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LAURE MAJCHERCZYK

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

DANIEL L. BALSAM, an individual,

Plaintiff,

vs.

TRANCOS, INC., a California corporation; LEWIS J. WRIGHT, an Individual; BRIAN NELSON, an Individual; LAURE MAJCHERCZYK, an Individual; AD SPONSORS LLC, an Oklahoma limited liability company; CASHONLINEAMERICA.COM LLC, a New York limited liability company; AFFILIATENETWORK.COM LLC, a New York limited liability company; AFFILIATENETWORK.COM MARKETING LLC, a New York limited liability company; EHARMONY.COM INC., a California corporation; QUINSTREET INC., a California corporation; STRATEGIC FINANCIAL PUBLISHING INC., an Indiana corporation; and DOES 1-100,

Defendants.

Case No. CIV471797

MEMORANDUM OF POINTS AND AUTHORITIES ON BEHALF OF DEFENDANTS TRANCOS, INC., BRIAN NELSON, AND LAURE MAJCHERCZYK IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT/ ADJUDICATION FILED BY PLAINTIFF

Date: September 25, 2009
Time: 9:00 AM
Dept: 3

Complaint filed on April 4, 2008
Trial Date: October 13, 2009

CAPTION – NO TEXT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Statutes

Federal Statutes:

California Statutes:

Cases

1. INTRODUCTION

Defendant Trancos is a leading online advertising agency that has delivered millions of customers on a pay-for-performance basis to small, medium and large businesses worldwide. The company has developed proprietary ad serving optimization technology across its network to help clients create relationships with new customers and partners. In 2007, Trancos was ranked 90 on *Inc.* Magazine's annual list of America's 500 fastest growing private companies. Trancos is a Better Business Bureau Accredited Business, with an A+ rating. Declaration of Brian Nelson at ¶7.

This action is brought against Trancos and its Chief Executive Officer, Brian Nelson, and its Chief Operations Officer, Laure Majcherczyk, by a professional Plaintiff who has built a litigation factory.[1] Plaintiff in this matter, a member of the California Bar, uses his efforts to further his activities as a professional Plaintiff. Plaintiff's claims are based upon his flawed premise that the law imposes strict liability on advertisers to pay outrageous sums of money based on allegedly defective "headers or from lines" that actually deceived no one, and certainly not Plaintiff! Courts have routinely rejected this premise and require a plaintiff to establish the traditional elements of fraud, *i.e.* scienter, intent, justifiable reliance and damage. This Plaintiff does not allege any of those elements, let alone submit admissible evidence that would support such an allegation.

Plaintiff is simply in the business of hoping that his groundless accusations would impose a sufficient *in terrorem* effect that he could reap a windfall settlement. As noted in the threatening e-mail Plaintiff sent to Defendants on March 5, 2008:

> In other words, if there is going to be litigation, it will be in superior court, where I will be represented by counsel. This has several implications for Trancos. First, corporations MUST be represented by counsel; you cannot appear personally to defend, which means that you're going to be paying thousands of dollars in attorney fees (unless

[1] Plaintiff maintains a website at danhatesspam.com. On his website, Plaintiff announces that in Small Claims' Court, he has "33 wins, and counting." Plaintiff admitted in his Deposition that he has filed "roughly 50 [lawsuits] in small claims since 2002, and probably 18 or so in superior court since 2003." See Declaration of Robert L. Nelson at ¶1, and **Exhibit "1" to the Table of Exhibits**, which is a portion of the Deposition testimony of Plaintiff at 25:2-8. Also on his Website, Balsam posts a "No Spam Policy," by which he warns persons, businesses and entities that send any unsolicited commercial email to any email address containing "danbalsam.com" that they are entering into a contract with him. Among the stated terms of the contract are that senders will "be subject to a $25,000.00 fee [payable to Balsam] for reading and responding," that the sender will pay "liquidated damages" of at least $10,000.00 for selling, bartering or giving away Balsam's email address, that the sender agrees "that California Business & Professions Code §17529.5 is not preempted by the Federal CAN-SPAM Act," and that if any suit or action is brought "to enforce any provision in this contract, Dan Balsam shall be entitled to all costs and expenses of maintaining such suit or action, including reasonable attorneys' fees." Finally, Balsam proudly boasts on his Website that he is "quite happy and flattered that my name has become shorthand for "Here's someone who will sue you if you send unlawful spam." See Declaration of Robert L. Nelson at ¶7, and Exhibit "6" to the Table of Exhibits, which are portions of Plaintiff's website.

> you plan to risk a default judgment). Second, pursuant to Bus. & Prof. Code 17529.5, you're going to end up paying MY attorney fees too. Third, you're going to be paying damages of $1,000 per email, not the $500 that I offered you as a settlement figure. Fourth, I suspect the discovery process is going to be very uncomfortable for you, because you're going to be making public admissions as to your fraudulent intent and activities. Fifth, in superior court I can get an injunction, and any violations of the injunction may be chargeable as contempt. Sixth, it creates a pubic record. See Declaration of Brian Nelson at ¶5, and Exhibit "7" to the Table of Exhibits.

Plaintiff, while trying to intimate Defendants into a civil settlement, also threatened Defendants with false criminal charges on February 22, 2009. "Also, all sending domain names were privately registered, which is an express violation of 18 USC 1037(a)(4), (d)(2)." See Declaration of Brian Nelson at ¶6, and Exhibit "8" to the Table of Exhibits.

Such threats are specifically condemned by California Rules of Professional Conduct, Rule 5-100: "A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute."[2]

The California Supreme court declined to grant a motion to strike on a civil complaint that had been brought against an attorney who had threatened criminal and public disclosures to coerce a settlement from defendant

> At the core of Mauro's letter are threats to publicly accuse Flatley of rape and to report and publicly accuse him of other unspecified violations of various laws unless he ``settled" by paying a sum of money to Robertson of which Mauro would receive 40 percent. In his followup phone calls, Mauro named the price of his and Robertson's silence as ``seven figures" or, at minimum, $ 1 million. The key passage in Mauro's letter is at page 3 where Flatley is warned that, unless he settles, ``an in-depth investigation" will be conducted into his personal assets to determine punitive damages and this information will then ``**BECOME A MATTER OF PUBLIC RECORD, AS IT MUST BE FILED WITH THE COURT . . . . [] Any and all information, including Immigration, Social Security Issuances and Use, and IRS and various State Tax Levies and information will be exposed.** We are positive the media worldwide will enjoy what they find." This warning is repeated in the fifth paragraph: ``**[A]ll pertinent information and documentation, if in violation of any U.S. Federal, Immigration, I.R.S., S.S. Admin., U.S. State, Local, Commonwealth U.K., or International Laws, shall immediately [be] turned over to any and all appropriate authorities.**" Finally, Flatley is warned that once the lawsuit is filed additional causes of action ``shall arise" including ``Defamatory comments, Civil Conspiracy, Reckless Supervision" which are ``just the beginning" and that ``ample evidence" exists ``to prove each and every element for all these additional causes of action. Again, these actions allow for **Punitive Damages.**" (Underlying added; bold and all caps are in the original)

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[2] Plaintiff was admitted to the State Bar in December 2008, just months after he threatened Defendants. As set forth in footnote 1, *supra*, Plaintiff is a professional plaintiff and repeatedly brags on his website about his knowledge of the law. Accordingly, at the time that Plaintiff made these threats, he knew or should have known that what he was doing was against the State Bar Rules for attorneys.

> ...
> Evaluating Mauro's conduct, we conclude that the letter and subsequent phone calls constitute criminal extortion as a matter of law.
> *Michael Flatley v. D. Dean Mauro* (2006) 39 Cal 4th 299, 329

Most recently, the Ninth Circuit on August 6, 2009, in *James S. Gordon Jr. v. Virtumundo, Inc*, 2009 WL 2393433 ("*Gordon*"), in a case eerily similar to this one, brought by the same Plaintiff's attorney as in this case (Timothy J. Walton), again confirmed the holding of most Courts that the type of claim made in this action has been preempted by federal law, and that the Courts are not supportive of litigation mills. Circuit Judge Gould, in his concurring opinion at p. *20, offered this sage description of Gordon's actions:

> The most pertinent conclusion for me in this case, one that I reach after a careful evaluation of the district court's comprehensive factual findings and cogent legal analysis, is that Gordon was seeking to use the CAN-SPAM Act to build a litigation factory for his personal financial benefit.

Furthermore, Circuit Judge Gould also explained *at p. *21 that:*.

> Thus the common law developed ample remedies for persons who had suffered grievous harms, but, as I understand the history of our common law, it did not develop remedies for people who gratuitously created circumstances that would support a legal claim and acted with the chief aim of collecting damages.

This description defines who Plaintiff is. As will be discussed, infra, Plaintiff fails miserably to meet his burden of persuasion that there is no triable issue of material fact and that he is entitled to a judgment as a matter of law. Code of Civil Procedure §437c(o)(1); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850. Most significantly, however, Plaintiff's Motion is fatally flawed because he offers no admissible evidence to support the Motion.

2. STATEMENT OF LAW

A. PLAINTIFF'S SEPARATE STATEMENT OF UNDISPUTED FACTS IS FATALLY DEFECTIVE

Plaintiff's Motion is fatally defective for lack of admissible evidence to support the alleged Separate Statement of Undisputed Material Facts submitted by Plaintiff.

As set forth in detail in Defendants' Response and Opposition to Plaintiff's Separate Statement

of Undisputed Material Facts in Support Of Plaintiff's Motion for Summary Judgment/Adjudication by Defendants, Trancos, Inc., Brian Nelson, and Laure Majcherczyk, and in Defendants' Objections to Evidence re Plaintiff Daniel L. Balsam's Motion for Summary Judgment/Adjudication by Defendants, Trancos, Inc., Brian Nelson and Laure Majcherczyk, Plaintiff has failed to comply with the requirements of the Code of Civil Procedure Section 437c.

> The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken. The supporting papers shall include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denial of the motion.
> *C.C.P. § 437c (b)(1)*
>
> Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations.
> *C.C.P. § 437c (d)*

Plaintiff's Statement of Undisputed Facts is a jumble of statements unsupported by admissible evidence, speculation, misrepresentations of the alleged supporting evidence and legal arguments. "The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for the denial of the motion" C.C.P. §437c(b)(1).

Accordingly, this Court should disregard Plaintiff's Statement of Undisputed Facts in its entirety and summarily deny the instant Motion.

B. PLAINTIFF'S CLAIM IS PREEMPTED BY FEDERAL LAW

1. Introduction

Even if Plaintiff submitted a proper Statement of Undisputed Facts, which he did not, his claims allegedly arising from a violation of Business and Professions Code §17529, *et seq.* (California Act) are preempted by federal law under the CAN-SPAM Act.

The California Act - On September 23, 2003, California enacted a ban on Unsolicited Commercial Emails (UCE). Business and Professions Code §17529, et seq. ("California Act").

Business and Professions Code §17529.5, contains the meat of the California Act, and provides, in pertinent part, that:

///

(a) It is unlawful for any person or entity to advertise in a commercial email advertisement either sent from California or sent to a California electronic mail address under any of the following circumstances:

(1) The email advertisement contains or is accompanied by a third-party's domain name without the permission of the third party.

(2) The email advertisement contains or is accompanied by falsified, misrepresented, or forged header information. This paragraph does not apply to truthful information used by a third party who has been lawfully authorized by the advertiser to use that information.

(3) The email 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.

(b)(1)(A) In addition to any other remedies provided by any other provision of law, the following may bring an action against a person or entity that violates any provision of this section:

. . . .

(iii) A recipient of an unsolicited commercial email advertisement, as defined in Section 17529.1.

(B) A person or entity bringing an action pursuant to subparagraph (A) may recover either or both of the following:

(i) Actual damages.

(ii) Liquidated damages of one thousand dollars ($1,000) for each unsolicited commercial email advertisement transmitted in violation of this section, up to one million dollars ($1,000,000) per incident.

2. The Federal CAN-SPAM Act Preempts State Law

Two points were stressed throughout CAN-SPAM's legislative history: (i) marketers' First Amendment right to utilize UCE should be protected; and, (ii) state laws should be preempted to establish a single uniform national standard to prevent the patchwork of state laws. This is reflected in the language of CAN-SPAM which expressly permits unsolicited commercial email; declares there "is a substantial government interest in regulation of commercial electronic mail on a nationwide basis" and preempts "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. §§7701(a)(11) and (b)(1), 7704(5), 7707(b)(1).[3]

[3] Specifically, 15 U.S.C. §7701(a)(11) provides that:

(a) The Congress finds the following: . . .

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

> In approving the bill, the Senate Commerce, Science and Transportation Committee explained: Given the inherently interstate nature of e-mail communications, the . . . creation of one national standard is a proper exercise of the Congress's power to regulate interstate commerce that is essential to resolving the significant harms from spam faced by American consumers, organizations, and businesses throughout the United States. 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 State law to comply.
> S. Rep. No. 102, 108th Cong, 1st Sess 21-22 (2003).

Accordingly, to ensure that American businesses had clear guidance on commercial e-mail advertising, Congress included in the CAN-SPAM Act a provision preempting "all state laws expressly regulating the use of electronic mail to send commercial messages, except to the extent that [the state statute] prohibits **falsity or deception** in any portion" of a commercial email. (Emphasis added) 15 U.S.C. §7707(b)(1). Thus, **courts have consistently held that the preemption clause in the CAN-SPAM Act "left states room only to extend their traditional fraud prohibitions and deception prohibitions into cyberspace.**" (Emphasis added) See *Kleffman v. Vonage Holdings Corp.*, 2007 WL 1518650 at *5 (C.D. Cal. May 23, 2007).[4]

Defendants therefore submit that §17529.5, with a limited fraud exception, is preempted by the provisions of the CAN-SPAM Act; the CAN-SPAM preempts the entirety of §17529, including §17529.5(b), except "to the extent" it regulates fraudulent email headers and subject lines. 15 U.S.C.

> 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.

[4] This case was not reported in F. Supp. However, this issue has been certified to the California Supreme Court by the Ninth Circuit in *Kleffman* at 551 F.3d 847 (9th Cir., 2008). In so certifying this case, the Ninth Circuit stated at 848-849 that:

> Pursuant to Rule 8.548 of the California Rules of Court, a panel of the United States Court of Appeals for the Ninth Circuit, before which this appeal is pending, certifies to the California Supreme Court a question of law concerning interpretation of California's anti-spam law, Cal. Bus. & Prof.Code § 17529.5. The decisions of the California Courts of Appeal and California Supreme Court provide no precedent to the certified question, and the answer may be determinative of this appeal.
>
> The California Supreme Court is respectfully requested to answer the certified question presented below. The phrasing of the issue is not meant to restrict the court's consideration of the case. We agree to follow the answer provided by the California Supreme Court. If the California Supreme Court declines certification, the issue will be resolved according to our perception of California law.
>
> . . . .
>
> The question of law to be answered is:
>
> Does sending unsolicited commercial email advertisements from multiple domain names for the purpose of bypassing spam filters constitute falsified, misrepresented, or forged header information under Cal. Bus. & Prof.Code § 17529.5(a)(2)?

§7707. Thus, **to the extent §17529.5 regulates anything beyond fraudulent e-mail headers and subject lines it is preempted by CAN-SPAM.**

In explaining the enactment of the CAN-SPAM Act, the Court in *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, (4th Cir., November 17, 2006) ("*Omega*"), and most recently by the Ninth Circuit in *Gordon, supra* at 2009 WL 2393433, addressed the issue of preemption. The facts of *Gordon* and *Omega* are strikingly similar to those alleged by Plaintiff Balsam in this case (and the pre-suit threats made by Balsam). In both *Omega* and *Gordon*, the plaintiffs operated litigation mills, operated websites devoted to opposing "spam" messages and provided other internet related services and alleged that they received unwanted commercial e-mails that contained inaccuracies. The plaintiffs alleged that the messages they received inaccurately stated that the recipient had signed up on the sender's mailing list when it had not. The plaintiffs also asserted that the identity of the sender was misleading. When the plaintiffs received the e-mails, rather than utilizing the opt-out link on the e-mail, they called the defendants making demands for money.

In both *Gordon* and *Omega,* plaintiffs filed suit and the trial courts were faced with motions for summary judgment. Summary Judgments were granted by the trial courts and the Circuit Courts of Appeal upheld a finding that the CAN-SPAM Act preempted the state claims. In its discussion upholding preemption, the *Omega* Appeals Court stated at pp. 352-353 as follows:

> . . . . **First, under our federal system, we do not presume that Congress intends to clear whatever field it enters. Instead, we start from "the basic assumption that Congress did not intend to displace state law**," *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981), and "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," *Medtronic*, 518 U.S. at 485, 116 S.Ct. 2240 (citations omitted). Second, from this departure point, we address preemption issues in accordance with the "oft-repeated comment ... that **'[t]he purpose of Congress is the ultimate touchstone' in every preemption case.**" *Id.* (alteration in original) (citation omitted).

The Court continued its discussion at pp. 353-354 as follows:

> . . . **Since the word "falsity" considered in isolation does not unambiguously establish the scope of the preemption clause, we read "falsity" in light of the clause as a whole. Reading "falsity" as referring to traditionally tortious or wrongful conduct is the interpretation most compatible with the maxim of *noscitur a sociis*, that a word is generally known by the company that it keeps.** See, *e.g.*, *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961); *Neal v. Clark*, 95 U.S. 704, 708-09, 24 L.Ed. 586 (1877). The canon applies in the context of disjunctive lists. See *Neal*, 95 U.S. at 706, 709; *Jarecki*, 367 U.S. at 304 n. 1, 307, 81 S.Ct. 1579. Here, the preemption clause links "falsity" with "deception"-one of the several tort actions based upon misrepresentations. Keeton et al., Prosser and Keeton on the Law

> of Torts § 105, at 726-27 (5th ed.1984) (defining deceit as species of false-statement tort); Restatement (Second) of Torts § 525 (describing elements of deceit). This pairing suggests that **Congress was operating in the vein of tort when it drafted the preemption 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.**
>
> . . . . Whether linked with materiality, see 15 U.S.C. § 7704(a)(1), or "deception," see *id.* § 7707(b)(1), we can find **nowhere in the statute that Congress meant to apply falsity in a mere error sense**. (Emphasis added)

The *Omega* Court also acknowledged that the patchwork of state laws made it virtually impossible for businesses to comply, and that federal preemption created the most logical solution to this problem. *Id.* at pp. 355-356. The Court observed that "Congress targeted only e-mails containing something more than an isolated error," and "created civil causes of action relating to error, but attached requirements beyond simply mistake to each of them." *Id.* at p. 355. Indeed, the *Omega* Court noted that: "Congress' enactment governing commercial e-mails reflects a calculus that a national strict liability standard for errors would impede 'unique opportunities for the development and growth of frictionless commerce,' while more narrowly tailored causes of action could effectively respond to the obstacles to 'convenience and efficiency' that unsolicited messages present. *Id.* §7701(a)." *Id.* at p. 355.

In a further discussion of preemption, the Court in *Hoang v. Reunion.Com, Inc.*, 2008 WL 4542418 (N.D. Cal., October 6, 2008) ("*Hoang*"), which relied on the opinion in *Omega*, stated at *1-*2 as follows:

> Plaintiffs allege that each of the five emails at issue herein had "falsified, misrepresented and/or forged header information," because each email, in the "From" line in the header, included the name of the member of defendant's website who provided "email contacts" to defendant. (See Compl. 5, 18, 19.) Plaintiffs also allege that each email had a "subject line" that was "false and/or misleading," (see *id.* 26, 29, 34); specifically, plaintiffs allege that "[Member Name] Wants to Connect with You," which was the subject line of four of the five emails at issue, and "Please Connect With Me:)," which was the subject line of the fifth email, were "likely to mislead" the recipients into believing the emails were a "personal request to connect with the individual, rather than an unsolicited commercial email advertisement." (See *id.* 5.) Plaintiffs further allege that one email was "deceptively accompanied by and/or contained a third-party's domain name, 'yahoo.com,' without the permission of that third party." (See *id.* 33.) Based on such allegations, plaintiffs allege three causes of action, each arising under § 17529.5(a) of the California Business & Professions Code, a statute that makes unlawful the sending of certain commercial emails.
>
> . . .
>
> CAN-SPAM preempts state statutes that "expressly regulate[ ] the use of electronic mail to send commercial messages," except to the extent such statutes prohibit "falsity or deception in any portion of a commercial electronic mail message or information attached thereto." See 15 U.S.C. § 7707(b)(1). **Section 7701(b)(1) has been interpreted to preempt state law claims, unless**

such claims are for "common law fraud or deceit." See *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, 353-56 (4th Cir.2006) (affirming dismissal of claim under Oklahoma statute based on defendant's having sent email containing "immaterial" false statement, because common law fraud claim cannot be based on "immaterial" false statement); *Kleffman v. Vonage Holdings* Corp., 2007 WL 1518650, *3 (C.D.Cal.2007) (holding claim under § 17529.5(a) preempted, where claim not based on "traditional tort theory" of "fraud and deceit").

.... **Here, plaintiffs fail to allege facts to support a claim of fraud, which must be alleged with particularity**. See Fed.R.Civ.P. 9(b). In that regard, plaintiffs fail to allege with the requisite specificity why the statements at issue were false and why defendant knew they were false when made. Further, **plaintiffs fail to allege plaintiffs relied to their detriment on any misrepresentation and that, as a result of such reliance, they incurred damage.** (Emphasis added)

The Ninth Circuit in *Gordon,* after a review of *Omega* found that Plaintiff, James S. Gordon lacked standing to bring an action under the CAN-SPAM Act, and that a state cause of action under Washington law was preempted by federal law.

We agree that: Gordon lacks standing to bring a private action under the CAN-SPAM Act. We commend the district court's pioneering analysis in this uncharted territory, and reach a similar conclusion based on our assessment of the CAN-SPAM Act's statutory requirements and the appellate record.
*Id at p.. *5.*

Having independently analyzed the CAN-SPAM Act, structure, and legislative purpose, we reach the same conclusion as the district court and the Fourth Circuit, and interpret the CAN-SPAM Act's express preemption clause in a manner that preserves Congress's intended purpose-i.e., to regulate commercial e-mail "on a nationwide basis" 15 U.S.C. §7701(b)(1), and to save from preemption only "*statutes, regulations, or rules that target fraud or deception,"*
*Id at p. *16.*

Plaintiff has not alleged the elements of the tort of fraud.

Recognizing the same ambiguity, the fourth circuit applied the maxim of *noscitur a sociis*, a cannon of statutory construction that "counsels that work is given more precise content by the neighboring words with which it is associated,"(citations omitted). Reading "falsity" in conjunction with "deception," which connotes a type of tort action based on misrepresentations, we are likewise persuaded that the exception language, read as Congress intended, refers to "traditionally tortious or wrongful conduct." (citations omitted). We find further support for this reading in the statutory text, which counsels against any interpretation that preempts laws relating to "acts of fraud."

...The Committee's repeated reference to "fraud" and "deception" is telling and confirms the Congress did not intend that states retain unfettered freedom to create liability of immaterial inaccuracies or omissions.
*Id at p. * 16.*

The CAN-SPAM Act established a national standard, but left the individual states free to extend traditional tort theories such as claims arising from fraud or deception ....To find otherwise would create "an exception to preemption [that] swallow[s] the rule and undermine[s] the regulatory balance that Congress established,"

*Id at p. *17*

The court squarely rejected plaintiff's claims that fanciful domain names equate to fraud.:

> There is of course nothing inherently deceptive in Virtumundo's use of fanciful domain names. See 15 U.S.C. § 7702(4); S. Rep. No. 108-102, at 3 (recognizing Microsoft's 'msn" and "hotmail" domains used for e-mail services...Gordon complains that in order to ascertain the actual identity of the e-mails' sender a recipient must either review the message content or consult a WHOIS-type database. He insists that any practice that requires consumers to engage in an extra step violates CEMA.
> **Nothing contained in this claim rises to the level of "falsity or deception" within the meaning of the CAN-SPAM Act's preemption clause. (emphasis added)**
> *Id at 18*

The court squarely rejected plaintiff's claims that his complaints regarding "from name" survived preemption.

> Gordon further suggests that the only information that could be used in the "from name" field that would not misrepresent is the name of the "person or entity who actually sent the e-mail, or perhaps...the person or entity who hired the [sender] to send the email on their behalf." In other words, he argues the CEMA's provisions require that "Virtumundo" or a client's name expressly appear in the "from lines." The CAN-SPAN Act does not impose such a requirement. **To the extent such a content or labeling requirement may exist under state law, it is clearly subject to preemption. ... In sum, Gordon's alleged header deficiencies relate to, at most, non-deceptive statements or omissions and a heightened content or labeling requirement. Regardless of the merits of his arguments, assuming they are actionable under CEMA, such state law claims falter under the weight of federal preemption.** (emphasis added)
> *Id at 18*

Accordingly, the Court concluded that plaintiffs' claims were preempted by federal law..

Plaintiff argues, without benefit of a Statement of Undisputed Facts that satisfies Code of Civil Procedure §437c, that the Defendants used private registration of domain names, a procedure **not** prohibited by California Law, as some sort of improper act. Plaintiff argues that such activity is prohibited by the CAN-SPAM Act, a point disputed by Defendants and unsupported by the CAN-SPAN Act. However, even if Plaintiff were correct, that too would be preempted by the CAN-SPAM Act.

Plaintiff alleges, again without benefit of a Statement of Undisputed Facts that satisfies C.C.P. §437c, that Defendants did not file a fictitious name statement for a registered domain name. Even if that were true, for the purpose of this Motion, Business and Professions Code §17910 only provides that: "Every person who regularly transacts business in this state for profit under a fictitious business name shall do all of the following; (a) File a fictitious name statement..." See also *Bryant v. Wellbanks* (1927) 88 Cal.App. 144.

There is **no** indication by any admissible evidence that Defendants were doing business under the domain name of USAProductsOnline.com. Simply using the domain name at the bottom of an email does not, in and of itself, establish that one is doing business under that name.. Even Plaintiff concedes that the domain name of USAProductsOnline.com is registered.

Of course, there is alternate authority as set forth in *Asis Internet Services v. Consumerbargaingiveaways, LLC,* 2009 WL 1035538 (N.D. Cal., April 17, 2009), in which the Court concluded that since no appellate decision (as opposed to a district court decision) has limited the phrase "falsity or deception" to only common law fraud actions, the Court refused to hold that a showing of actual fraud was necessary. However, the Ninth Circuit's opinion in *Gordon* renders the reasoning and decision in *Asis* suspect. It is doubtful that *Asis* would be decided the same way today as the result of the Ninth Circuit's subsequent decision in *Gordon.*

3. Section 17529.5(b) Liquidated Damage Provision is Preempted and is Not Severable From The Act's Preempted Provisions

CAN-SPAM preempts "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." 15 U.S.C. §7701(b)(1). The California Act's punitive damage provision falls squarely within the scope of this preemption since, by awarding punitive damages solely for the use of UCE, California is "expressly regulating the use of commercial email" by imposing an opt-in requirement on commercial email.

In addition, by maintaining and re-enacting punitive damages for UCE, California is penalizing a right which Congress chose to protect and thereby defeating both the balance of interests that were carefully struck by CAN-SPAM and Congress' attempt to set a "uniform, nationwide spam standard." This is contrary to nearly two centuries of Supreme Court jurisprudence, since as early as 1819 the Supreme Court has held that under the Constitution's Supremacy Clause, states may not "'retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress.'" *Nash v. Florida Industrial Commission*, 389 U.S. 235, 240 (1967) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 436 (1819)) (state law that imposed penalty for exercising rights under the National Labor Relations Act was preempted because it would "defeat or handicap a valid national objective"). Since *McCulloch*, the Supreme Court has consistently found that a state law that "frustrates

the purpose of the national legislation" cannot stand. *Id.* (quoting *Davis v. Elmira Savings Bank*, 161 U.S. 275 (1896)). The punitive damages provision of the California Act clearly "frustrates the purpose" of CAN-SPAM, and must be struck down in order to preserve Congress' authority to regulate commercial email.

Moreover, while §17529.5(a) proscribes conduct that is within the scope of the CAN-SPAM preemption exception, the remedy provided under Section 17529(b) exceeds this scope by attempting to regulate UCE by imposing civil penalties on unsolicited mail that otherwise violates the statute. Distinguishing between solicited and unsolicited commercial e-mail, however, is a regulation of "the use of electronic mail to send commercial messages" and is entirely distinct from and has nothing to do with regulating "falsity or deception in any portion of a commercial electronic mail message." The harm to consumers from fraudulent e-mails is the same regardless of whether or not the e-mail was sent with consent. Consequently, the attempt of §17529.5(b) to draw distinctions between solicited and unsolicited commercial e-mail can only be for a purpose other than regulating fraudulent e-mails and, by definition, is outside the scope of the Act's preemption exception.

Moreover, the conclusion that the punitive damages provision is preempted by CAN-SPAM is further supported by case law on statutory severability. See *McMahan v. City and County of San Francisco* (2005) 127 Cal.App.4th 1368, 1374. Functionally severable provisions "'must stand on their own, unaided by the invalid provisions nor rendered . . . inextricably connected to them by policy considerations.'" (Citations omitted) *Id.* at p. 1379.

For example, in *Long Beach Lesbian and Gay Pride, Inc. v. City of Long Beach* (1993) 14 Cal.App.4th 312, 327, *r'hrg denied* (1993), *review denied* (1994). the court invalidated the central provision of the city's parade permit ordinance and would not sever other provisions regulating permit holders, since the invalid provision was the hub of the ordinance's wheel and "without it the spokes cannot stand."

The current penalty provision is derived from SB 1457, which was enacted after CAN-SPAM and sought "to mirror the penalty provisions" of the original California Act. Assembly Committee on the Judiciary, Should Recent State Law Banning E-Mail Spam Be Updated? (June 22, 2004) at 4. Since it was passed as a stand alone provision after CAN-SPAM, the provision clearly satisfies the volitional

test.

Moreover, §17529.5(b) still is not severable, however, since it is "inextricably connected" to the original California Act because: (i) the penalty provisions are a "mirror [of] the penalty provisions" of each other, and, (ii) both regulate and punish the use of UCE. As in *Long Beach Lesbian and Gay Pride, Inc., supra* at 327, the two provisions are connected like a hub and spokes since Section 17529.5(b) is only viable to the extent that California's regulation of UCE is permissible. With CAN-SPAM removing the hub, Section 17529.5(b) is a spoke that cannot stand."

4. Balsam's Complaint Fails to Allege Fraud

As set forth above, actual fraud must be pleaded and proven to qualify for an exception to preemption by the CAN-SPAM Act. The elements of fraud/deceit are (1) a false representation or concealment of a material fact (or, in some cases, an opinion) susceptible of knowledge, (2) made with knowledge of its falsity or without sufficient knowledge on the subject to warrant a representation, (3) with the intent to induce the person to whom it is made to act on it, (4) and an act by that person in justifiable reliance on the representation, (5) to that person's damage. See Civil Code §§1709-1710; *South Tahoe Gas Co. v. Hofmann Land Improvement Co.* (1972) 25 Cal. App. 3d 750, 765; *Balfour, Guthrie & Co. v. Hansen* (1964) 227 Cal. App. 2d 173, 192-193.

There are no allegations whatsoever in Plaintiff's Complaint that set forth the required elements of fraud.

Balsam's state claims are preempted by the CAN-SPAM Act, leaving him with the traditional tort claim for fraud. The Complaint is devoid of the allegations necessary in a cause of action for fraud.

C. PLAINTIFF FAILS TO STATE A CAUSE OF ACTION UNDER THE UNDER THE CONSUMER LEGAL REMEDIES ACT AND FOR DECLARATORY RELIEF

Plaintiff has not stated a cause of action under the Consumers Legal Remedy Act (CLRA), Civil Code §1750, *et seq.*

With respect to Balsam's Second Cause of Action for violations of the CLRA, Balsam's Complaint fails to allege that he relied on the emails by expending any money for goods and services. Indeed, Plaintiff proudly asserts that he does not have to purchase anything in reliance on the emails. Complaint at ¶¶116; 26:19-22 and 117; 27:1-3.

Defendants submit that Plaintiff does not have standing to bring an action under the CLRA because: (1) he has suffered no actual damages; and, (2) he was not a consumer under the statute.

To the first point (that he sustained no actual damages) in Plaintiff's Complaint at ¶117, Plaintiff Balsam inappropriately cites the case of *Kagan v. Gibraltar Savings and Loan Assoc.* (1984) 35 Cal.3d 582, 593 ("*Kagan*") in his Complaint, to support his contention that "a consumer who simply receives false or deceptive advertising is *per se* damaged . . ."

However, our Supreme Court in *Meyer v. Sprint Spectrum* (January 29, 2009) 45 Cal.4th 634, *rehearing denied* April 1, 2009 ("*Meyer*"), addressed the issue of whether a "consumer" must sustain some actual damage in order to have standing to sue under the CLRA. *Meyer* spells the death knell for Plaintiff's Second Cause of Action for Defendants' purported violation of the CLRA, and specifically declined to extend Kagan to situations in which an allegedly unlawful practice under the CLRA has not resulted in some kind of tangible cost to the consumer.

The *Meyer* Court at 641 concluded that the CLRA clearly and unambiguously requires a plaintiff to sustain actual damages in order to have standing to bring such an action:

> We conclude based on the language of the statute that Sprint has the better position. Section 1780(a) provides that: "Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action" under the CLRA. **The statute speaks plainly about the use of an unlawful practice causing or resulting in some sort of damage. Thus, the statute provides that in order to bring a CLRA action, not only must a consumer be exposed to an unlawful practice, but some kind of damage must result. If the Legislature had intended to equate "any damage" with being subject to an unlawful practice by itself, it presumably would have omitted the causal link between "any damage" and the unlawful practice, and instead would have provided something like "any consumer who is subject to a method, act, or practice declared to be unlawful by Section 1770 may bring an action" under the CLRA.** (Emphasis added)

As to the second point (Plaintiff is not a consumer under the Act), the Court in *Kleffman, supra,* promptly disposed of an argument by plaintiff that he was entitled to pursue relief under the CLRA. The Court at *4 concluded that plaintiff was not a consumer under the provisions of the statute:

> . . . . " '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. 57.) Moreover, **the emails clearly are not goods, and Kleffman offers only a conclusory argument that they constituted a "service." "Service" means "[t]he act of doing something useful for a person or company for a fee.**" 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. (Emphasis added)

See also *Von Grabe v. Sprint PCS,* (S.D.Cal., 2003), 312 F.Supp.2d 1285, 1303.

Balsam fails to allege that he purchased goods or services as the result of purportedly receiving the eight e-mails; thus, he is not a consumer under the CLRA, and cannot use the act to obtain relief against Defendants herein. This, of course, includes Balsam's request for punitive damages pursuant to Civil Code §1780(a)(4).

Moreover, Plaintiff's entitlement to attorney's fees pursuant to the CLRA similarly fails as explained by the *Meyer* Court at 644.

However, reasonable attorney's fees may be awarded to a prevailing defendant on a finding by the court that the plaintiff's prosecution of the action was not in good faith. Civil Code §1780(d). Defendants herein will seek an award of attorney's fees under the CLRA.

As to the Third Cause of Action for Declaratory Relief, Defendants assert that such claim is preempted by the CAN-SPAM Act, and that Plaintiff does not have standing to bring an action under the CLRA. Since the Third Cause is based on the same allegations as the First and Second Causes of Action, it falls of its own weight.

3. CONCLUSION

Defendants submit that Plaintiff's Separate Statement is a mess. There are only three facts that are admissible and undisputed: Brian Nelson is the Chief Executive Officer of Trancos; Laure Majcherczyk is the Chief Operations Officer of Trancos; and, that Trancos is the registrant of the domain name USAProductsOnline.com. All other "evidence" submitted to support Plaintiff's instant Motion is inadmissible on a variety of grounds. Most significantly, despite our Supreme Court's conclusion that a party *cannot* rely on the allegations of his own pleadings, ***even if verified***, to make the evidentiary showing required in the summary judgment arena, Plaintiff repeatedly relies on the allegations of his Verified Complaint. *College Hospital Inc. v. Superior Court (Crowell)* (1994) 8 Cal.4th 704, 720, fn. 7.

The drain on Defendants' resources to object to the obvious flaws in Plaintiff's Separate Statement is staggering. Thus, Plaintiff's Motion should be summarily denied.

Additionally, and for the reasons set forth above, Defendants submit that Plaintiff has not and cannot assert a valid cause of action under §17529.5, as it is preempted by the CAN-SPAM Act. Furthermore, as explained in detail above, Balsam is not entitled to recover under the exception provided for state law enforcement because he has not pleaded the required elements of fraud.

With respect to the CLRA, Plaintiff does not have standing to bring such an action.

Finally, Plaintiff's cause seeking declaratory relief adds nothing to his claims and similarly fails.

Defendants respectfully submit that Plaintiff's motion be denied.

Dated: September 9, 2009

ROBERT L. NELSON
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Trancos, Inc., Brian Nelson, and
Laure Majcherczyk