No. _____

In The
Supreme Court of the United States

TRANCOS, INC., a California Corporation,

Petitioner,

v.

DANIEL L. BALSAM,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal First Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the claims of Respondent, Daniel L. Balsam, which are founded on Section 17529.5(a)(2) of the California Business and Professions Code regulating certain unsolicited commercial electronic mail advertisements, are pre-empted under 15 U.S.C. Section 7707(b)(1), which is a part of the federal CAN-SPAM Act of 2003 (15 U.S.C. Sections 7701 *et seq*.).

PARTIES TO THE PROCEEDING

The Petitioner in this case is Trancos, Inc., a California corporation, organized and existing under the laws of the State of California. Trancos maintains its principal office in Pleasanton, California.

The Respondent is Daniel L. Balsam, an individual who resides in the City and County of San Francisco, State of California.

CORPORATE DISCLOSURE STATEMENT

Petitioner, Trancos, Inc., has no parent corporation and there is no publicly held company that owns ten percent (10%) or more of the stock of Trancos, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Trancos, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, First Appellate District, in this case issued on February 24, 2012. The Court of Appeal issued an order modifying its opinion and denying Petitioner's petition for rehearing on March 21, 2012. On May 23, 2012, the California Supreme Court denied Petitioner's Petition for Review.

OPINIONS AND ORDERS ENTERED IN THIS CASE

The opinion of the California Court of Appeal and that court's order modifying its opinion and denying rehearing are reported at 203 Cal.App.4th 1083. The order of the California Supreme Court is reported at 2012 Cal. LEXIS 4979. The judgment and statement of decision of the California Superior Court for the County of San Mateo is unreported.

JURISDICTION

On February 24, 2012, the California Court of Appeal, First Appellate District issued an opinion affirming in all respects the Judgment and Final Statement of Decision issued by the California Superior Court, County of San Mateo, on March 10, 2010 after trial. Subsequently, on March 21, 2012, the Court

of Appeal issued an order modifying its February 24, 2012 opinion without change in judgment and denied rehearing. The California Supreme Court denied Petitioner's Petition for Review of the Court of Appeal decision on May 23, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2.

The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (15 U.S.C. § 7701 *et seq.* (the CAN-SPAM Act) provides, at 15 U.S.C. § 7707(b)(1):

> 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.

Division 7, Part 3, Chapter 1, Article 1.8 of the California Business and Professions Code sets forth Restrictions on Unsolicited Commercial E-Mail (the California Anti-Spam Act). Business and Professions Code Section 17529.5(a) states:

> 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 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. 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 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.

———♦———

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Petitioner raised the issue of preemption at the inception of this case in its verified answer to the complaint, and in each appropriate instance through the proceedings in the Superior Court, the Court of Appeal, and the California Supreme Court.

STATEMENT OF THE CASE

This Petition for Certiorari seeks a definitive determination by this Court as to the scope and proper interpretation of the savings clause of Section 7707(b)(1) of the CAN-SPAM Act (15 U.S.C. § 7707(b)(1)) and whether the claims of the Respondent, Daniel L. Balsam (Balsam), under California Business and Professions Code § 17529.5(a) are preempted by virtue of Section 7707(b)(1) of the CAN-SPAM Act.

On April 4, 2008, Balsam sued Trancos, Inc. (Trancos) and others[1] for alleged violations of the California anti-spam law (California Business and Professions Code sections 17529 through 17529.9, inclusive) Balsam claimed to have received, in 2007,

[1] All defendants except Trancos and its CEO, Brian Nelson, were dismissed before judgment. After trial and in its judgment, the trial court held that Brian Nelson was not liable to Balsam on any cause of action in Balsam's complaint. Thus, only Trancos is the Petitioner on this Petition.

eight commercial e-mail messages sent by Trancos to one of his e-mail addresses. His complaint alleged that each of these eight e-mail messages contained or was accompanied by falsified, misrepresented or forged header information and was misleading and was, therefore, unlawful under California Business and Professions Code section 17529.5.

A. Background

Trancos operates several internet advertising businesses through its various divisions. As relevant to this case, for a brief period in 2007, Trancos operated a division called Meridian E-mail (Meridian) and, through Meridian, Trancos acquired the right to use e-mail address lists from several partner entities with whom it contracted, including Hi-Speed Media (Hi-Speed). Trancos acquired e-mail address lists from its partners, including Hi-Speed, and sent commercial e-mail promotions to consumers whose e-mail addresses were included on the acquired address lists. (App. 3) Trancos and its respective partners shared revenue resulting from these promotional e-mail messages on a 50-50 basis.

In conducting its commercial e-mail promotion business through Meridian, Trancos rented a private-mail box at a UPS store on Santa Monica Boulevard in West Los Angeles, California under the name "USAProductsOnline.com." (App. 7) Its application for this mail box contained the physical street address of Trancos at its Pacific Palisades, California office

which existed at the time. Like all of the domain names stated on the Trancos e-mail messages, USAProductsOnline is a domain name privately registered by Trancos (App. 6, 8, 50) through Domains By Proxy, a service of GoDaddy.com, a domain registrar and web hosting company. (See *Gordon v. Virtumundo, Inc.,* 575 F.3d 1040 at 1045 (9th Cir. 2009)) "Private Registration" shields the registrant's personal information from public display.

At trial, Brian Nelson, the Trancos CEO, explained that Trancos privately registered its domain names in order to protect its employees because of past incidents of retaliation and death threats. Another reason for private registration was that Trancos had been "mail bombed" whereby an individual had sent Trancos millions of e-mails which knocked out its entire network for several days, costing Trancos well over one hundred thousand dollars in lost revenue alone in addition to its losing many of its advertisers. (App. 8) All domain names used by Trancos in its e-mail advertisements were properly registered through private registration. Notwithstanding the private registration of its domain names, the e-mails sent by Trancos were fully traceable to Trancos. The identity of the person or entity privately registering domain names through Domains By Proxy could be ascertained by contacting GoDaddy. GoDaddy would have informed Trancos of any requests or problems called to its attention and Trancos would have acted on them. Further, the recipient of any e-mail message sent by Trancos could

opt out of receiving further e-mails from Trancos in various ways. A recipient could request to be unsubscribed by sending an e-mail message to the sender's e-mail address. Trancos received all e-mails sent to those addresses and as a matter of policy removed the requester's e-mail address from its address list. (App. 6) In addition, a recipient could contact GoDaddy to request to be removed and GoDaddy would see that the request was given to Trancos. A recipient could also write to the mail box address in West Los Angeles which was stated in each of the Trancos e-mail messages. (App. 60)

Through a consultant hired by it, Trancos managed e-mail address lists it acquired from Hi-Speed and the consultant uploaded the content for the subject line and body of e-mail messages provided by various advertisers and sent out the e-mails to e-mail addresses on the Hi-Speed address lists. Trancos' consultant generated the domain names used in the "From" lines of the e-mails he sent out.

B. The Trial Court Decision

The trial of this matter commenced on October 14, 2009 and concluded on October 19, 2009. On January 15, 2010 the court filed its Tentative Statement of Decision and served it on both parties. That tentative decision determined, among other things, that Balsam's claims for violation of the California Anti-Spam law (Business and Professions Code §§ 17529

through 17529.9) were not preempted by the CAN-SPAM Act.

Both parties filed timely objections to the court's tentative decision. Trancos devoted twenty (20) pages of its objections to a discussion of the issue of preemption under the CAN-SPAM Act and explained in detail why Balsam's claims were preempted. In its Judgment and Final Statement of Decision on March 10, 2010, the Superior Court reaffirmed its decision that Balsam's claims under the California Business and Professions Code anti-spam provisions are not preempted by the CAN-SPAM Act. (App. 70)

The court found that the California anti-spam statutes are not preempted by federal law, based on *Asis Internet Services v. Consumerbargaingiveaways, LLC,* 622 F.Supp.2d 935 (N.D.Cal. 2009); *Asis Internet Services v. Subscriberbase, Inc.,* unpublished, 2010 WL 1267763 (N.D.Cal. 2010); *Asis Internet Services v. Vistaprint USA, Inc.,* 617 F.Supp.2d 989 (2009); and *Ferguson v. Friendfinders, Inc.,* 94 Cal.App.4th 1255, 115 Cal.Rptr.2d 258 (2002) (holding that former California Business and Professions Code § 17538.4 did not violate the dormant commerce clause of the United States Constitution). (App. 70)

The court's decision made no reference to *Omega Travel, Inc. v. Mummagraphics, Inc*, 469 F.3d 348 (4th Cir. 2006) and distinguished *Gordon v. Virtumundo, Inc.*, *supra*, on the basis that in *Virtumundo* the Ninth Circuit was considering the Washington anti-spam law which the court found was materially

different from the California Business and Professions Code enactment. (App. 70-71)

The trial court found that Balsam had failed to prove his claim of a violation of Business and Professions Code § 17529.5(a)(3) which prohibits e-mail advertisements having a subject line that a person knows would be likely to mislead a recipient about a material fact regarding the contents or subject matter of the message. Thus, in the court's view, this case came down to the following: (1) whether Trancos' e-mail messages to Balsam violated Section 17529.5(a)(2) that makes it unlawful to advertise in a commercial e-mail that contains or is accompanied by falsified, misrepresented or forged header information, and (2) whether Balsam's claim in that regard is preempted by 15 U.S.C. § 7707(b)(1).[2] The court found that in seven of the eight Trancos e-mail advertisements the sender information in the "from" line was misrepresented because those e-mail messages did not disclose that they came from Trancos. According to the court, the senders of those seven e-mail messages as identified in their headers did not exist or were otherwise misrepresented, each of those senders being a non-existent entity using a nonsensical domain name reflecting no actual company. (*Ibid*.)

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[2] The court found there was no evidence the Trancos e-mails were forged; thus, the issue was whether they were falsified or misrepresented. (Judgment and Final Statement of Decision, p. 23)

C. The Court of Appeal Decision

On May 4, 2010 Trancos timely filed a Notice of Appeal to the California Court of Appeal. Trancos' brief on appeal contains comprehensive discussion and argument on two substantial legal issues. The first was the issue of federal preemption under the CAN-SPAM Act. The second related to the trial court's award of substantial attorneys fees to Balsam. That second topic of Trancos' appellate brief is, of course, not germane to this Petition for Certiorari. After full briefing and oral argument, the Court of Appeal issued its published opinion on March 21, 2012.

On the question of preemption, the court held that the trial court's ruling in Balsam's favor on his claim of violation of the California anti-spam law was not preempted by the CAN-SPAM Act. (203 Cal.App.4th at 1103) (App. 30) In coming to that conclusion, the court noted the existence of "a split in the recent decisions addressing the scope of the CAN-SPAM preemption." It referred to the unpublished decision of the United States District Court for the Central District of California in *Kleffman v. Vonage Holdings Corp.,* 2007 WL 1518650 (C.D.Cal. 2007), affd. 387 Fed. Appx. 696 (9th Cir. 2010) and that of the U.S. District Court for the Northern District of California in *Asis Internet Services v. Optin Global, Inc.*, 2008 WL 1902217 (N.D.Cal. 2008) as representing the judicial view that all elements of common law fraud must be established for a plaintiff's claims under the Business and Professions Code anti-spam

provisions to survive preemption, and *Asis Internet Services v. Consumerbargaingiveaways, LLC,* 622 F.Supp.2d 935 (N.D.Cal. 2009); *Asis Internet Services v. Vistaprint USA, Inc.*, 617 F.Supp.2d 989 (N.D.Cal. 2009); *Hypertouch, Inc. v. ValueClick, Inc*., 192 Cal.App.4th 805, 123 Cal.Rptr.3d 8 (2011), and the unpublished opinion in *Asis Internet Services v. Subscriberbase, Inc*., 2010 WL 1267763 (N.D.Cal. 2010) as espousing the opposite conclusion that the "falsity and deception" exception to the preemption provision of CAN-SPAM does not require the proof of all common law fraud elements.

Interestingly, the Court of Appeal in this case did not cite either *Omega Travel, Inc. v. Mummagraphics, Inc*., 469 F.3d 348 (4th Cir. 2006) (see discussion, *infra*) or *Gordon v. Virtumundo, Inc*., *supra*, for the first proposition, although the court did discuss both these cases in its opinion, not so much in reference to preemption but more particularly as those cases bear on the meaning of the California anti-spam law.

Between the issuance of the Superior Court's decision in this case and the determination of the appeal, the California Supreme Court announced its decision in *Kleffman v. Vonage Holdings Corp*., 49 Cal.4th 334, 110 Cal.Rptr.3d 628, 232 P.3d 625 (2010). The Supreme Court's *Kleffman* decision came about as a result of the Ninth Circuit Court of Appeal having certified a question to it in connection with that court's appeal of the decision of the United States District Court referred to, *supra*.

Kleffman sued Vonage in California Superior Court based on his receipt of eleven (11) e-mail advertisements for Vonage telephone services. Because these e-mail solicitations contained differing headers, similar but not identical subject lines, and each was sent from a different domain name, Kleffman claimed that their failure to identify Vonage in the domain names and to send the e-mails from a single address constituted a misrepresentation in violation of Section 17529.5 of the California Business and Professions Code, which makes it unlawful to advertise in a commercial e-mail advertisement that contains or is accompanied by falsified, misrepresented or forged header information.

Vonage removed Kleffman's action to federal district court and moved to dismiss on the ground, among others, that Kleffman's claim under Section 17529.5 was preempted by the CAN-SPAM Act. The district court agreed and granted Vonage's motion to dismiss. The court held that, assuming that the California anti-spam statute created a cause of action as alleged by Kleffman, the cause of action was preempted because the CAN-SPAM Act leaves states room "only to extend traditional fraud and deception prohibitions into cyberspace." The court explained:

> Though Congress did not define the terms "falsity" or "deception," it is clear that it meant these terms to refer to traditional, tort-type concepts and not to innovative theories such as Kleffman's."

Kleffman appealed to the Ninth Circuit Court of Appeals which certified the following question to the California Supreme Court:

> Does sending unsolicited commercial e-mail advertisements from multiple domain names for the purpose of bypassing spam filters constitute falsified, misrepresented, or forged header information under [section] 17529.5(a)(2)?

The Supreme Court succinctly answered the question thus: "We hold that, on the undisputed facts of this case, the answer is 'no.'"

In reaching that conclusion the court noted it was undisputed that the domain names used by Vonage actually exist, are technically accurate, literally correct and fully traceable to Vonage's marketing agents. It was also undisputed that the Vonage e-mail advertisements neither contained nor were accompanied by falsified or forged header information.

D. The California Supreme Court Weighs in on *Kleffman v. Vonage Holdings Corp.*

After the Superior Court had rendered its final decision and before briefing in the Court of Ap peal had been completed, the California Supreme Court issued its published opinion on the question certified to it by the Ninth Circuit in *Kleffman*. (*Kleffman v. Vonage Holdings Corp*., 49 Cal.4th 334, 110 Cal.Rptr.3d 628, 232 P.3d 625 (2010)) The court rejected Kleffman's argument that Section 17529.5(a)(2)

should be construed in light of California Business and Professions Code §§ 17200 and 17500 (making fraudulent business practices and false or misleading advertising unlawful), noting several significant linguistic differences between the anti-spam statutes and Sections 17200 and 17500. Further, the court observed that the domain names used by Vonage actually existed, were technically accurate, legally correct and traceable to Vonage's marketing agent. Further, said the court, a domain name in a single e-mail that does not identify the sender, the merchant-advertiser or any other person or entity does not make any "representation" regarding the e-mail's source, either express or implied. (49 Cal.4th at 345-346)

In *Kleffman* the Supreme Court was not presented with a preemption issue. However, in concluding that a domain name that does not identify the sender does not constitute a misrepresentation the court stated that "a contrary conclusion would raise significant preemption problems." (*Id*. at 346) In that connection, the court noted that the Court of Appeal for the Ninth Circuit held in *Gordon v. Vitumundo, Inc*., *supra* at 1064 that a state law requiring an e-mail's "from" line to include the name of the person or entity who actually sent the e-mail or who hired the sender constitutes a content or labeling requirement that is clearly subject to preemption.

It is suggested that the opinion of the California Supreme Court bears on the issue presented in this Petition in two ways. First, it illuminates a core issue decided by the Superior Court in this case as to the

meaning and effect of the California anti-spam law and, second, it clearly expresses the Supreme Court's view that to interpret Section 17529.5(a)(2) as making it unlawful to use a domain name in a single e-mail that does not clearly identify either the sender or the merchant advertiser on whose behalf it is sent would render such a claim preempted by the CAN-SPAM Act. Further, *Kleffman* reveals the Supreme Court's view that *Gordon v. Virtumundo* serves as pertinent precedent on the question of CAN-SPAM's preemption of a claim under Section 17529.5, thus discrediting the view espoused by the Court of Appeal in this case (App. 30) distinguishing *Gordon* and *Mummagraphics*.

REASONS WHY THE WRIT SHOULD BE GRANTED

The federal cases that have grappled with the language of 15 U.S.C. § 7707(b)(1) creating a limited exception to the preemptive effect of that section are inconsistent and infuse the analysis with an excess of confusion. On the one hand, there are the decisions of the Fourth and Ninth Circuit Courts of Appeal in *Omega Travel, Inc. v. Mummagraphics, Inc.*, *supra*, and *Gordon v. Virtumundo*, *supra*, and those of the United States District Courts in *Kleffman v. Vonage*, *supra*, and *Asis Internet Services v. Optin Global*, *supra*, which held that the plaintiffs' claims were preempted under CAN-SPAM, based on the idea that only claims based on traditional tort theories of fraud

and deception survive preemption. On the other hand, there are the district court decisions holding state law claims that go beyond such traditional tort theories are not preempted under CAN-SPAM. (See, *e.g.*, *Asis Internet Services v. Consumerbargain-giveaways, LLC*, *supra*; *Asis Internet Services v. Vistaprint USA, Inc.*, *supra*; and *Asis Internet Services v. Subscriberbase, Inc.*, *supra*; see also *Hypertouch, Inc. v. ValueClick, Inc.*, 192 Cal.App.4th 805, 123 Cal.Rptr.3d 8 (2011))

In determining whether a particular state law claim is preempted by a federal statute, the courts must seek to understand the purpose of Congress in enacting the particular statute. In doing so, they look to both the language of the preemption provision and the structure and purpose of the statute as a whole. (*Medtronic, Inc. v. Lohr,* 518 U.S. 470, 486, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996))

Section 7707(b)(1) generally preempts state law claims under a state statute, regulation or rule that expressly regulates the use of electronic mail to send commercial messages. However, Section 7707(b)(1) includes a "safe harbor" that excepts from preemption claims under a statute, regulation or rule that prohibits "falsity or deception" in any portion of a commercial e-mail message or information attached to it. The phrase "falsity or deception" is not defined in Section 7707(b)(1), thus severely complicating the efforts of the courts in attempting to understand its meaning. In *Mummagraphics* the Fourth Circuit observed that the term "falsity" does not have a black and white meaning. It can simply mean the character or quality

of not conforming to the truth or it can denote tortiousness as in deceitfulness. (469 F.3d at 354) The court concluded that Congress' pairing of the term "falsity" with "deception" evinces its intent to refer to traditionally tortious or wrongful conduct such that "falsity" refers to torts involving misrepresentation." (*Ibid*.)

The Ninth Circuit came to a similar conclusion in *Gordon v. Vitumundo*, *supra*. Both *Mummagraphics* and *Virtumundo* conclude that only state law claims sounding in traditional tort theories of fraud and deceit fall within the exception to the preemption provision of the CAN-SPAM Act. The California Supreme Court appears to have embraced that idea in its opinion in *Kleffman v. Vonage Holdings Corp.*, *supra*.

The trial and appellate court opinions in this case, and the cases they relied on came to a different interpretation of Section 7707(b)(1). Generally, those cases concluded that the scope of the exception to preemption under CAN-SPAM is much broader than traditional fraud and deception tort claims. Under those decisions, a wide spectrum of claims under state anti-spam legislation survives preemption. If those decisions are correct, the efficacy of the Congressional purpose of establishing a comprehensive, nationwide system for regulating spam would be severely undermined. (See *Report of the Committee on Commerce, Science, and Transportation on S. 877*, Report 108-102, July 16, 2003)

Based on all the judicial decisions discussed above, it can fairly be said that the state of the law of preemption under 15 U.S.C. § 7707(b)(1) is a muddle. The CAN-SPAM Act has been the nationwide law on the legal limits on unsolicited commercial electronic mail advertising and solicitation for almost a decade. Yet, the scope of its preemption provision continues to vex state and federal courts throughout the land.

This case presents questions of increasing importance to businesses throughout the United States who direct commercial e-mail to consumers residing throughout the country. Without clarification from this Court, businesses nationwide will be burdened with contradictory authority, as well as confusing standards, concerning the regulation of commercial e-mail. The conflicting opinions offered by state and federal Courts on this issue, and the California Court of Appeal's opinion in this case, make the issues raised herein ripe for review by this Court. The decisions of the trial court and Court of Appeal in this case run afoul of the stated purpose set forth by Congress when it adopted CAN-SPAM, *i.e.*, to establish a nationwide standard for commercial e-mail in order to avoid the patchwork of inconsistent state laws. As is stated by Congress at 15 U.S.C. § 7701(a)(11):

> [S]ince 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.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be granted.

August 21, 2012

Respectfully submitted,

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DANIEL L. BALSAM, Plaintiff and Appellant, v. TRANCOS, INC., et al., Defendants and Appellants. DANIEL L. BALSAM, Plaintiff and Respondent, v. TRANCOS, INC., et al., Defendants and Appellants.

A128485, A129458

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE

203 Cal. App. 4th 1083*; *138 Cal. Rptr. 3d 108*; *2012 Cal. App. LEXIS 212

February 24, 2012, Filed

As Modified Mar. 21, 2012.

COUNSEL: Law Offices of Timothy J. Walton and Timothy J. Walton for Plaintiff and Appellant and for Plaintiff and Respondent.

Nelson & Weinkauf, Robert L. Nelson and Susan B. Cohen for Defendants and Appellants.

JUDGES: Opinion by Margulies, J., with Marchiano, P. J., and Banke, J., concurring.

OPINION BY: Margulies

OPINION

Defendant Trancos, Inc. (Trancos) appeals from a judgment awarding statutory damages and attorney fees to plaintiff Daniel L. Balsam under Business and

Professions Code[1] section 17529 et seq. (Anti-spam Law). Balsam cross-appeals from portions of the judgment denying him relief under the Consumers Legal Remedies Act, Civil Code section 1750 et seq. (CLRA), and finding Trancos's chief executive officer (CEO), Brian Nelson, not personally liable for the judgment along with Trancos. We affirm the judgment in all respects.

I. BACKGROUND

Balsam filed suit against Trancos, Nelson, and other individuals and entities[2] in April 2008, alleging causes of action for (1) violations of section 17529.5,[3] (2) violations of the CLRA, and (3) declaratory relief as to the legality of the defendants' actions under these statutes.

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[1] All statutory references are to the Business and Professions Code unless otherwise indicated.

[2] No defendants other than Trancos and Nelson are involved in this appeal.

[3] Section 17529.5 is part of the Anti-spam Law. The term "spam" is defined in the law's findings and declarations to mean "unsolicited commercial e-mail advertisements." (§ 17529, subd. (a).) The probable origin of this popular usage, and its connotation as an annoying, unwanted, repetitious communication, was explained in *Hypertouch Inc. v. ValueClick, Inc.* (2011) 192 Cal.App.4th 805, 818, footnote 4, [123 Cal.Rptr.3d 8] (*Hypertouch*). (*See also Gordon v. Virtumundo, Inc.* (9th Cir. 2009) 575 F.3d 1040, 1044-1045 & fn. 1 (*Gordon*).)

A court trial commenced on October 14, 2009. At the outset of the trial, the court ruled Balsam lacked standing to sue under the CLRA because he was not a "consumer" of any goods or services as defined in Civil Code section 1761, subdivision (d) and he did not sustain any damages caused by defendants' conduct as required by Civil Code section 1780. The court further held Balsam's Anti-spam Law cause of action was not preempted by federal law, as asserted by defendants. Balsam agreed to the dismissal of his declaratory relief cause of action before trial.

A. *Trial Evidence*

1. *The Parties*

Nelson is the CEO and founder of Trancos, which operates several Internet advertising businesses. In 2007, Trancos operated a division called Meridian E-mail (Meridian). Through Meridian, Trancos acquired the right to use e-mail address lists from nine entities, including Hi-Speed Media (Hi-Speed), which is owned by ValueClick. Under its agreement with Hi-Speed, Trancos found advertisers who would pay to have their offers and promotions sent out to Hi-Speed's list, and Trancos would split the revenues with Hi-Speed.[4] Trancos hired a consultant, Joe

[4] Nelson testified that a typical revenue sharing agreement with Hi-Speed might include a requirement that e-mails be sent out to its list on a daily basis. He estimated Trancos sent millions of e-mails per month.

Costeli, to "manage" the list, which meant he would upload the content the advertiser provided for the subject line and body of the e-mail to Trancos's e-mail servers, and send them out. Costeli would generate the domain name used in the "From" line.

Nelson testified he believed Hi-Speed obtained e-mail addresses by using promotions and Web sites in which the consumer gave his or her broad consent to receive future commercial e-mail messages from Hi-Speed or any of its "partners." Nelson maintained such a consent extended to Trancos as well as to any advertiser whose messages Trancos sent out to Hi-Speed's e-mail list, subject to the recipient's right to unsubscribe or "opt out" of future messages, which was offered as an option in all of the commercial e-mail messages Trancos sent.

Balsam is a licensed California attorney with experience in consumer protection litigation. Balsam has been either a named plaintiff or has represented plaintiffs in dozens of lawsuits against companies for unsolicited e-mail advertising. He maintains a Web site and blog with information on spammers and spam litigation. He maintains over 100 e-mail addresses.

2. *The E-mails*

Balsam owns four computers, all of which are located in California. In the summer of 2007, Balsam received eight commercial e-mails sent by Trancos to one of his e-mail addresses using Hi-Speed's e-mail

list. According to each of the eight e-mails, Balsam allegedly gave consent for use of his e-mail address on "'2007 July 11'" by responding to an offer on a Web site owned by Hi-Speed using a computer with the Internet protocol address or IP address 64.184.86.246. Balsam presented uncontradicted evidence he could not have accessed Hi-Speed's Web site from that IP address on that date, and did not otherwise provide his e-mail address to or consent to its use by Hi-Speed, Trancos, or any of the advertisers named in the eight e-mails.

The e-mails Balsam received had the following relevant content:

> E-mail No. 1 stated on the "From" line that it was from "'Paid Survey'" with an e-mail address of survey@misstepoutcome.com. The subject line stated: "Get paid 5 dollars for 1 survey." The content in the body of the e-mail was a commercial advertisement purportedly by "Survey Adventure." Paid Survey was not the name of any existing company. There was no company named misstepoutcome and no Web site at www.misstepoucome.com.[5] The latter is a fanciful name Trancos gave to one of the 477 domain names it has privately

[5] According to Trancos, even though the e-mail addresses appearing on the "From" lines of the eight e-mails, such as survey@misstepoutcome.com, did not reflect the names of any actual Web sites or businesses, they were all functioning e-mail addresses monitored by Trancos to which recipients could have sent return e-mails.

registered.[6,7] As in all eight of the e-mails, Trancos's name does not appear anywhere in the e-mail.

In regard to opting out of future e-mails, e-mail No. 1 stated the recipient could do so by writing to "Strategic Financial Publishing, Inc." at an address in Indiana or by clicking on a link to "http://misstepoutcome.com./soi?m=79444&!=2." There was a second opt-out link near the end of the e-mail stating in part "if you no longer wish to receive our emails please click *here*." The name "USAProductsOnline.com" appeared at the end of the e-mail with a specified street address and suite number on Santa Monica Boulevard in Los Angeles. The domain name, USAProductsOnline.com, is privately registered to Trancos, but there is no actual company named USAProductsOnline.com, no such entity is registered as a fictitious business name of Trancos, and there is no Web site at

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[6] A "domain name" is defined in the Anti-spam Law as an "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).)

[7] Trancos's domain names were registered through Domains by Proxy, a private registration service operated by The GoDaddy Group, Inc. (GoDaddy). With private registration, members of the public would not be able to determine that Trancos had any connection to the domain name. A search of publicly available databases such as "WHOIS" would show Domains by Proxy or GoDaddy as the domain name's owner, and provide no identifying or contact information about Trancos. According to Nelson, however, GoDaddy would have contacted Trancos if it received inquiries or complaints about commercial e-mails using one of Trancos's registered domain names.

www.USAProductsOnline.com. The street address given for it is the address of The UPS Store, where Trancos rented a post office box in the name of USAProductsOnline.com. The suite number referenced in the e-mail was actually Trancos's mail box number at The UPS Store.[8]

E-mail No. 2 stated it was from "'Your Business'" with an e-mail address of franchisegator@modalworship.com. There was no actual business named Your Business, no actual entity named modalworship, and no Web site at modalworship.com. The subject line stated: "Be Your Own Boss! You could own a franchise!" The body of the e-mail consisted of a commercial advertisement purportedly by Franchise Gator. E-mail No. 2 advises recipients they may opt out by sending a copy of the e-mail to Franchise Gator at a Seattle address or by clicking on a link. Like all eight of the e-mails sent to Balsam, e-mail No. 2 provided a second opt-out link and the name and same Santa Monica Boulevard street address for USAProducts Online.com.

E-mails Nos. 3 through 8 contained "From" lines stating the sender was, respectively, "'Christian Dating,'" "'Your Promotion,'" "'Bank Wire Transfer Available,'" "'eHarmony,'" "'Dating Generic,'" and "'Join

[8] Balsam was only able to trace the post office box to Trancos by subpoenaing The UPS Store to obtain the application submitted to it for the post office box. The application included a physical address for USAProductsOnline.com in Pacific Palisades that turned out to be Trancos's office at the time.

Elite.'" Each purported to be from an e-mail address at a different one of the fancifully named domain names privately registered to Trancos (e.g. "moussetogether.com," "nationalukulelee.com"). Only one of the e-mails, e-mail No. 6 purporting to be from eHarmony, contained the name of an actual, existing company on its "From" line, although the return e-mail address, "eHarmony@minecyclic.com," referenced a domain name privately registered by Trancos, not one belonging to eHarmony.

Nelson testified Trancos privately registered its domain names due to past incidents of retaliation and threats, and to protect its employees. According to Nelson, one person angry with the company had bombarded it with millions of e-mails, knocking out Trancos's network for three days and costing the company approximately $120,000. Trancos had also received angry and threatening telephone calls demanding the caller's e-mail address be removed from its list. Nelson testified he had been advised that private registration was a good idea because "what if there's a complaint, you know, I don't want someone like Dan Balsam . . . driving through my front window or coming in there and harassing us or . . . phoning us and badgering us."[9]

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[9] There was no testimony as to how Costeli chose the actual domain names. It may be inferred one motivation was to avoid disclosing Trancos was the sender. None of the domain names contained any variation or hint of Trancos's name. If the names themselves connected Trancos to the mailing, private registration would be pointless. Other potential motivations for

(Continued on following page)

3. *The Anti-spam Law*

(1) Section 17529.5 makes it unlawful as follows to send e-mail advertisements containing certain falsified or misrepresented header information: "(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: [¶] . . . [¶] (2) The e-mail 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."

The California statute does not define the term "header information," but the California Supreme Court in *Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334 [110 Cal. Rptr. 3d 628, 232 P.3d 625] (*Kleffman*) applied a definition borrowed from the federal CAN-SPAM Act of 2003 (15 U.S.C. § 7701 et seq.),[10] which makes it unlawful to initiate transmission of a commercial e-mail message that contains or is accompanied by "'header information that is materially false or materially misleading.'" (*Kleffman,* at

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the whimsical name choices – including evading spam filters and avoiding accidental infringement of names used by other businesses or web sites – are not in issue in this case.

[10] The CAN-SPAM Act's full title is the "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003." (*See* Act Dec. 16, 2003; Pub.L. No. 108-187, § 1, 117 Stat. 2699.)

p. 340, fn. 5, quoting from 15 U.S.C. § 7704(a)(1).) The federal spam law defines "header information" as "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.*" (15 U.S.C. § 7702(8), italics added.) Although this case was tried before *Kleffman* was decided, it was undisputed by the parties that the "header information" in the Trancos e-mails, for purposes of section 17529.5, included the purported sender names, domain names, and e-mail addresses that appeared on the e-mails' "From" lines.

(2) Section 17529.5 of the Anti-spam Law provides a recipient of an unsolicited commercial e-mail advertisement may bring an action against a person or entity that violates its provisions for either or both actual damages or liquidated damages of $1,000 for each unsolicited commercial e-mail violating the section. (§ 17529.5, subd. (b).) The prevailing plaintiff in such an action may recover reasonable attorney fees and costs. (*Ibid.*)

B. *Statement of Decision*

The trial court found all of the e-mails except the eHarmony e-mail violated section 17529.5, subdivision (a)(2) (hereafter section 17529.5(a)(2)). The court found the header information on each of these e-mails was falsified or misrepresented because it did not

accurately represent who sent the e-mail: "All of these emails came from Defendant Trancos, but none of the emails disclose this in the header (or the body or the opt-out). The emails were sent on behalf of eight different advertisers . . . but only eHarmony was a real company. The rest of the 'senders' identified in the headers . . . do not exist or are otherwise misrepresented, namely, Paid Survey, Your Business, Christian Dating, Your Promotion, Bank Wire Transfer Available, Dating Generic, and Join Elite[.] In those same headers reflecting the 'from' line of the email, the referenced sender email is a non-existen[t] entity using a nonsensical domain name reflecting no actual company. . . ." The court added that the issue was not the use of multiple domain names to send spam, which it noted was before the California Supreme Court in the *Kleffman* case. Instead, the court held the falsity or misrepresentation consisted in the fact "that the 'sender' names (or domain names used) *do not represent any real company, and cannot be readily traced back to the true owner/sender.*" (Italics added.)

The trial court awarded Balsam $1,000 in liquidated damages against Trancos for each of the seven e-mails it found to have violated section 17529.5 of the Anti-spam Law, and found Trancos liable for his reasonable attorney fees and costs. It found Nelson was not personally liable for the award. Balsam thereafter sought attorney fees in the amount of $133,830. The court awarded him $81,900 in fees.

C. Appeals and Cross-appeal

Trancos appealed from the judgment (case No. A128485) and postjudgment order awarding fees (case No. A129458). Balsam cross-appealed (case No. A128485) on the issues of whether he had standing to sue under the CLRA and whether Nelson was jointly and severally liable for Trancos's violations of the Anti-spam Law. The appeals were consolidated for briefing, argument, and decision.

II. DISCUSSION

Trancos contends the judgment must be reversed because (1) the California Supreme Court held in *Kleffman* that the sending of commercial e-mails from multiple and nonsensically named domain names does not violate section 17529.5(a)(2) of the Anti-spam Law; and (2) the federal CAN-SPAM Act pre-empts application of California's Anti-spam Law in this case absent a finding of all elements of common law fraud, including reliance and actual damages. Trancos contends in the alternative that, assuming the e-mails did violate the Anti-spam Law, the trial court abused its discretion in granting Balsam $81,900 in attorney fees.

In his cross-appeal, Balsam maintains the trial court erred in (1) finding he lacked standing to seek injunctive relief under the CLRA as a consumer damaged by Trancos's unlawful practices, and (2) failing to hold Nelson jointly and severally liable along with Trancos for violating the Anti-spam Law even though

Nelson personally participated in and ratified Trancos's tortious conduct.

A. *Falsification/Misrepresentation*

The specific issue decided in *Kleffman* was whether "it is unlawful [under section 17529.5(a)(2)] to send commercial e-mail advertisements from multiple domain names for the purpose of bypassing spam filters." (*Kleffman, supra,* 49 Cal.4th at p. 337.) By way of background, the *Kleffman* court explained that each entity connected to the Internet (such as a computer or network) must have a unique numeric address, known as an Internet protocol address or IP, that enables other computers or networks to identify and send information to it. (*Ibid.*) An IP address consists of four sets of numbers separated by periods, such as "12.34.56.78." (*Ibid.*) But because the number strings that make up an IP address can be difficult to remember, the Internet community developed the domain name system, which enables users to substitute an easier to remember domain name such as "google.com" for a set of number strings. (*Ibid.*)

Kleffman alleged in his complaint that Vonage through its marketing agents sent him 11 unsolicited e-mail advertisements for its broadband telephone services, identifying 11 different domain names as the senders of the e-mail. (*Kleffman, supra,* 49 Cal.4th at p. 338.) The domain names, such as "'ourgossipfrom.com'" and "'countryfolkgospel.com'" were all fanciful or nonsensical, and did not refer to Vonage or to any

other existing business or entity. (*Ibid.*) All were traceable to a single physical address in Nevada where Vonage's marketing agent was located. The complaint further alleged the use of multiple domain names was for the purpose of evading the spam filters used by Internet service providers to block spam before it reached their customers' e-mail boxes. (*Ibid.*) The complaint alleged "'[t]he multitude of "from" identities falsifie[d] and misrepresent[ed] the true sender's identity and allow[ed] unwanted commercial e-mail messages to infiltrate consumers' inboxes.'" (*Id.* at p. 339.) After removal to federal court, defendant Vonage moved successfully to dismiss the complaint on the grounds that it failed to state a claim under section 17529.5(a)(2). (*Kleffman,* at p. 339.) Kleffman appealed to the Ninth Circuit, which asked the California Supreme Court to decide whether the use of multiple domain names for the purpose of bypassing spam filters violated the statute. (*Id.* at p. 339.)

At the outset of its analysis, the Supreme Court noted there was no dispute the domain names used in the challenged e-mails "actually exist and are technically accurate, literally correct, and fully traceable to Vonage's marketing agents," and the e-mails therefore "neither contained nor were accompanied by 'falsified . . . or forged header information' within the meaning of section 17529.5(a)(2)." (*Kleffman, supra,* 49 Cal.4th at p. 340.) The parties agreed the issue for the court was whether the e-mails contained or were accompanied by "'misrepresented . . . header information'" within the meaning of that subdivision.

(*Kleffman,* at p. 340.) Kleffman argued the domain names, while not actually false, were "misrepresented" because their random, garbled, and nonsensical nature created a misleading or deceptive impression the e-mails were all from different entities when in fact they were all from Vonage via a single marketing agent. (*Id.* at pp. 341-342.)

(3) Based on a close reading of the text and legislative history of the statutory language in issue, the Supreme Court rejected Kleffman's argument that the word "misrepresented" in section 17529.5(a)(2) means "'misleading'" or "'likely to mislead.'" (*Kleffman, supra,* 49 Cal.4th at pp. 342-345.) The court also found the Legislature did not intend subdivision (a)(2) "generally to prohibit the use of multiple domain names." (*Kleffman,* at p. 345.) Thus, as Kleffman conceded, the mere use of multiple domain names does not "'in and of itself'" violate the subdivision. (*Kleffman,* at p. 345.)

(4) Furthermore, the court found the use of a domain name in a single e-mail that "does not make clear the identity of either the sender or the merchant-advertiser on whose behalf the e-mail advertisement is sent" also does not per se violate section 17529.5(a)(2). (*Kleffman, supra,* 49 Cal.4th at p. 345.) The court found such use does not in fact make any representation, express or implied, regarding the e-mail's source. (*Id.* at pp. 345-346.) In addition, the court concluded that construing the statute otherwise would raise a substantial question about its constitutionality under the supremacy clause of

the United States Constitution. (*Kleffman,* at p. 346.) Citing to *Gordon, supra,* 575 F.3d at page 1064, and to the legislative history of the CAN-SPAM Act, the court opined that a state law requiring an e-mail's "From" field to include the actual name of the sender would constitute a content or labeling requirement preempted by the federal law. (*Kleffman,* at p. 346.)

(5) While expressly declining to define what the statutory phrase "'misrepresented . . . header information'" *includes* rather than what it *excludes,* the court reached the following conclusion: "[A] single e-mail with an accurate and traceable domain name neither contains nor is accompanied by 'misrepresented . . . header information' within the meaning of section 17529.5(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.] 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." (*Kleffman, supra,* 49 Cal.4th at p. 347 & fn. 11.)

(6) This case presents a different factual scenario than the one addressed by the Supreme Court in *Kleffman* in three critical respects. First, the trial court in this case did not decide Trancos's use of multiple, random, nonsensical domain names to defeat spam filters or to otherwise create an impression its

e-mails were from different senders in and of itself violated section 17529.5(a)(2). Second, the court did not decide the use of a domain name that failed to clearly identify Trancos violated the statute. Third, unlike *Kleffman,* this case did not involve the use of domain names both parties agreed were fully traceable to Trancos. Here, the trial court decided the fact the senders' domain names in seven of the e-mails did not represent a real company *and could not be readily traced back to Trancos, the owner of the domain names and true sender of the e-mails,* constituted falsification or misrepresentation for purposes of the statute. Further, unlike *Kleffman,* the salient motivation for the use of multiple, random domain names here was not to fool spam filters, but to prevent recipients of the e-mails from being able to identify Trancos as their true source. It was undisputed Trancos 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 an address the sender would have no way of linking to Trancos. Because the facts here are distinguishable, and the Supreme Court in *Kleffman* expressly disclaimed an intention to determine the full scope of section 17529.5(a)(2), *Kleffman* informs our analysis, but does not dictate its result. (*See Kleffman, supra,* 49 Cal.4th at p. 347, fn. 11.)

(7) *Kleffman* states: "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." (*Kleffman, supra,* 49 Cal.4th at p. 347, italics added & omitted.) The importance of being able to trace the owner of a domain name for purposes of evaluating a claim of misrepresented header information was also highlighted in *Gordon.* (*See Gordon, supra,* 575 F.3d at pp. 1063-1064.) *Gordon* addressed whether plaintiff Gordon's claim under a Washington State statute barring commercial e-mails that misrepresent their point of origin was preempted by the CAN-SPAM Act. (*Gordon,* at pp. 1057-1058.) In the course of holding the claim was preempted, the court found there was nothing "inherently deceptive" in the defendant's use of fanciful domain names based in part on the admitted fact that "a WHOIS search, or a similar reverse-look-up database, accurately identifies [the defendant] as the domain registrant and provides other identifying information." (*Id.* at pp. 1063-1064, fn. omitted.) According to *Gordon,* the use of multiple domain names in those circumstances is not false or deceptive because it does not "impair a recipient's ability to identify, locate, or respond to the person who initiated the e-mail." (*Id.* at p. 1063.) But where, as in this case, the commercial e-mailer intentionally uses privately registered domain names in its headers that neither disclose the true sender's identity on their face nor permit the recipient to readily identify the sender, it is implicit in the reasoning of *Kleffman* and *Gordon* that such header information *is* deceptive

and *does* constitute a falsification or misrepresentation of the sender's identity.

The federal CAN-SPAM Act incorporates a similar concept. The Act makes it a crime to "materially falsif[y] header information in multiple commercial electronic mail messages." (18 U.S.C. § 1037(a)(3).) The Act specifies "header information . . . is materially falsified if it is altered or concealed in a manner that would impair the ability of a recipient of the message [among others, including law enforcement] . . . to *identify, locate, or respond to a person who initiated the electronic mail message*. . . ." (18 U.S.C. § 1037(d)(2), italics added; cf. *Omega World Travel, Inc. v. Mummagraphics* (4th Cir. 2006) 469 F.3d 348, 357-358 (*Omega*) [e-mail headers not materially false or misleading where the e-mail is "replete with accurate identifiers of the sender," including its telephone number and mailing address].)

(8) Properly construed, *Kleffman* simply held a commercial e-mailer is not misrepresenting its identity when it uses multiple, randomly-named, *but accurate and traceable,* domain names in order to avoid spam filters. The plaintiff in *Kleffman* had urged there was a vital distinction for purposes of section 17529.5(a)(2) between a commercial e-mailer who happened to use more than one domain name for mailing purposes and an e-mailer who deliberately used multiple, randomly chosen, nonsensically named domain names in order to create a misleading impression the e-mails were from different sources when they were in fact all from a single source. (*Kleffman,*

supra, 49 Cal.4th at pp. 341-342.) The Supreme Court found that distinction immaterial *provided* all of the names used were accurate and traceable to the sender.[11] (*Kleffman,* at pp. 345-347.) We are presented with a different case. Here, the domain names were *not* traceable to the actual sender. The header information is "falsified" or "misrepresented" because Trancos deliberately created it to prevent the recipient from identifying who actually sent the message. Thus, the nonsensical domain name "misstepoutcome.com" neither discloses Trancos's name nor can it be linked to Trancos using any public database. While, as *Kleffman* states, 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 Trancos.

(9) The *Kleffman* court did not define what it meant by a *traceable* domain name. It did state specifically that the 11 e-mails at issue in that case

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[11] As noted earlier, the plaintiff in *Kleffman conceded* the domain names used in the challenged e-mails "actually exist[ed] and [were] technically accurate, literally correct, and fully traceable to Vonage's marketing agents." (*Kleffman, supra,* 49 Cal.4th at p. 340.) Here, there was no concession the domain names were traceable to Trancos using any publicly available database, and the trial court specifically found they were not traceable. However, it was not disputed that the domain names actually existed and were owned by Trancos. Whether the e-mails were actually sent from the domains listed in their headers is a technical question that was not established one way or the other.

could all be "traced" to a single physical address in Nevada where Vonage's marketing agent was located. (*Kleffman, supra,* 49 Cal.4th at p. 338.) Although *Gordon* did not use the words "trace" or "traceable," it did place significance on the fact that a WHOIS search or similar database would provide the name, physical address, and other identifying information for the registrant/owner of all of the domain names used in that case. (*Gordon, supra,* 575 F.3d at p. 1064 & fn. 22.) Besides *Kleffman* and *Gordon,* our own research did not disclose any other cases that have used the term or discussed the concept of traceability in this context. The most relevant dictionary definition of the verb "trace" would seem to be "to ascertain by investigation; find out; discover." (<http://dictionary.reference.com/browse/trace> [as of Feb. 24, 2012].) We have no reason to believe the Supreme Court in *Kleffman* intended a different standard of investigation than that discussed in *Gordon*. If the court meant that a sender was "traceable" if a trained investigator or a determined litigant armed with discovery and subpoena rights could ascertain the sender's identity – as Balsam was required to do to find Trancos – it would have said so with particularity. We read *Kleffman* commonsensically in light of *Gordon* to mean that a domain name is "traceable" to the sender if the recipient of an e-mail could ascertain the sender's identity and physical address through the use of a publicly available database such as WHOIS.

There is good reason to treat a commercial e-mailer's deliberate use of untraceable, privately registered domain names to conceal its identity as a falsification or misrepresentation for purposes of the statute. Judging from Trancos's Meridian eMail business, such e-mailers send out millions of commercial e-mail offers per month. Each such e-mail sent 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 identify theft.[12] Sending millions of such e-mails, as Trancos did, makes harm inevitable. If Trancos deliberately hides its identity from recipients, as it concedes it did, what means of redress does a recipient have? The recipient can send a blind e-mail message or a letter to a nonexistent company at a post office box making a complaint or attempting to opt out of future e-mails, but if Trancos (or an employee who sees the complaint) chooses not to respond or take any action, the recipient is at a dead end.[13] Because Trancos hides its

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[12] "[Unsolicited commercial e-mail (UCE)] can be difficult if not impossible to identify without opening the message itself. Having to take that extra step can be more than a waste of time and money. Studies indicate that UCE often contains offensive subject matter, is a favored method for pursuing questionable if not fraudulent business schemes, and has been successfully used to spread harmful computer viruses." (*Ferguson v. Friendfinders, Inc.* (2002) 94 Cal.App.4th 1255, 1268 [115 Cal.Rptr.2d 258].)

[13] A Federal Trade Commission (FTC) study conducted before enactment of the CAN-SPAM Act found that most purported

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identity behind an impenetrable shield of made-up names, an aggrieved recipient cannot look up public information about Trancos's business, cannot find its Web site, cannot call and speak to a Trancos employee, cannot write to Brian Nelson, cannot report Trancos to the Better Business Bureau or the Attorney General, and cannot warn others about Trancos by writing a letter to a newspaper or posting a complaint on the Internet. Using a privately registered domain name leaves it entirely up to Trancos whether it will or will not respond to or provide redress to persons (other than determined litigants like Balsam) who are harmed, annoyed, or offended by its communications.[14] Trancos does not explain why its business is so sensitive and so different from all other businesses that it must be free to hide its identity

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"remove me" links and addresses in a sample of 200 unsolicited commercial e-mails were invalid or ineffective. (The Integrity and Accuracy of the "WHOIS" Database, Hearings before the House Com. on Judiciary, Subcom. on Courts, the Internet, and Intellectual Property, 107th Cong., 2d Sess. (2002), prepared statement of Howard Beales, Dir. of the Bureau of Consumer Protection, FTC <http://www.ftc.gov/os/2002/05/whois.htm> [as of Feb. 24, 2012].) Whether warranted or not, there is widespread consumer fear that using unsubscribe links will result in increased spam or other harms. (FTC, Effectiveness and Enforcement of the CAN-SPAM Act (Dec. 2005) pp. A12-A14, <http://www.ftc.gov/reports/canspam05/051220canspamrpt.pdf> [as of Feb. 24, 2012].)

[14] Before filing suit, Balsam did send a certified, return receipt requested letter to USAProductsOnline.com at The UPS Store address provided in the e-mails, to which Trancos never responded. Nelson did not recall seeing the letter.

from the millions of individuals to whom it directed its commercial solicitations.

If anything, the absence of ordinary marketplace safeguards in commercial e-mailing suggests Trancos should bear some accountability to the recipients of its e-mails. By Trancos's own account, those recipients have not given any direct consent to receive e-mails from Trancos or its advertisers. The consent Trancos claims to have by virtue of recipients assertedly agreeing to receive e-mails from ValueClick and its partners is highly attenuated at best. Not being *customers* of Trancos, the recipients have no power to influence how Trancos deals with them by purchasing from someone else. Attempting to unsubscribe is not a practical option when the unwilling recipient has no ability to determine the sender's identity or good faith. In fact, Trancos's financial incentive, and possibly even its agreement with the list owner, is to mail out offers to as many recipients as possible as frequently as possible. Since it does not save Trancos a penny to remove a recipient from its mailing list, it is by definition more expensive for Trancos to *stop* sending e-mails to any given recipient than it is to *keep* sending them. Moreover, recipients have no control over whose advertising messages Trancos is sending into their mailboxes and, with its own identity concealed from potential victims, Trancos has little incentive to make sure it is only advertising legitimate businesses. Allowing commercial e-mailers like Trancos to conceal themselves behind untraceable domain names amplifies the

likelihood of Internet fraud and abuse – the very evils for which the Legislature found it necessary to regulate such e-mails when it passed the Anti-spam Law. (*See* § 17529.)

(10) Trancos relies on a nonpublished United States District Court case, *Asis Internet Services v. Member Source Media, LLC* (N.D.Cal., Apr. 20, 2010, No. C-08-1321 EMC) 2010 WL 1610066 (*Member Source*), to show private registration does not matter under section 17529.5(a)(2). While not binding on us, a nonpublished federal district court case can be citable as persuasive authority. (*Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, 1301, fn. 11 [42 Cal. Rptr. 3d 268].) But we do not find *Member Source* persuasive on the question of traceability because the court does not address the issue. In *Member Source,* a federal magistrate judge found a commercial e-mailer's use of multiple, privately registered domain names in its headers was not false or deceptive, and a section 17529.5 claim based on that conduct was therefore preempted by the CAN-SPAM Act.[15] (*Member Source,* at p. *4.) For that conclusion, *Member Source* relied exclusively on *Gordon,* finding the plaintiff's allegations in *Gordon* and those in

[15] As further discussed *post,* the CAN-SPAM Act includes an express preemption clause preempting any state statute that "regulates the use of electronic mail to send commercial messages, *except* to the extent that any such statute . . . *prohibits falsity or deception* in any portion of a commercial electronic mail message or information attached thereto." (15 U.S.C. § 7707(b)(1), italics added.)

the case before it were indistinguishable. (*Member Source,* at p. *4.) *Member Source* made no mention of the plaintiff's concession in *Gordon* that the domain names the sender used were traceable to the sender using a WHOIS search, and did not address the apparent significance this had for the *Gordon* panel.

Trancos argues the subject e-mails *were* traceable to it in any event because each e-mail provided multiple ways to unsubscribe, an e-mail sent to the address on the "From" line would have been received and acted upon by Trancos, and Balsam could have complained to GoDaddy, which would have forwarded his complaint to Trancos.[16] However, the issue before us is not whether the recipient could have communicated its desire to opt out or written a complaint that might have come to Trancos's attention, but whether the "From" line falsified or misrepresented the sender's *identity.* As explained, the significance of being able to readily trace the sender's identity is that it gives the recipient recourse if the sender finds it expedient to ignore the recipient's communication.

(11) We therefore hold, consistent with the trial court's ruling, that header information in a commercial e-mail is falsified or misrepresented for purposes of section 17529.5(a)(2) when it uses a sender domain

[16] Trancos also points out each e-mail included the advertiser's physical address. However, when the sender and advertiser are unrelated entities, including the advertiser's purported address does not affect whether the sender's identity is falsified or misrepresented.

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.[17]

B. *Federal Preemption*

Trancos contends the federal CAN-SPAM Act preempts application of California's Anti-spam Law in this case because, in its view, the Act's express preemption clause exempting state statutes that prohibit falsity or deception in any portion of a commercial e-mail is properly construed to require a state law plaintiff to prove all elements of common law fraud. Since the trial court did not, for example, require Balsam to prove either reliance or actual damages, his claim would be preempted under Trancos's theory.

As Trancos acknowledges, there is a split in the recent decisions addressing the scope of the CAN-SPAM preemption. Some federal cases hold all elements of common law fraud must be established to survive preemption. (*See, e.g., Kleffman v. Vonage Holdings Corp.* (C.D.Cal., May 22, 2007) No. CV 07-2406 GAF(JWJx)) 2007 WL 1518650 at p. *3, affd. (9th Cir. 2010) 2010 WL 2782847 [Congress left states

[17] We express no judgment about other circumstances in which (1) header information might be falsified or misrepresented for purposes of the statute, or (2) the presence of other information identifying the sender in the body of the e-mail could affect liability under the statute.

room only to extend their traditional fraud prohibitions to the realm of commercial e-mails]; *ASIS Internet Services v. Optin Global Inc.* (N.D.Cal., Apr. 29, 2008) No. C-05-05124 JCS, 2008 WL 1902217 [relying on *Kleffman v. Vonage Holdings Corp.*].) Other federal cases have found the scope of the savings clause in the CAN-SPAM Act's preemption provision is broader than common law fraud. (*See, e.g., Asis Internet v. Consumerbargaingiveaways, LLC* (N.D. Cal. 2009) 622 F.Supp.2d 935, 941-944 [§ 17529.5*subd.*(a) claim not preempted even though plaintiffs could not prove reliance or damages, since "'falsity or deception'" is not confined to strict common law fraud]; *Asis Internet Services v. Vistaprint USA, Inc.* (N.D.Cal. 2009) 617 F.Supp.2d 989, 992-994 [same]; *see also Asis Internet Services v. Subscriberbase Inc.* (N.D.Cal., Apr. 1, 2010, No. 09-3503 SC) 2010 WL 1267763 at pp. *9-*13 ["'falsity or deception'" exemption does not require proof of reliance or damages].)

The application of CAN-SPAM's preemption and savings clauses to claims under section 17529.5 was recently analyzed in depth by a Second District panel in *Hypertouch, supra,* 192 Cal.App.4th 805, 818-833. The plaintiff's underlying claims in *Hypertouch* included, among others, that the "From" field in commercial e-mails sent out by third parties to drive traffic to ValueClick's Web sites violated section 17529(a)(2) by failing to accurately reflect the identity of the sender. (*Hypertouch,* at pp. 815-816.) ValueClick moved for summary judgment in part on the grounds the CAN-SPAM Act's exemption for state statutes

prohibiting "falsity or deception" was only intended to permit state law claims based on all elements of common law fraud. Since the plaintiff had no evidence ValueClick knew about the e-mails or any recipients relied on or were harmed by their deceptive content, the plaintiff's claims were preempted. (*Hypertouch,* at p. 816.)

Hypertouch rejected ValueClick's argument, holding instead "the CAN-SPAM Act's savings clause applies to any state law that prohibits material falsity or material deception in a commercial e-mail regardless of whether such laws require the plaintiff to prove and plead each and every element of common law fraud." (*Hypertouch, supra,* 192 Cal.App.4th at p. 833.) The CAN-SPAM Act therefore did not preempt the plaintiff's state statutory claims, the court reasoned, even though section 17529.5 does not require proof of three elements of common law fraud – scienter, reliance, and damages. (*Hypertouch,* at pp. 820-823, 826-830, 833.) The court considered the text, legislative history, and purpose of the preemption and savings clauses at issue, concluding that Congress must have intended the phrase "falsity or deception" to encompass fraudulent or deceptive conduct that would not satisfy all elements of common law fraud. (*Id.* at pp. 826-830.) We find the reasoning of *Hypertouch* persuasive on this issue, and adopt it here.

(12) *Hypertouch* rejected the view – also pressed by Trancos in this case – that the Fourth and Ninth Circuits in *Omega* and *Gordon,* respectively, took a more restrictive view of the CAN-SPAM Act's savings

clause. (*Hypertouch, supra,* 192 Cal.App.4th at pp. 831-833.) Although there is dicta in *Omega* that arguably goes further, we agree with *Hypertouch* that these cases merely decided "falsity or deception" connotes an element of tortiousness or wrongfulness and, therefore, state law claims based on no more than *immaterial* or *nondeceptive* inaccuracies or omissions in commercial e-mails are preempted. (*See Hypertouch,* at pp. 831-833; *Omega, supra,* 469 F.3d at pp. 353-354; *Gordon, supra,* 575 F.3d at pp. 1063-1064.) In this case, Trancos's deliberate use of randomly chosen, untraceable domain names on the "From" line of the subject e-mails for the stated purpose of concealing its role in sending them does involve deception as to a material matter – the sender's identity – as well as an element of wrongful conduct. Trancos makes no argument to the contrary.

Accordingly, we will affirm the award of liquidated damages to Balsam. The award is neither inconsistent with the statute as construed in *Kleffman* nor preempted by federal law. We turn now to the attorney fee award and Balsam's cross-appeal.

C. *Attorney Fees*

Trancos argues the trial court abused its discretion in awarding Balsam $81,900 in attorney fees because Balsam's fee motion was unsupported by proper documentation, including proper bills, an unambiguous statement of the hourly rate charged by Balsam's counsel, or complete, comprehensible time

sheets. Trancos also claims the case could and should have been brought in small claims court without expenditure of attorney fees.

A trial court is vested with wide discretion in fixing the amount to be awarded to a prevailing party for attorney fees, and a court's award will not be disturbed on appeal unless the record discloses an abuse of discretion. (*Rogel v. Lynwood Redevelopment Agency* (2011) 194 Cal.App.4th 1319, 1321 [125 Cal. Rptr. 3d 267].) "The 'experienced trial judge is the best judge of the value of professional services rendered in [her] court, and while [her] judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.'" (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49 [141 Cal. Rptr. 315, 569 P.2d 1303], quoting *Harrison v. Bloomfield Building Industries, Inc.* (6th Cir. 1970) 435 F.2d 1192, 1196.) Detailed time sheets are not necessarily required to support fee awards. (*Margolin v. Regional Planning Com.* (1982) 134 Cal.App.3d 999, 1006-1007 [185 Cal. Rptr. 145].)

We have reviewed the handwritten time sheets of counsel Timothy Walton supporting Balsam's motion which were submitted to the trial court on CD-ROM. Contrary to Trancos's representations, the time sheets are not illegible or incomprehensible. Each daily time sheet was contemporaneously prepared, and specifies the client's name, the matter worked on, the task performed, and the time spent on the task. Only days on which Walton worked on the Trancos case are included, and each day includes no more

than a handful of different entries. The handwriting is perfectly legible, and the abbreviations used are easily understood (e.g., "TC" for telephone conference, "RF" for review file, etc.). While not as detailed as some attorney time-keeping records, Walton's time-sheets were adequate. An accompanying declaration by him adds up the hours spent on this case, broken down by quarter and type of task performed. If Trancos felt Walton's summary was inaccurate or misleading, the raw data used was available to it to analyze in a different format.

We do not find the hours recorded by Walton – a total of 166.9 over a nearly three-year period, including time spent on a five-day court trial and its aftermath – were unusual or unreasonable for a case of this difficulty and complexity. In fact, Walton's time spent on the case was undoubtedly reduced because Balsam, a licensed attorney with considerable expertise in the subject matter of the lawsuit, devoted a substantial amount of his own, uncompensated time to the case. According to Balsam, this included most of the time spent on issues in which he did not prevail, such as his CLRA claim and Nelson's joint and several liability. Balsam was also billed for 86 hours of paralegal time he was unable to recover because the paralegals did not meet all requirements of section 6450. The trial court reduced Walton's time by 10.9 hours to reflect time spent on a defective motion for summary judgment, and denied Balsam's request for a multiplier. We cannot say the trial court abused its discretion by awarding Balsam compensation

based on 156 hours of attorney time spent on the case. We also find no fatal ambiguity in Walton's declaration. He states his customary and usual hourly rate was $400, and that Balsam was billed for his time and paid all amounts billed. Trancos makes no argument Walton's hourly rate was excessive. We find no abuse of discretion in the trial court's award of $62,400 for Walton's time.

Trancos also objects to the trial court's award to Balsam of 75.5 hours at $250 per hour for Walton's second chair at trial, Jim Twu. Twu's resume showed he had extensive pretrial civil litigation experience after graduating from law school in 1994. Walton stated Twu assisted with trial preparation, and maintained the organization of the files, exhibits, and evidence at trial. As the trial court impliedly found, an hourly rate of $250 for a litigation attorney with Twu's experience is not excessive. Having presided at the trial, the trial judge was in the best position to evaluate whether this portion of the fee claim was reasonable. Trancos fails to establish the court abused its discretion.

Trancos questions whether it was necessary for Balsam to incur the fees he did since the $7,000 awarded could have been obtained in small claims court or in a limited civil case, and Trancos had already shut down its Meridian operation in 2007. Trancos ignores the fact Balsam originally sought liquidated damages of $8,000 for eight e-mails, an amount exceeding the then-applicable small claims maximum of $7,500. (Code Civ. Proc., former § 116.221.) He also

sought permanent injunctive relief in connection with his CLRA cause of action, which is beyond the scope of a limited civil case. (Code Civ. Proc., § 580, subd. (b)(2).) Trancos did not establish Balsam knew it was out of the list management business when he filed suit, or that its voluntary abandonment of the business would have affected his right to pursue monetary or even injunctive relief against it. In any event, as Trancos conceded in the trial court, it was within the court's discretion whether to award fees notwithstanding that Balsam's ultimate recovery could have been rendered in a limited civil case. (Code Civ. Proc., § 1033, subd. (a).)

Finally, Trancos argues the court acted arbitrarily and capriciously because it failed to explain the reasons for the award. No statement of reasons was required. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140 [104 Cal. Rptr. 2d 377, 17 P.3d 735].) The record reflects the trial court did not merely "rubber stamp" Balsam's fee request. It required him to submit additional documentation after the original motion was filed, and invited additional briefing. The court's comments at the two hearings it held on the motion showed it had read the parties' extensive submissions and was fully conversant with their positions and documentation. At the second hearing, the court responded directly to Trancos's objections as they were raised. In the end, the court accepted some of Trancos's arguments and awarded Balsam substantially less than he had originally requested. We find no basis in

the record to conclude the court acted arbitrarily or capriciously in failing to make greater reductions.

Accordingly, we affirm the trial court's order awarding fees.

D. *Balsam's Cross-appeal*

1. *Balsam's CLRA Standing*

The trial court held Balsam lacked standing to sue under the CLRA because he (1) was not a "consumer" of any goods or services as defined in Civil Code section 1761, subdivision (d); and (2) did not sustain "any damages" caused by defendants' conduct as required by Civil Code section 1780. Balsam disputes both conclusions.

The CLRA provides: "*Any consumer who suffers any damage* as a result of the use . . . of a method, act, or practice declared to be unlawful by [Civil Code] Section 1770 may bring an action against that person to recover or obtain" specified relief including actual damages and an injunction against the unlawful method, act, or practice. (Civ. Code, § 1780, subd. (a), italics added.) Section 1770, subdivision (a) of the CLRA lists some 24 proscribed acts or practices, such as passing off goods and services as those of another, disparaging the business of another by false or misleading representations of fact, and inserting unconscionable provisions in a contract. A "consumer" is defined in Civil Code section 1761, subdivision (d) part of the CLRA as "an individual who *seeks or acquires,*

by purchase or lease, any goods or services for personal, family, or household purposes." (Italics added.)

Here, Balsam freely acknowledges he did not seek or acquire any of the goods or services advertised in Trancos's e-mails. Balsam testified the e-mails were entirely unsolicited and he would never on principle buy anything advertised in what he considered to be spam e-mail. He stated he clicked on the links in some of Trancos's e-mails to see where they would take him, but with no intention of buying anything. Based on the plain text of Civil Code section 1761, it is difficult to see how Balsam could have been a "consumer" for purposes of the CLRA.

Balsam focuses on the word "any" in Civil Code section 1761, arguing if the Legislature intended to limit standing only to persons who sought or acquired the particular product or service being falsely advertised, it would have chosen its words differently. According to Balsam, the "consumer" definition was merely intended to distinguish consumers from non-consumers, such as businesses or governmental entities, by specifying consumers can bring CLRA actions, but businesses and governmental entities cannot. Balsam does not explain why the Legislature would have chosen such a roundabout way of specifying only individuals could sue under the CLRA. His interpretation would also render nugatory the words "by purchase or lease" in the definition.

The one case Balsam cites in support of his construction, *Nordberg v. Trilegiant Corp.* (N.D.Cal.

2006) 445 F.Supp.2d 1082 (*Nordberg*), merely held plaintiffs who were charged for products they did not seek or want nonetheless met the CLRA definition of "consumer" because the verb "acquire" in the definition did not require any conscious action or desire on the plaintiffs' part. (*Nordberg,* at pp. 1087-1088, 1095-1096.) *Nordberg* did not adopt anything resembling the sweeping "consumer" definition Balsam urges upon this court. Under *Nordberg*'s interpretation, Balsam would not in fact be a consumer since he neither sought *nor* acquired any good or service connected to Trancos or its advertisers. *Nordberg* thus undermines rather than supports Balsam's position.

In *Schauer v. Mandarin Gems of Cal., Inc.* (2005) 125 Cal.App.4th 949 [23 Cal. Rptr. 3d 233] (*Schauer*), the court held a woman suing a jeweler who had sold her former husband an engagement ring based on a fraudulent appraisal was not a "consumer" for purposes of the CLRA: "Unfortunately for plaintiff, by statutory definition [plaintiff's former husband] was the consumer because it was he who purchased the ring. [Citation.] [Fn. omitted.] Plaintiff's ownership of the ring was *not acquired as a result of her own consumer transaction with defendant,* and . . . she [therefore] does not fall within the parameters of consumer remedies under the Act." (*Schauer,* at p. 960, italics added.) *Schauer* thus also takes a view of the statute inconsistent with Balsam's.

(14) In a case directly on point, a federal district court judge specifically rejected Balsam's view of the CLRA, holding a recipient of spam e-mail from

Vonage was not a "consumer" under the CLRA because he specifically alleged he had not sought or acquired any products or services offered by Vonage. (*Kleffman v. Vonage Holdings Corp., supra,* 2007 WL 1518650 at p. *4.) Citing *Schauer,* the court stated: "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." (*Kleffman v. Vonage Holdings Corp.,* at p. *4.)

We agree with *Schauer* and reject Balsam's proposed definition of "consumer." *Schauer*'s holding is reinforced by the requirement the plaintiff suffer damage as a result of the method, act, or practice alleged to be unlawful. A person who did not seek, purchase, or lease any product or service from a defendant, either directly or indirectly, would seemingly be in no position to allege damage as a result of the defendant's unlawful practice. Balsam tries to thread that needle by arguing the phrase "any damage" in Civil Code section 1780, subdivision (a) is much broader than just pecuniary damages and can apparently include even mere annoyance and loss of time. He cites certain legislative findings and declarations contained in section 17529 part of the Anti-spam Law to show that all recipients of spam e-mails are damaged in various ways including the passed-through costs of spam filtering technologies, the consumption of valuable data storage space, and annoyance and loss of time. (§ 17529, subds. (d), (e), (g), (h).) Balsam then applies the simple syllogism that since the

Legislature found all recipients of e-mail spam are damaged, and he was a recipient, it must follow he suffered damage.

(15) There are two problems with Balsam's argument. First, the harms Balsam claimed he automatically suffered as a result of being a recipient of spam are not the *result* of any method, act, or practice allegedly made unlawful by Civil Code section 1770, as the CLRA standing provision requires. Balsam alleged the subject e-mails violated various provisions of Civil Code section 1770, subdivision (a) by misrepresenting their source and containing other false or deceptive representations. To support his CLRA cause of action, Balsam was required to prove "not only that [the] defendant's conduct was deceptive *but that the deception caused [him] harm*." (*Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1292 [119 Cal. Rptr. 2d 190], italics added.) The harms cited by the Legislature when it passed the Anti-spam Law do not satisfy that burden of proof. Those harms do not stem from the *deceptive content* of individual spam e-mails, but from the *excessive volume* of e-mail that spammers *collectively* send out over the Internet. Balsam's theory of how he was damaged, if accepted by the trial court, would have made it impossible for him to prove his damages were caused by Trancos's deceptive conduct under the CLRA. (*See Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 809-810 [66 Cal. Rptr. 3d 543], disapproved on other grounds in *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 337 [120

Cal. Rptr. 3d 741, 246 P.3d 877] [plaintiff's lack of actual reliance on defendant's deceptive packaging and advertising defeated her CLRA claim].)

This points to a second, related problem with Balsam's logic. In section 17529, the Legislature was addressing problems caused by the *collective* conduct of *many* spammers which taxes Internet resources and clogs individual in-boxes. These asserted harms are not the result of the conduct of any one commercial e-mailer, including Trancos. Balsam engages in a fallacy of division[18] when he tries to bootstrap legislative findings about the aggregate effects of abusive commercial e-mailing practices in general into an argument he personally must have suffered some unspecified damage as a result of the eight e-mails he received from Trancos.

(16) Balsam maintains he was not required to prove reliance or causation because he was seeking only injunctive, not monetary relief under the CLRA. He supports that proposition with a passage from *Annunziato v. eMachines, Inc.* (C.D.Cal. 2005) 402 F.Supp.2d 1133, in which the court states there is no need to prove reliance or causation when the plaintiff is seeking an injunction to protect the public. (*See id.* at p. 1137.) But *Annunziato* involved no claims

[18] "The 'fallacy of division' is the reverse of the fallacy of composition. It is committed when one argues that what is true of a whole must also be true of its parts." (*Rosen v. Unilever U.S., Inc.* (N.D.Cal., May 3, 2010, No. C 09-02563 JW) 2010 WL 4807100 pp. *5-*6.)

brought under the CLRA. (*Annunziato,* at p. 1136.) In the passage Balsam cites, *Annunziato* was concerned only with claims under the Unfair Competition Law (§ 17200 et seq.) and the False Advertising Law (§ 17500 et seq.), and was in fact distinguishing these laws from the CLRA, which does require proof of causation and damages. (*Annunziato,* at p. 1137.) By its own terms, section 1780, subdivision (a) part of the CLRA requires a consumer sustain damages as a result of conduct made unlawful by Civil Code section 1770 in order to obtain *any* relief, whether monetary or injunctive. Balsam fails to prove the statute means something different from what it says.

The trial court properly dismissed Balsam's CLRA cause of action.

2. *Nelson's Liability Under the Anti-spam Law*

The trial court found Nelson had no individual liability to Balsam because Nelson "was acting at all relevant times as an officer and employee of Defendant Trancos Inc. in regard to the subject transactions. . . ." Balsam disagrees, contending even if Nelson was acting within the course and scope of his duties, he personally participated in, authorized, and set in motion the actions taken by Trancos that violated the Anti-spam Law. In particular, Balsam points to evidence Nelson personally registered some of the domain names Trancos used for its Meridian operation, allowed his credit card to be used to pay for

registration of the USAProductsOnline.com domain name, and agreed with and ratified independent contractor Costeli's recommendation the domain names used in the Meridian operation be privately registered. Balsam also cites to Nelson's testimony he was sure he must have been asked to make decisions concerning the Meridian business, but could not recall the specifics.

(17) The relevant legal principles are reviewed in *PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368 1378-1389 [93 Cal. Rptr. 2d 663[(*PMC*). "Corporate director or officer status neither immunizes a person from personal liability for tortious conduct nor subjects him or her to vicarious liability for such acts. [Citations.] . . . 'Directors or officers of a corporation do not incur personal liability for torts of the corporation merely by reason of their official position, unless they participate in the wrong or authorize or direct that it be done. They may be liable, under the rules of tort and agency, for tortious acts committed on behalf of the corporation. [Citations.]' . . . ' . . . "[A]n officer or director will not be liable for torts in which he does not personally participate, of which he has no knowledge, or to which he has not consented. . . . While the corporation itself may be liable for such acts, the individual officer or director will be immune unless he authorizes, directs, or in some meaningful sense actively participates in the wrongful conduct."'" (*Id.* at p. 1379.)

(18) "A corporate director or officer's participation in tortious conduct may be shown not solely by

direct action but also by *knowing consent to or approval of unlawful acts.*" (*PMC, supra,* 78 Cal.App.4th at p. 1380, italics added.) "[T]he rule imposing liability on an officer or director for participation in or authorization of tortious conduct has its roots in agency law. [Citations.] . . . Civil Code section 2343 provides: 'One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others: [¶] . . . [¶] 3. *When his acts are wrongful in their nature.*' **(19)** This rule applies to officers and directors." (*Id.* at p. 1381, italics added; *see also McClory v. Dodge* (1931) 117 Cal.App. 148, 152-154 [4 P.2d 223], disapproved on other grounds in *Mary Pickford Co. v. Bayly Bros., Inc.* (1939) 12 Cal.2d 501, 522 [86 P.2d 102] [corporate directors personally liable for misappropriation of plaintiff's stock when they knew or should have known conduct was wrongful].) An officer or director who commits a tort in reasonable reliance on expert advice or other information cannot be held personally liable for the resulting harm. (*PMC,* at pp. 1386-1387.)

The evidence in this case did not warrant imposition of personal liability on Nelson. When he was asked what his involvement was in Meridian, Nelson responded: "I paid Joe [Costeli] his monthly consulting fees. Of course, I paid Garrett [Hunter, a Trancos vice president in charge of Meridian], touched base with Garrett on occasion on this. Again, he was working out of our Pacific Palisades office. I would come down every three weeks to say hi to them. That's it. I

mean I signed . . . off on the checks and release[d] payments to our advertisers and publishers." He further testified Costeli and Hunter usually did not ask him to make decisions about the operation, and although he was sure one of them must have asked him to make a decision on *some* aspect of the project, he could not remember any specifics. Nelson let Hunter use his credit card to register the USAProductsOnline.com domain name used in the mailings and he registered some of the domain names himself. Costeli told him it would be a good idea to privately register the domain names used in the operation, and Nelson agreed to it because of issues Trancos had in the past, including being "mail bombed" by one person, and employees receiving threatening telephone calls.

Nelson had minimal involvement with Meridian's operations. He did not participate in most of its decisions. There is no evidence he *knowingly* consented to or approved of any unlawful acts on its part. The legal violation that did occur – sending out e-mails using domain names on the "From" line that were untraceable to the sender – stemmed from a consultant's recommendation on which Nelson reasonably relied for reasons unrelated to the Anti-spam Law. There is no evidence Nelson knew or should have known using privately registered, untraceable domain names would violate the law or was otherwise tortious or wrongful. Doing so was not "wrongful in [its] nature." (Civ. Code, § 2343, subd. 3.)

Balsam cites no case remotely similar, and we have found none, in which personal liability was

imposed on a corporate officer. *People v. Conway* (1974) 42 Cal.App.3d 875 [117 Cal. Rptr. 251] (*Conway*), cited by Balsam, is distinguishable. In *Conway,* the president of an auto dealership was held personally liable for the unlawful activities of his salesmen where the evidence showed that he controlled the business and "permitted the unlawful practices to continue after being informed of them on numerous occasions." (*Id.* at p. 886.)[19] There is no evidence Nelson was informed in 2007 that using untraceable domain names on the "From" line of Meridian's e-mails violated the Anti-spam Law, yet allowed the practice to continue.

The trial court properly declined to hold Nelson jointly and severally liable with Trancos.

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[19] The relevant facts in *Conway* were as follows: "After being informed of the practices of his subordinates by Mr. Elmer Kunkle, special investigator for the Department of Motor Vehicles, and by Ms. Elizabeth Steidel, [Conway] allowed these subordinates to continue in their positions and carry on their unlawful practices for the benefit of Pasadena Motors. The evidence shows a repeated pattern of illegal conduct by the agents of Pasadena Motors which indicates inferentially [Conway's] toleration, ratification, or authorization of their illegal actions." (*Conway, supra,* 42 Cal.App.3d at p. 886.)

III. DISPOSITION

The judgment is affirmed. Balsam shall recover his costs on Trancos's appeal. Trancos and Nelson shall recover their costs on Balsam's cross-appeal.

Marchiano, P.J., and Banke, J., concurred.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

DANIEL L. BALSAM, Plaintiff, vs. TRANCOS, INC., et al., Defendants. /	Civil No. 471797 **JUDGMENT AND FINAL STATEMENT OF DECISION** Dept. 2, Hon. Marie S. Weiner (Filed Mar. 10, 2010)

This matter was assigned for trial in Department 2 of this Court before the Honorable Marie S. Weiner. Timothy Walton, Esq. appeared on behalf of Plaintiff Daniel Balsam, and Robert Nelson of Nelson & Weinkauf appeared on behalf of the remaining Defendants Trancos Inc. Brian Nelson, and Laure Majcherczyk. Plaintiff voluntarily dismissed Defendant Laure Majcherczyk during the course of the trial.

A Court Trial commenced in this action on October 14, 2009 and concluded the presentation of evidence and oral argument on October 19, 2009. As set forth on the record, this Court held that Plaintiff has no standing to sue under the second cause of action for violation of the Consumers Legal Remedies Act, Civil Code Section 1750 *et seq.,* as Plaintiff was not a "consumer" of any goods or services as defined in Civil Code Section 1761(d), and as Plaintiff did not

sustain "any damages" caused by Defendants' alleged conduct as required by Section 1780.[1] See *Buckland v. Threshold Enterprises Ltd*. (2007) 155 Cal.App.4th 798, 809.

The Court also held that Plaintiff's first cause of action for violation of Business & Professions Code Section 17529 *et seq*. is not pre-empted under federal law, for the reasons set forth on the record, which are incorporated herein by reference without repeating. Further, it was undisputed that Plaintiff had no claim for actual injury or actual monetary damages from any violation of the Business & Professions Code.

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[1] Plaintiff now argues, as an "objection" to the tentative decision, that he need not show "actual damages" in order to sue under the Consumer Legal Remedies Act. Plaintiff ignores the fact that there was no evidence that Plaintiff sustain *any* monetary loss. Plaintiff relies upon *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, but that case held, consistent with this Court's ruling, that a violation of CLRA is not enough – the Plaintiff must have sustained some monetary implication *caused by* the defendant's violation of the law. *Meyer,* at p. 641 ("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 CLRA.") The Supreme Court stated in *Meyer* that tort damages are not required, but "any damage" may include transaction costs and opportunity costs. *Id*., at p. 640. Plaintiff had no evidence of any economic loss or costs incurred.

It was agreed by counsel for the parties that the third cause of action for declaratory relief was duplicate of the first cause of action.

According, the Court held that Plaintiff was not entitled to a trial by jury, and proceeded with a court trial.

Based upon a preponderance of the evidence presented at trial, and having considered the objections and responses to the tentative statement of decision, THE COURT FINDS as follows:

Material Facts Presented

This case presents issues of first impression as to interpretation and application of Business & Professions Code sections which prohibit spam emails.

Plaintiff Daniel Balsam is a licensed California attorney with experience in consumer protection litigation. Plaintiff Balsam is also a named plaintiff and/or attorney representing plaintiffs in dozens of lawsuits since 2002 against companies for unsolicited commercial email advertising, commonly known as "spam" emails. Plaintiff has a website named "DanhatesSpam.com", undertakes efforts to track spammers, and has a weblog ("blog") with articles regarding spam litigation. Plaintiff personally has over 100 email addresses.

Plaintiff is a San Francisco resident who owns four computers, all of which are located in California. The subject of this lawsuit are eight emails sent to his

email address dan_in_sf@yahoo.com This constitutes a "California address" under B&P Code Section 17529(b). Plaintiff received these eight emails in July and August 2007. It is undisputed that the emails were sent by Defendant Trancos Inc.

Brian Nelson is the CEO and founder of Defendant Trancos Inc. Defendant Trancos has 44 employees and three offices (the headquarters in Redwood City, in Malibu, and in New York). Defendant Trancos owns/registered 477 different domain names. These are privately registered through DomainsByProxy. Defendant privately registers its domain names and uses DomainsByProxy so that reference to that site by members of the public would not reveal the true owner of the domain name. The purpose of private registration of these domain names by Defendant was to avoid complaints by the public, and avoid getting direct complaints by members of the public. Indeed, Defendant previously had threatening phone calls from people who wanted to opt-out of their email lists. Use of private registration avoided receiving threatening phone calls over unsolicited emails. Rather, Defendant would require, by this method, that unhappy people would have to (1) leave message with Domains By Proxy to supposedly forward to Trancos and/or (2) affirmatively unsubscribe by opting out from the domain name communication.

During the relevant time period, namely the Summer of 2007, Trancos had a division called Meridian. It managed nine email lists including Hi-Speed Media email lists. Defendant would find internet

advertisers, and send advertisements using email lists provided by Hi-Speed Media/ValueClick (which is a huge network advertiser).

It was Nelson's understanding that Hi-Speed Media/ValueClick obtained emails subject to the proviso that the emails could be used for itself or its "partners", and by this broad authorization Hi-Speed could use emails of its customers for any commercial use whatsoever as long as it shared in the revenue. Hi-Speed Media provided (and kept ownership) of the email address lists and Trancos "managed" the lists and used them to send out email advertisements. Revenue from the advertising was then split between Trancos and Hi-Speed Media. This arrangement commenced in June 2007 and was terminated in September 2007 – because Trancos was losing money or not making money. Meridian is no longer a division of Trancos since its efforts were discontinued in 2007. Thus Defendant has stopped doing the allegedly wrongful conduct of which Plaintiff complains.

Defendant Trancos Inc. sent eight emails to Plaintiff. As best as Defendant can determine, Trancos obtained Plaintiff's email address from GiveAwayCafe.com, which is owned by Hi-Speed Media, which is owned by Value Click. Defendant used eight different domain names to send the eight emails to Plaintiff.

According to each of the eight emails, Plaintiff allegedly gave consent for use of his email address on "2007 July 11" for IP address 64.184.86.246. Plaintiff

presented uncontradicted evidence that Plaintiff *never* consented to receive any of these eight emails from any of the sources, including Defendant Trancos, Hi-Speed Media, ValueClick, Give Away Cafe.com, and the eight advertisers.

Defendant Nelson testified that it is possible for someone – who is not Plaintiff – to type Plaintiff's email address into the website of Give Away Cafe.com, and thereby "authorizing" use of Plaintiff's email. Thus it is possible that email is used by an advertiser or list collector which is not authorized by the true person.

The eight emails received by Plaintiff from Defendant Trancos are as follows, in order as set forth in Trial Exhibit #2:

Email #1: The email from IP address 75.140.65.221, dated July 22, 2007, states it is from "Paid Survey" with an email address of survey@misstepoutcome.com. The Subject stated is "Get paid 5 Dollars for 1 survey". The content in the body of the email is a commercial advertisement purportedly by Survey Adventure. In regard to opting out of future emails, it states at the end of the email:

> To block further mailings, write to: Strategic Financial Publishing, Inc., 10535 E. Washington Street, Ste. 310, Indianapolis, IN 46229-2609 or http://misstepoutcome.com/soi?m+79444&!=2

> We hope you enjoyed receiving this email, but if you no longer wish to receive our emails please click here.
>
> USAProductsOnline.com
> 11870 Santa Monica Blvd. Suite #106-529
> Los Angeles, C.A. 90025

Paid Survey is not the name of any existing company, but rather treats the "from" line as though an additional "subject" line. Evidence was presented that there is no company actually named misstepoutcom [sic] and no website named www.misstepoutcome.com, but rather this is nonsensical name for one of Defendant Trancos' hundreds of privately registered domain names. Brian Nelson never had any communications with anyone at Strategic Financial Publishing nor Survey Adventure.

If one clicks on the advertisement for Survey Adventure, you do *not* "get paid 5 dollars for 1 survey". Indeed, you are obligated to sign up for three offers, then take multiple surveys and have no guarantee of getting paid anything by anyone for taking the survey. Of the people who testified at trial, no one who actually tried the website got paid for taking a survey.

There is no actual company named USAProducts Online.com nor USA Products Online. No such entity is registered as a corporation, LLC or limited partnership to do business in the State of California, and is not a registered fictitious business name in Los Angeles County or San Mateo County. There is no

website at www.USAProductsOnline.com. This is a domain name created by Defendant Trancos which has no real existence.

Email #2: The email from IP address 75.140.65.217, dated July 21, 2007, states it is from "Your Business" with an email address of franchisegator@modalworship.com. The Subject stated is "Be Your Own Boss! You could own a franchise!" The content in the body of the email is a commercial advertisement purportedly by Franchise Gator. In regard to opting out of future emails, it states at the end of the email:

> To unsubscribe, *click here.* Or mail a copy of this email to:
>
> Franchise Gator
> 315 5th Ave S, Suite 100
> Seattle, WA 98104
>
> We hope you enjoyed receiving this email, but if you no longer wish to receive our emails please click here.
>
> USAProductsOnline.com
> 11870 Santa Monica Blvd. Suite #106-529
> Los Angeles, C.A. 90025

Again, there is no actual business named Your Business, no actual entity named modalworship, no website at www.modalworship.com, and no actual entity named USA Products Online or USAProductsOnline.com. The name of the true sender, Trancos, appears nowhere.

Email #3: The email from IP address 75.140.65.210, dated July 27, 2007, states it is from "Christian Dating" with an email address of ChristianDating@moussetogether.com. The Subject stated is "Date single Christians". The content in the body of the email is a commercial advertisement purportedly by ChristianCafe.com. In regard to opting out of future emails, it states at the end of the email:

> Unsubscribe: To stop receiving email messages from or on behalf of ChristianCafe.com write to: 600 Alden Road, Suite 210, Markham, ON L3R 0E7
>
> We hope you enjoyed receiving this email, but if you no longer wish to receive our emails please click here.
>
> USAProductsOnline.com
> 11870 Santa Monica Blvd. Suite #106-529
> Los Angeles, C.A. 90025

No evidence was presented as to whether ChristianCafe.com actually exists or references a real business. The business is not named Christian Dating. There is no actual entity "moussetogether", no website at www.moussetogether.com, and no actual entity named USA Products Online.com. The name of the true sender, Trancos, appears nowhere.

Email #4: The email from IP address 75.40.65.209 [sic], dated July 27, 2007, states it is from "Your Promotion" with an email address of YourPromotion@mucousmarquise.com. The Subject

stated is "Workers Needed Online". The content in the body of the email is a commercial advertisement giving no indication of the name of the advertiser or business. In regard to opting out of future emails, it states at the end of the email:

> Ad Sponsors LLC 4301 N.W. 63rd St., Suite 105 Oklahoma City, OK 73116 Follow this link for removal: http//mucousmarquise.com/soi?m=151444&!=1
>
> We hope you enjoyed receiving this email, but if you no longer wish to receive our emails please click here.
>
> USAProductsOnline.com
> 11870 Santa Monica Blvd. Suite #106-529
> Los Angeles, C.A. 90025

There is no business named "Your Promotion", no entity called mucousmarquise nor any website at www.mucousemarquise.com. The nature of Ad Sponsors LLC is unknown. There is no USA Products Online.com. The name of the true sender, Trancos, appears nowhere.

Email #5: The email from IP address 75.140.65.226, dated July 31, 2007, states it is from "Bank Wire Transfer Available" with an email address of BankWireTransferAvailable@minuteprovenance.com. The Subject stated is "Sign up for a 24-hour Renters Cash Advance". The content in the body of the email is a commercial advertisement giving no indication of the name of the advertiser or business. On the contrary, the small print at the end of the ad states that

the advertiser is a conduit for financial institutions and is not a lender itself, but rather only a "sponsor". These are for usurious loans of 300% to 800%. In regard to opting out of future emails, it states at the end of the email:

> To stop further mailings, visit this link: https:// secure. renterscashadvance. com/ unsubscribe.php or write: RentersCashAdvance, 260 West 36th Street FL 10, New York NY 10018.
>
> We hope you enjoyed receiving this email, but if you no longer wish to receive our emails please click here.
>
> USAProductsOnline.com
> 11870 Santa Monica Blvd. Suite #106-529
> Los Angeles, C.A. 90025

Once again, there is no company "BankWireTransferAvailable", there is no entity "minuteprovenance", no website at minuteprovenance. com, no entity Renters Cash Advance, and no entity USA Products Online.

Email #6: The email from IP address 75.140.65.228, dated August 11, 2007, states it is from "eHarmony" with an email address of eHarmony@ minecyclic.com. The Subject states is "You Could Be in Everlasting Dating Harmony". The content in the body of the email is a commercial advertisement by eHarmony for their singles-matching services. There is an opt-out opportunity at the end of the email, by mail or by clicking a link *with eHarmony.* It is

undisputed that eHarmony is a real company, generally known to the public. There is also an opt-out opportunity allegedly with USAProductsOnline.com. Apparently, Plaintiff's claim is based upon the non-existence of minecyclic and USA Products Online, and the lack of identification of Trancos.

Email #7: The email from IP address 75.140.65.206, dated August 14, 2007, states it is from "Dating Generic" with an email address of dating@mythicaldumbwaiter.com. The Subject is "It's a Great Time to Say Hello to Someone New!" The content in the body of the email is a commercial advertisement with no identification of the advertiser or business. Instead it contains a suggestive photo of a young woman, scanty clad in lingerie. There is not even a name of the entity whom you could contact to unsubscribe in the first instance. In regard to opting out of future emails, it states at the end of the email:

> We respect your privacy. If you wish to no longer receive emails like this one, please click here to unsubscribe and your email address will be removed from future email promotions. You can also unsubscribe by writing to us at 800 El Camino Real Suite #180, Mountain View, CA 94040. Please allow up to 10 days upon receipt to process physical mail.
>
> We hope you enjoyed receiving this email, but if you no longer wish to receive our emails please click here.

USAProductsOnline.com
11870 Santa Monica Blvd. Suite #106-529
Los Angeles, C.A. 90025

Plaintiff Daniel Balsam investigated the address listed in Mountain View, California. At that address, Plaintiff found that it was a shared suite with no company named listed at all. Thus, even if mail was sent, there would be no one to direct the mail *to*, because multiple businesses are sharing the suite. Thus the physical address given for mailing an opt-out is useless.

Needless to say, there is no company named Dating Generic, no entity Mythical Dumbwaiter, no website mythicaldumbwaiter.com, and no entity USA Products Online.

Email #8: The email from IP address 75.140.65.204, dated August 13, 2007, states it is from "Join Elite" with an email address, of JoinElite@nationalukulele.com The Subject stated is "Get your criminal Justice Degree". The content in the body of the email is a commercial advertisement about getting a criminal justice degree, but there is no identification of any person, company or business as the advertiser. No true sender is identified. Plaintiff clicked on the ad, and was transferred to "Find the Right School", which lists several online universities, but no identification of the business sponsor. In regard to opting out of future emails, it states at the end of the email:

> We respect your privacy. If you wish to no longer receive emails like this one, please click here to unsubscribe and your email address will be removed from future email promotions. You can also unsubscribe by writing to us at 800 El Camino Real Suite #180, Mountain View, CA 94040. Please allow up to 10 days upon receipt to process physical mail.
>
> We hope you enjoyed receiving this email, but if you no longer wish to receive our emails please click here.
>
> USAProductsOnline.com
> 11870 Santa Monica Blvd. Suite #106-529
> Los Angeles, C.A. 90025

As set forth above, Plaintiff Daniel Balsam investigated the address listed in Mountain View only to find that it is a shared suite with no company name identified and no way for mail to be delivered to a particular person or company. As set forth above, there is no USA Products Online. There is no entity named Join Elite nor named national ukulele.

Plaintiff Daniel Balsam investigated the address of USAProductsOnline.com, which is listed at the end of each of these eight emails from Trancos. The address on Santa Monica Boulevard is a UPS Store, not the address of the business. Defendant Nelson admitted that this is not a physical location for Defendant Trancos, but merely a postal box. Plaintiff subpoenaed documents for this address from the UPS Store (Trial Exhibit #9), and the application for the postal

box is in the name of USAProductsOnline.com – an entity which does not exist. The physical address given on the application is the Trancos office that was in Pacific Palisades, California.

Plaintiff never "clicked" to opt-out of any of these email communications Plaintiff never sent a letter asking to opt-out of future communications from these companies. Plaintiff did not attempt to "reply" to these emails with a request to stop sending future communications.

Opting out by the recipient is not required under the law. Indeed, the Attorney General and Internet Service Providers, such as Plaintiff's ISP Yahoo, tell the public *not* to respond or click on the opt-out button, because it is more likely to *cause* more spans to be sent – because it confirms the viability of the email address.

Plaintiff did sent a certified letter addressed to USAProductsOnline.com at the UPS address, which was received on August 9, 2007, complaining about receiving five spam emails, and demanding a remedy under the law of a $1000 penalty. Plaintiff never received a reply.

Plaintiff was not tricked into believing that these emails were anything other than commercial advertisements. Plaintiff was not tricked into seeking to purchase any goods or services. Plaintiff has a policy of never purchasing anything from a spam advertiser. The problem for Plaintiff is that the use of hundreds of nonsensical names for the sender tricks the spam

filters from catching and identifying spam (and sending it into the spam file of a person's email).

During the relevant time period, Trancos had a procedure for deleting or otherwise segregating recipients who electronically request to "opt-out" of future communications from the same entity who provided the service lists. Trancos also commonly utilized a form of contract (with those entering into an agreement to provide e-mail lists for sending of advertisements and the sharing of revenue) explicitly requiring its "partner" to represent that the e-mails were authorized or otherwise acquired through direct consent. Notably, the agreement with Hi-Speed Media did *not* use this standard contract, but rather had no promises or representations by Hi-Speed that they had direct consent or other authorization for the use of the e-mails provided.

Plaintiff has not received any further spam from Defendant since August 2007. Defendant Nelson testified to efforts to erase or exclude Plaintiff's e-mail address from all subsequent use of e-mail lists, now and in the future.

Applicable Law

The parties' requests for judicial notice are GRANTED as to federal and non-California reported decisions and statutes and California legislative history, and is DENIED as to unreported California trial court decisions.

Pertinent provisions of the California Business & Professions Code prohibiting spam are as follows:

Section 17529.1

(a) "Advertiser" means a person or entity that advertises through the use of commercial e-mail advertisements.

(b) "California electronic mail address" or "California e-mail address" means any of the following:

(1) An e-mail address furnished by an electronic mail service provider that sends bills for furnishing and maintaining that e-mail address to a mailing address in this state;

(2) An e-mail address ordinarily accessed from a computer located in this state.

(3) An e-mail address furnished to a resident of this state.

(c) "Commercial e-mail advertisement" means any electronic mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift, offer, or other disposition of any property, goods, services, or extension of credit.

(d) "Direct consent" means that the recipient has expressly consented to receive e-mail advertisements from the advertiser, either in response to a clear and conspicuous

request for the consent or at the recipient's own initiative.

* * *

(i) "Initiate" means to transmit or cause to be transmitted a commercial e-mail advertisement or assist in the transmission of a commercial e-mail advertisement by providing electronic mail addresses where the advertisement may be sent. . . .

* * *

(l) "Preexisting or current business relationship," as used in connection with the sending of a commercial e-mail advertisement, means that the recipient has made an inquiry and has provided his or her e-mail address, or has made an application, purchase, or transaction, with or without consideration, regarding products or services offered by the advertiser.

Commercial e-mail advertisements sent pursuant to the exemption provided for a preexisting or current business relationship shall provide the recipient of the commercial e-mail advertisement with the ability to "opt-out" from receiving further commercial e-mail advertisements by calling a toll-free telephone number or by sending an "unsubscribe" e-mail to the advertiser offering the products or services in the commercial e-mail advertisement. This opt-out provision does not apply to recipients who are receiving free-email service with regard to commercial

e-mail advertisements sent by the provider of the e-mail service.

* * *

(o) "Unsolicited commercial e-mail advertisement" means a commercial e-mail advertisement sent to a recipient who meets both of the following criteria:

(1) The recipient has not provides [sic] direct consent to receive advertisements from the advertiser.

(2) The recipient does not have a preexisting or current business relationship, as defined in subdivision (1), with the advertiser promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

Section 17529.2

Notwithstanding any other provision of law, a person or entity may not do any of the following:

(a) Initiate or advertise in an unsolicited commercial e-mail advertisement from California or advertise in an unsolicited commercial email advertisement sent from California.

(b) Initiate or advertise in an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.

* * *

Section 17529.5

(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 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. 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 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.

(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 e-mail 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 e-mail advertisement transmitted in violation of this section, up to one million dollars ($1,000,000) per incident.

(C) The recipient, an electronic mail service provider, or the Attorney General, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.

* * *

(2) If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements that are in violation of this section, the court shall reduce the liquidated damages recoverable under paragraph (1) to a maximum of one hundred dollars ($100) for each unsolicited commercial e-mail advertisement, or a maximum of one hundred thousand dollars ($100,000) per incident.

(3)(A) A person who has brought an action against a party under this section shall not bring an action against that party under Section 17529.8 or 17538.45 for the same commercial e-mail advertisement, as defined in subdivision (c) of section 17529.1.

* * *

Section 17529.8

(a)(1) In addition to any other remedies provided by this article or by any other provisions of law, a recipient of an unsolicited commercial email advertisement transmitted in violation of this article, an electronic mail service provider, or the Attorney General may bring an action against an entity that violates any provision of this article to recover either or both of the following:

(A) Actual damages.

(B) Liquidated damages of one thousand dollars ($1,000) for each unsolicited commercial e-mail advertisement transmitted in violation of Section 17529.2, up to one million dollars ($1,000,000) per incident.

(2) The recipient, an electronic mail service provider, or the Attorney General, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.

* * *

(b) If the court finds that the defendant established and implemented, with due care, practice and procedures reasonably designed

to effectively prevent unsolicited commercial e-mail advertisements that are in violation of this article, the court shall reduce the liquidated damages recoverable under subdivision (a) to a maximum of one hundred dollars ($100) for each unsolicited commercial e-mail advertisement, or a maximum of one hundred thousand dollars ($100,00) [sic] per incident.

Section 17538.5

(a) It is unlawful in the sale or offering for sale of consumer goods or services for any person conducting, any business in this state which utilizes a post office box address, a private mailbox receiving service, or a street address representing a site used for the receipt or delivery of mail or as a telephone answering service, to fail to disclose the legal name under which business is done and, except as provided in paragraph (2) of subdivision (b), the complete street address from which business is actually conducted in all advertising and promotional materials, including order blanks and forms. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or both.

There Is No Federal Preemption

The Court also held that Plaintiff's first cause of action for violation of Business & Professions Code

Section 17529 *et seq.* is not pre-empted under federal law, for the reasons set forth on the record which are incorporated herein by reference without repeating. As its "objection" to the tentative statement of decision, Defendant argues further with additional authorities cited for the proposition that the California anti-spam statute is preempted by federal law, known as CAN-SPAM, 15 U.S.C. §7701 *et seq.* This further argument does not lead the Court to a difference [sic] conclusion, and the Court finds that Plaintiff's claim is not preempted by federal law.

That the California statute is *not* preempted by federal law is supported by *Asis Internet Services v. Consumerbargaingiveaways LLC* (N.D. Cal. 2009) 622 F.Supp.2d 935; *Asis Internet Services v. Subscriberbase Inc.* (N.D. Cal. 2009) 2009 U.S. Dist. LEXIS 112852; *Asis Internet Services v. Vistaprint USA Inc.* (N.D. Cal. 2009) 617 F.Supp.2d 989; see also *Ferguson v. Friendfinders Inc.* (2002) 94 cAL.aPP.34TH [sic] 1255, 1267-1268 ("We find that California has a substantial legitimate interest in protecting its citizens from the harmful effects of deceptive UCE [unsolicited commercial e-mail]"). Congressional legislative history reflects that "a State law prohibiting fraudulent or deceptive headers, subject lines, or content in commercial e-mail would not be preempted." S. Rep. No. 108-102.

Defendants assert that the Ninth Circuit decision in *Gordon v. Virtumundo Inc.* (9th cir. 2008) 575 F.3d 1040, supports its assertion of preemption. It does not demonstrate preemption as to Plaintiff's claims

herein. First, the Ninth Circuit in *Gordon* was applying Washington State law, which is *not* the same as our California statute. For example, the Washington State statute, Wash. Rev. Code § 19.190.010 *et seq.*, does not require that the "initiator" of the spam email *know* that it is false or misleading, and does not require that any false information or misrepresentation be *material.* Second, the Ninth Circuit in *Gordon* held that Gordon's claim was not for a deceptive or fraudulent practice, because he was able to easily trace and identify the actual owner of the domain names used and the sending of the emails. *Gordon,* at p. 1064. The Ninth Circuit explicitly distinguished the sort of claim – as alleged by Plaintiff Balsam – which *would* be exempt and *not* subject to federal preemption:

> Nothing contained in this claim [by Gordon] rises to the level of "falsity or deception" within the meaning of the CAN-SPAM Act's preemption clause. Gordon offers no proof that any headers have been altered to impair a recipient's ability to identify, locate, or respond to the person who initiated the e-mail. Nor does he present evidence that Virtumundo's practice is aimed at misleading recipients as to the identity of the sender.

Gordon, at p. 1064. Plaintiff Balsam *has* proven that Defendant Trancos intentionally undertook efforts to impair a recipient's ability to identify, locate, or respond to it as the initiator of the email, and that it intended to hide itself from identification by recipients as the sender.

Legal Analysis

The evidence reflects that Defendant Brian Nelson was acting at all relevant times as an officer and employee of Defendant Trancos Inc. in regard to the subject transactions, and thus liability and responsibility reposes in the corporation and not in Defendant Nelson individually.

Plaintiff has demonstrated by a preponderance of the evidence that his email is a California email as defined in Section 17529.1(b), that the eight emails he received from Defendant Trancos are commercial email advertisements as defined in Section 17529.1(c), that Plaintiff did *not* give direct consent to receive commercial email advertisements from any of these eight advertisers nor from Trancos nor from Hi-Speed Media nor from Give Away Cafe.com as defined in Section 17529.1(d), that Defendant Trancos initiated the eight emails sent to Plaintiff as defined in Section 17529.1(i), and that Plaintiff had no preexisting or current business relationship with any of the eight advertisers whose products or services were the subject of the eight emails as defined in Section 17529.1(1).

Even if there had been a preexisting or current business relationship, Defendant Trancos did not comply with the opt-out requirements of Section 17529.1(1), nor did the eight advertisers. The statute requires that there be an opportunity to opt-out by calling a toll-free number or "by sending an unsubscribe e-mail to the advertiser offering the products or

services in the commercial e-mail advertisement". *None* of the eight email; provided a toll-free number to call to opt-out. *Seven* of the eight emails did not provide the ability to send an "unsubscribe" email *to the advertiser* of the product or service advertised in the email. Only the email for eHarmony nominally provided a link to eHarmony. Defendants presented no evidence that clicking the opt-out on the email would have sent an unsubscribe message *to the advertiser*. Trancos was not the advertiser because it was not selling any product or service advertised in the email – the same is true for Hi-Speed Media.

Plaintiff has asserted that Email #1 violates Section 17529.5(a)(3) for having a false subject line, in that the representation, "Get paid 5 dollars for 1 survey", is false. Yet, Section 17529.5(a)(3) requires "that a person knows" it "would be likely to mislead a recipient". Plaintiff did not prove by a preponderance of the evidence that Trancos or its officers (such as Nelson) actually *knew* this was a false statement or was misleading.

Plaintiff has asserted that all eight emails violate Section 17529.5(a)(2) because of "falsified, misrepresented, or forged header information". There is no evidence that header information was forged. Rather the issue is whether it is falsified or misrepresented. Other than the email for eHarmony, which does state that it is from eHarmony, the seven other emails do not truly reveal who sent the email. Thus the sender information ("from") is misrepresented. All of these emails came from Defendant Trancos, but none of the

emails disclose this in the header (or the body or the opt-out). The emails were sent on behalf of eight different advertisers, i.e., purveyors of good and service, but only eHarmony was a real company. The rest of the "senders" identified in the headers of the other seven emails do not exist or are otherwise misrepresented, namely Paid Survey, Your Business, Christian Dating, Your Promotion, Bank Wire Transfer Available, Dating Generic, and Join Elite In those same headers reflecting the "from" line of the email, the referenced sender email is a non-existence entity using a nonsensical domain name reflecting no actual company, namely misstepoutcome.com, modalworship.com, moussetogether.com, mucousmarquise.com, minute provenance.com, mythicaldumbwaiter.com, and nation. alukulele.com.[2]

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[2] This Court acknowledges that the California Supreme Court presently has pending a decision, upon certification by the Ninth Circuit, to answer the following question of law: "Does sending unsolicited commercial email advertisements from multiple domain names for the purpose of bypassing spam filters constitute falsified, misrepresented, or forged header infromation [sic] under Cal. Bus & prof. Code § 17529.5(a)(2)?" (S169195.) In our case, the issue is not just sending of spam through multiple domain names, but that the "sender" names (or domain names used) do not represent any real company, and cannot be readily traced back to the true owner/sender. Contrary to the assertion by Defendant, the same cannot be said of use of email from "aol.com" or "comcast.net" or "google.com" because those all reflect a real existing company that actually does business.

Accordingly, Plaintiff would be entitled to "liquidated damages"[3] against Defendant Trancos Inc. pursuant to Section 17529.5(b)(1)(B) of $7000.00 (seven spam multiplied by $1000).

Alternatively, Plaintiff has proven by a preponderance of the evidence that each, of these eight emails constituted an unsolicited commercial e-mail advertisement as defined in Section 17529.1(o). Plaintiff has demonstrated that Defendant Trancos violated Section 17529.2 by initiating spam to a California email (and also sent from California). Accordingly, based upon the identical evidence and allegations, Plaintiff would be entitled to a (non-duplicative) remedy of a monetary penalty of $8000.00 (8 spam emails multiplied by $1000).

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[3] In its "objection" to the tentative decision, Plaintiff argues extensively that the award should be called liquidated damages and not a penalty. In this case, there is no material distinction, i.e., the liquidated damages are the same as a statutory penalty. "Liquidated damages" consisting of a fixed sum with no demonstrate [sic] that the fixed amount is a fair approximation of probable damages for a violation or breach is the same as a "penalty" under the law. See *Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 977. Here, there is no evidence and no legislative history reflecting that the $1000 amount in the "liquidated damages" provision is calculated based upon anticipated damages that one would actually incur for a violation of the statute; rather it is simply a fixed penalty. Further, despite its extensive argument, Plaintiff points to no substantive or material difference as to the effect in this case if the Court calls it a penalty or calls it liquidated damages.

As Plaintiff is required by law to only receive damages or penalties under one of these two anti-spam statutes, as its primary claim was under Section 17529.5, the Court will only award the lesser amount of $7000.00.

The statutes provide a mitigation clause if the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent spam. See §17529.5(b)(2) and §1759.8(b). Defendant has failed to demonstrate the elements of the mitigation clause by a preponderance of the evidence. Indeed, the evidence reflects that Trancos intentionally and affirmatively established practices and procedures to avoid all human contact, avoid the ability of members of the public to contact Trancos directly to stop the sending of emails, and avoid members of the public even *knowing* who actually sent the emails.

Although not the basis of a claim, Plaintiff presented evidence that Trancos violated Section 17538.5 by giving a phony name for a nonexistence [sic] company as the business name for its UPS Store private mailbox address listed on each of the eight emails sent to Plaintiff, in that the mailbox was registered under the name of USAProductsOnline.com. This further denigrates any assertion that Defendant was acting with due care and design to avoid sending spam.

IT IS HEREBY ADJUDGED AND ORDERED that Defendant Trancos Inc. is liable to Plaintiff Daniel L. Balsam on the first cause of action for

violation of the Business & Professions Code, and Plaintiff is awarded statutory "liquidated damages" of $7000.00 against Defendant Trancos Inc. The third cause of action for declaratory relief is DENIED AND DISMISSED AS MOOT. Defendant Trancos Inc. is not liable to Plaintiff Daniel L. Balsam on the second cause of action for violation of the Consumers Legal Remedies Act, and Plaintiff shall take nothing thereon. Defendant Brian Nelson is not liable to Plaintiff Daniel L. Balsam on any cause of action, and Plaintiff shall take nothing from Defendant Brian Nelson. No punitive damages are awarded to Plaintiff as Plaintiff has not presented actual damages by a preponderance of the evidence, and there is no statutory right to punitive damages for violation of the Business & Professions Code sections at issue here. Plaintiff is deemed the prevailing party as to Defendant Trancos Inc. and entitled to recovery of reasonable attorneys' fees and costs, pursuant to timely filing and service of a Memorandum of Costs and a Motion for Award of Attorneys' Fees.

DATED: March 10, 2010

/s/ Marie S. Weiner
HON. MARIE S. WEINER
JUDGE OF THE
SUPERIOR COURT

DANIEL L. BALSAM, Plaintiff and Appellant, v. TRANCOS INC. et al., Defendants and Appellants. AND CONSOLIDATED CASE.

S201366

SUPREME COURT OF CALIFORNIA

2012 Cal. LEXIS 4979

May 23, 2012, Opinion Filed

JUDGES: CANTIL-SAKAUYE, Chief Justice.

OPINION

Petition for review denied.