of [subdivision \(a\)\(2\)](#) in light of [Rosolowski v. Guthy-Renker LLC \(2014\) 230 Cal.App.4th 1403 /179 Cal. Rptr. 3d 558](#) (*Rosolowski*). The trial court largely agreed. In sustaining the demurrer, the court noted that the bodies of the e-mails identified Transparent Auto Warranty, and the recipients stated they could amend the complaint to allege that DMS is the registrant and operator of transparentautowarranty.com. The court also observed that the complaint alleged a recipient could click on a hyperlink in the e-mails’ bodies and be taken to platinumautowarranty.com, [*6] another website registered to DMS. The court determined that the recipients therefore could not “plausibly allege that [DMS] attempted to conceal its identity, as the clear purpose of its e-mails, apparent from their face, was to drive traffic to its [Platinum Auto Warranty] website.”

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Although the trial court ruled that the recipients could not state a claim regarding the e-mails' subject lines under subsection (a)(2), it granted leave to amend the complaint to allege a claim that the subject lines were misleading under section 17529.5, subsection (a)(3) (subsection (a)(3)). After the recipients declined to amend the complaint, the court dismissed it with prejudice and entered judgment in favor of DMS.

II.

DISCUSSION

A. Legal Background and Standard of Review

CA(2)[] (2) California has a long-held antipathy toward spam. In 2003, the Legislature passed Senate Bill No. 186 (2003–2004 Reg. Sess.), sweeping legislation that would have banned all spam sent to California residents. Before the law went into effect, however, Congress reacted to the growing ““patchwork of state laws”” governing spam by enacting the CAN-SPAM Act of 2003 (15 U.S.C. § 7701 et seq.) (CAN-SPAM Act or Act).⁴ (Rosolowski, supra, 230 Cal.App.4th at p. 1412.) HN2[] “The Act does “not ban spam outright, but rather provides a code of conduct to regulate commercial e-mail messaging practices. Stated in general [*7] terms, the ... Act prohibits such practices as transmitting messages with ‘deceptive subject headings’ or ‘header information that is materially false or materially misleading.’ [Citation.] The Act also imposes requirements regarding content, format, and labeling. For instance, unsolicited e-mail messages must include the sender’s physical postal address, indicate they are advertisements or solicitations, and notify recipients of their ability to decline further mailings.””” (*Ibid.*)

CA(3)[] (3) With the passage of the Act, many state laws regulating spam, including much of Senate Bill No. 186 (2003–2004 Reg. Sess.), were preempted. HN3[] The Act includes one exception to preemption, however: A state statute is not preempted “to the extent that any such statute ... prohibits falsity or deception in any portion of a commercial [e-mail] message or information attached thereto.” (15 U.S.C. § 7707(b)(1).) Section 17529.5, which was adopted in 2003 as part of Senate Bill No. 186, falls within this exception. (Rosolowski, supra, 230 Cal.App.4th at pp. 1412–1413.)

In relevant part, subsection (a) of section 17529.5 provides that “[i]t is unlawful for any person or entity to advertise in a commercial e-mail advertisement either sent from California

or sent to a California [e-mail] address under any of the following circumstances: [¶] ... [¶]

“(2) The e-mail [*8] 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.”

HN4[] CA(4)[] (4) Thus, section 17529.5, subsection (a)(2) makes it illegal to advertise with e-mail that has header information that is falsified, misrepresented, or forged, and subsection (a)(3) makes it illegal to advertise with e-mail that has a subject line that is reasonably likely to mislead a recipient about a material fact. If the representation in the header information or subject line is not material, its regulation is preempted by the CAN-SPAM Act. (See *Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 346 [110 Cal. Rptr. 3d 628, 232 P.3d 625] (*Kleffman*); *Omega World Travel, Inc. v. Mummagraphics, Inc.* (4th Cir. 2006) 469 F.3d 348, 355.)

HN5[] CA(5)[] (5) We review de novo a claim that a demurrer was improperly sustained. (Ram v. OneWest Bank, FSB (2015) 234 Cal.App.4th 1, 9 [183 Cal. Rptr. 3d 638].) In doing so, “[w]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions[,] or conclusions of law.’ [Citation.] ‘[W]e are not bound by the trial court’s analysis’ of questions of [*9] law and ‘independently construe statutory law.’” (*Id. at pp. 9–10.*)

B. *The Trial Court Properly Rejected the Recipients’ Challenge to the E-mails’ Subject Lines.* [NOT CERTIFIED FOR PUBLICATION]

C. *The Trial Court Incorrectly Dismissed the Recipients’ Challenge to the E-mails’ Domain Names.*

A closer question is presented by the recipients’ claim that the e-mails’ domain names and from names violated section 17529.5, subsection (a)(2). As we have said, the recipients alleged that this header information was unlawful both because the from names consisted of generic phrases like “Vehicle Service Plan” or “Vehicle Protection Info” and the domain names failed to identify the actual senders—i.e., DMS’s marketing partners—or provide enough information to

⁴The full name of the legislation is the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003.

* See footnote, *ante*, page ____.

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make them readily traceable using a publicly available online database. We conclude that the recipients may proceed on the portion of the claim involving domain names.

1. Applicable case law

Several decisions bear on our analysis, starting with *Kleffman*. The plaintiff in that case alleged that the defendant, through its marketing partners, sent him unsolicited e-mail advertisements for its broadband telephone services using a variety of peculiar domain names, such as superhugeterm.com; [*10] urgrtquirkz.com; and ourgossipfrom.com. (*Kleffman, supra*, 49 Cal.4th at p. 338.) The plaintiff asserted that the defendant was liable under section 17529.5, subdivision (a)(2) because these domain names failed to identify the true sender and reduced the likelihood that the e-mail would be identified and blocked as spam. (*Kleffman*, at p. 338.)

CA(6)[T] (6) The Supreme Court rejected the plaintiff's claim. It concluded that the e-mails "neither contained nor were accompanied by 'falsified ... or forged header information' within the meaning of [section 17529.5, subdivision (a)(2)]," because the domain names "actually exist[ed] and [were] technically accurate, literally correct, and fully traceable to [the defendant's] marketing agents." (*Kleffman, supra*, 49 Cal.4th at p. 340.) The plaintiff argued that even if the information was not falsified or forged, it was nonetheless "misrepresented" because the domain names' random nature created the misleading impression that the e-mails were from different entities when in fact it was all from the defendant, albeit sent through its marketing agents. (*Id.* at pp. 341–342.) While the court declined to define the full scope of the statutory phrase "'misrepresented ... header information,'" it held that "a single e-mail with an accurate and traceable domain name neither contains nor is accompanied by 'misrepresented ... header information' [*11] within the meaning of [subdivision (a)(2)] merely because its domain name is ... 'random,' 'varied,' 'garbled,' and 'nonsensical' when viewed in conjunction with domain names used in other e-mails. [Fn. omitted.] **HN6[T]** An e-mail with an accurate and traceable domain name makes no *affirmative* representation or statement of fact that is false ... [and] cannot reasonably be understood to be an implied assertion that the source of that e-mail is different from the source of another e-mail containing a different domain name." (*Id.* at pp. 346–347 & fn. 11.)

Subsequently, this division considered e-mail advertisements whose domain names did not identify the actual sender and were not "readily traceable to the sender." (*Balsam v. Trancos, Inc.* (2012) 203 Cal.App.4th 1083, 1101 [138 Cal. Rptr. 3d 108] (*Balsam*)). Unlike the *Kleffman* defendant, the main defendant in *Balsam* was not the actual advertiser but

instead a third party Internet advertising business that advertisers paid to send offers to e-mail addresses the third party had acquired. (*Id.* at pp. 1088–1089.) It was undisputed for purposes of the appeal that the third party "intentionally used only privately registered, meaningless domain names in order to prevent e-mail recipients from being able to identify it as the sender, or to contact it except by sending a blind reply e-mail to [*12] an address the [recipient] would have no way of linking to [the third party]." (*Id.* at p. 1096.)

CA(7)[T] (7) In affirming a posttrial judgment entered against the third party, *Balsam* held that **HN7[T]** "header information in a commercial e-mail is falsified or misrepresented for purposes of [section 17529.5, subdivision (a)(2)] when it uses a sender domain name that neither identifies the actual sender on its face nor is readily traceable to the sender using a publicly available online database such as WHOIS."⁷ (*Balsam, supra*, 203 Cal.App.4th at pp. 1093, 1101, italics omitted.) We decided that there was "good reason" to conclude that "a commercial e-mailer's deliberate use of untraceable, privately registered domain names to conceal its identity" violates subdivision (a)(2), given that each of the millions of spam sent each month "has the potential to cause harm to the recipient, ranging from mere annoyance or offense to more tangible harms such as inducing the recipient to visit Web sites that place malware or viruses on their computer, defraud them out of money, or facilitate identi[ty] theft." (*Balsam*, at pp. 1098–1099.)

Two years after *Balsam*, the Second District Court of Appeal decided *Rosolowski*. In that case, the sender of the e-mails at issue was the actual advertiser. (*Rosolowski, supra*, 230 Cal.App.4th at p. 1416.) The plaintiffs sued on the basis that "instead of identifying [*13] the sender as [the defendant], [the e-mails] indicated the sender was 'Proactiv Special Offer,' 'Wen Hair Care,' 'Proactiv Special Bonus Deal,' 'Wen Healthy Hair,' 'Wen by Chaz Dean,' 'Proactiv Bonus Deal,' 'Proactiv Bonus Gift,' and 'Proactiv: Special Offer,' which are not names or registered fictitious business names of existing entities, and are not traceable to [the defendant] via a WHOIS search." (*Id.* at pp. 1407–1408.)

The Second District concluded that the plaintiffs failed to state a cause of action under section 17529.5, subdivision (a)(2), however, because "the body of the e-mails was sufficient to enable the recipient to identify ... the sender." (*Rosolowski, supra*, 230 Cal.App.4th at p. 1416.) As the court

⁷ "WHOIS 'is a public[ly] available online database through which users can access information regarding domains, including the registrant's name, address, phone number, and e-mail address.'" (*Rosolowski, supra*, 230 Cal.App.4th at p. 1407, fn. 3.)

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explained, “The e-mails were advertisements for [the defendant’s] various consumer brands. The emails provided a hyperlink to [the defendant’s] Web site, and provided an unsubscribe notice as well as a physical address.” (*Ibid.*) Thus, the plaintiffs could not “plausibly allege that [the defendant] attempted to conceal its identity, as the clear purpose of the e-mails was to drive traffic to [the defendant’s] Web site.” (*Ibid.*) The court held that “a header line in a commercial e-mail advertisement does not misrepresent the identity of the sender merely because it does not [*14] identify the official name of the entity which sent the e-mail, or merely because it does not identify an entity whose domain name is traceable from an online database, provided the sender’s identity is readily ascertainable from the body of the e-mail.” (*Id. at p. 1407.*)

2. Analysis

With these cases in mind, we consider the recipients’ allegations here. We begin by agreeing with DMS that the recipients cannot state a cause of action under [section 17529.5, subdivision \(a\)\(2\)](#) based on the allegations that the e-mails’ from names consisted of generic phrases like “Vehicle Service Plan” or “Vehicle Protection Info.” The recipients contend that these generic phrases “misrepresent who[m] the spams are from.” But similar to the domain names in *Kleffman*, which also failed to “make clear the identity of either the sender or the merchant-advertiser on whose behalf the e-mail advertisement is sent,” such phrases “do[] not make any ‘representation’ regarding the e-mail’s source, either express or implied, within the common understanding of that term, so [they] cannot be said to constitute ‘misrepresented’ information within the meaning of [[subdivision \(a\)\(2\)](#)].” (*Kleffman, supra, 49 Cal.4th at pp. 345–346.*) Moreover, as in *Kleffman*, “a contrary conclusion would raise significant preemption problems,” given [*15] federal authority holding that the [CAN-SPAM Act](#) preempts “a state law requiring an e-mail’s ‘from’ field to include the name of the person or entity who actually sent the e-mail or who hired the sender.” (*Kleffman, at p. 346, citing [Gordon v. Virtumundo, Inc. \(9th Cir. 2009\) 575 F.3d 1040, 1064.](#)*)

We come to a different conclusion, however, as to the allegations regarding the domain names. Similar to the facts established in *Balsam*, the recipients’ allegations here are that the domain names neither disclosed the senders’ identities nor provided sufficient information to trace those identities. The circumstances in *Rosolowski* were different because the sender there was also the actual advertiser, and its identity was disclosed in the body of the e-mail. In contrast, nothing here made the “sender’s identity … readily ascertainable from the body of the e-mail[s].” (*Rosolowski, supra, 230 Cal.App.4th at p. 1407.*) Thus, even assuming, without

deciding, that *Rosolowski* correctly held that information in the body of an e-mail may “cure” header information that would otherwise violate [subdivision \(a\)\(2\)](#), we conclude that principle does not apply here because nothing in the body of the e-mails made the identities of DMS’s marketing partners readily ascertainable.

[CA\(8\)\[↑\]](#) (8) We recognize that, as we stated above, [HN8\[↑\]](#) a domain name is not required to [*16] explicitly state the name of the sender, and any state law so requiring would likely be preempted. (*Kleffman, supra, 49 Cal.4th at pp. 345–346.*) But while “an e-mail with an accurate *and traceable* domain name makes no affirmative representation or statement of fact that is false, an e-mail with a made-up *and untraceable* domain name affirmatively *and falsely* represents the sender has no connection to [the actual sender].” (*Balsam, supra, 203 Cal.App.4th at p. 1098.*) The complaint here alleges that the domain names were essentially made up and untraceable, and the materiality of such representations is not appropriate to resolve on demurrer. (See *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 332–333 [120 Cal.Rptr.3d 741, 246 P.3d 877].) Particularly given *Balsam*’s discussion of the issue (see *Balsam, at pp. 1098–1099*), we cannot conclude as a matter of law that reasonable spam recipients would attach no importance to knowing or being able to trace the identity of the senders.

[CA\(9\)\[↑\]](#) (9) The main difference between *Balsam* and this case is the nature of the defendants. As we have said, in *Balsam* the defendant was not the advertiser but a third party that sent e-mail on the advertiser’s behalf, and it was sued for failing to identify *itself* sufficiently. Here, in contrast, DMS is the advertiser, and it is being sued for third-party senders’ failure to identify *themselves* sufficiently. [HN9\[↑\]](#) But as [*17] DMS acknowledges, “[[selection 17529.5](#) is specifically aimed at advertisers so that advertisers can be held liable for abuses perpetrated by their marketing agents.]” (See *Hypertouch, Inc. v. ValueClick, Inc.* (2011) 192 Cal.App.4th 805, 820 [123 Cal. Rptr. 3d 8] [“by its plain terms, the statute is not limited to entities that actually send or initiate a deceptive commercial e-mail, but applies more broadly to any entity that advertises in those e-mails”]; see also *Rosolowski, supra, 230 Cal.App.4th at p. 1411.*) We have already rejected DMS’s claim that it is immune from liability based on the e-mails’ domain names so long as *it* is identified in the body of an e-mail, and we perceive no other reason it should not be responsible for its marketing partners’ misrepresentation of their own identities. We observe that [section 17500](#)—a provision of the unfair competition law that is similar to [17529.5, subdivision \(a\)\(2\)](#)—“incorporates the concept of principal-agent liability,” meaning that “persons can be found liable for misleading advertising and unfair business practices under normal agency theory.” (*People v.*

JTH Tax, Inc. (2013) 212 Cal.App.4th 1219, 1242 [151 Cal. Rptr. 3d 728].) [HN10](#) [↑] [CA\(10\)](#) [↑] (10) “The existence of an agency relationship is usually a question of fact” (*Violette v. Shoup* (1993) 16 Cal.App.4th 611, 619 [20 Cal. Rptr. 2d 358]), and here, the recipients have alleged that DMS had a contractual relationship with at least some of the marketing partners who sent the e-mails.⁸ [CA\(11\)](#) [↑] (11) Given these circumstances, we conclude that the recipients [*18] are not precluded as a matter of law from stating a cause of action against DMS under [subdivision \(a\)\(2\)](#) based on the domain-name allegations. Accordingly, the trial court incorrectly sustained the demurrer as to these allegations.

III.

DISPOSITION

The trial court's demurrer rulings are reversed in part and affirmed in part. We reverse the ruling that the recipients did not state a claim under [section 17529.5, subdivision \(a\)\(2\)](#), based on the domain-name allegations, but we affirm the balance of the order sustaining the demurrer. The judgment of dismissal is reversed, and the matter is remanded for further proceedings consistent with this opinion.

Margulies, J., and Sanchez, J., concurred.

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⁸The complaint alleged that the marketing partners—which have never appeared in this action—are independently liable under [section 17529.5, subdivision \(a\)\(2\)](#) “on the basis of civil conspiracy.” In contrast, DMS suggests that only an advertiser, but not “a third-party marketing agent,” can be liable under [subdivision \(a\)\(2\)](#). We need not and do not resolve the issue here, but we note that there is conflicting authority on whether spam recipients can state a claim under [subdivision \(a\)\(2\)](#) against entities that send spam but are not the actual advertisers. California appellate cases have held or assumed they can. (E.g., *Balsam, supra*, 203 Cal.App.4th at p. 1101; *Hypertouch, Inc. v. ValueClick, Inc., supra*, 192 Cal.App.4th at p. 820.) At least one federal district court has held they cannot. (*Blanchard v. Fluent, Inc. (N.D.Cal., Sept. 22, 2017, No. 17-cv-04497-MMC)* 2017 WL 4224768, at pp. *2-*3; see *Bank v. Hydra Group LLC (E.D.N.Y. Mar. 31, 2019, No. 10 Civ. 1770 (VMS))* 2019 WL 1434081, at p. *10 [addressing liability under [subd. \(a\)\(3\)](#)].)