S169195

In the Supreme Court of California

CRAIG E. KLEFFMAN, Plaintiff and Appellant,

v.

VONAGE HOLDINGS CORP., a New Jersey Corporation, et al., Defendants and Appellants.

On Request Pursuant to California Rules of Court, Rule 8.548, that this Court Decide a Question of California Law Presented in a Matter Pending in the United States Court of Appeals for the Ninth Circuit

OPENING BRIEF ON THE MERITS

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STATEMENT OF ISSUE

The Ninth Circuit requested this Court to determine the following issue of California state law: "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 Cal. Bus. & Prof. Code § 17529.5(a)(2)?" (*Kleffman v. Vonage Holdings Corp.* (9th Cir. 2008) 551 F.3d 847, 849.)

INTRODUCTION

The plain language of California Business and Professions Code section 17529.5, subdivision (a)(2) ("Section 17529.5(a)(2)")[1] prohibits any person or entity from advertising in a commercial e-mail with misrepresented header information. Vonage violates this provision because its multiple random and nonsensical domain names bypass spam filters and mislead recipients and their internet service providers ("ISPs") into receiving and/or opening its unsolicited commercial e-mail advertisements. Significantly, this misrepresentation occurs before the e-mail advertisements are opened, which vitiates the district court's reliance on the fact that the content of each identifies Vonage as the advertiser of broadband telephone services.

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

Moreover, the statutory findings and legislative history of California's Restrictions on Unsolicited Commercial E-Mail Advertisers Act, § 17529 et. seq. ("the California Act"), show that it was passed in part to combat spammers that bypass spam filters. Thus, the Court should interpret Section 17529.5(a)(2) to prevent deception in e-mail header information that permits e-mail advertisements to bypass spam filters.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Ninth Circuit's Statement of Facts for This Court's Review

The Ninth Circuit provided the following statement of facts for this Court's review:

"Craig E. Kleffman filed a putative class action complaint against Vonage Holdings Corp., Vonage America, Inc., and Vonage Marketing, Inc. ('Vonage') for violating, inter alia, California's anti-spam law, Cal. Bus. & Prof. Code § 17529.5. The anti-spam law prohibits unsolicited commercial e-mail advertisements containing or accompanied by falsified, misrepresented, or forged header information. Cal. Bus. & Prof. Code § 17529.5(a)(2).

"Kleffman alleged he received 11 unsolicited e-mail advertisements for broadband telephone services from Vonage through Vonage's marketing agents. The body of each e-mail contained an advertisement stating, 'You Could Save up to 50% on Your Phone Bill!' The

advertisements were marked with Vonage's copyright and were clearly identified as Vonage mailings in the body of the e-mail.

"Vonage sent the e-mails from 11 different domain names: superhugeterm.com; formycompanysite.com; ursunrchcntr.com; urgrtquirkz.com; countryfolkgospel.com; lowdirectsme.com; yearnfrmore.com; openwrldkidz.com; ourgossipfrom.com; specialvrguide.com; and struggletailssite.com. Kleffman alleged that because of Vonage's use of 'multiple random, not repeated, garbled and nonsensical domain names,' internet service providers were less likely to identify and block Vonage's unsolicited commercial e-mail advertisements, and recipients were deceived into opening the e-mails. Plaintiff-Appellant's Opening Brief at 6. In Kleffman's words, 'Vonage essentially creates multiple deceptive identities, as represented by the multiple deceptive domain names,' to distribute the total volume of unsolicited commercial e-mail advertisements and reduce the amount sent from each domain name. This practice 'tricks [internet service providers] into believing there are multiple sources, when in actuality the [unsolicited commercial e-mail] advertisements are all for Vonage'[s] broadband telephone services.' *Id.* at 6-7. The district court dismissed the complaint, holding, inter alia,

Kleffman's allegations failed to state a claim under the plain language of § 17529.5." (*Kleffman v. Vonage*, 551 F.3d at p. 849.)

II. Petitioner's Additional Statement of Procedural Facts

Petitioner filed an appeal with the Ninth Circuit on August 10, 2007. (ER at Vol. II, pp. 11-12.)[2] In addition to the question presented here, that appeal raised other issues, including whether the district court should have granted Petitioner leave to file his First Amended Complaint. (*Ibid.*) After the appeal was fully briefed, the Ninth Circuit certified its question to this Court on December 19, 2008. This Court accepted review on January 28, 2009.

LEGAL DISCUSSION

I. The Plain Language of the California Act Permits Petitioner's Claim

A. The plain meaning of Section 17529.5(a)(2) disallows using multiple domain names to mislead e-mail recipients.

Section 17529.5(a)(2) makes it unlawful for any entity to advertise in a commercial e-mail advertisement sent to a California electronic mail address where the "e-mail advertisement contains or is accompanied by falsified, misrepresented, or forged header information." (§ 17529.5(a)(2).)

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[2] "ER" refers to the Petitioner's consecutively numbered Excerpts of Record, Volumes I and II, filed with the Ninth Circuit on or about September 25, 2007, in conjunction with his briefing on appeal to that court.

There is no dispute that the eleven e-mails sent to Petitioner were "e-mail advertisements" for Vonage's broadband telephone services. (ER at Vol. I, p. 5; Vol. II, pp. 106-124.)

There is no dispute that each of Vonage's e-mail advertisements "contains or is accompanied by" the originating domain name, which is part of an e-mail's "header information." (*Ibid.*) Though the California Act does not define "header information" among the other definitions in section 17529.1, the federal anti-spam law known as CAN-SPAM defines header information as the "source, destination, and routing information attached to an electronic mail message, including the originating domain name and originating email address." (15 U.S.C. § 7702(8).)

In dispute is the meaning and application of the phrase "falsified, misrepresented, or forged," and in particular the word "misrepresented." Vonage and the district court contend that sending these e-mail advertisements from multiple domain names does not constitute misrepresented header information, because the content of each e-mail advertisement identifies Vonage as the advertiser of broadband telephone services.

Petitioner contends that sending e-mail advertisements from multiple domain names for the purpose of bypassing spam filters does constitute

misrepresented header information and that the misrepresentation occurs before the e-mail advertisements are opened and the recipient can see they are from Vonage. Put another way, sending e-mail advertisements from multiple *random and nonsensical* domain names constitutes misrepresented header information, because intent to bypass spam filters can be inferred from the random and nonsensical nature of the domain names, which render spam filters ineffective. (Cal. Evid. Code, § 600, subd. (b); *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1149; see also *Fenton v. Board of Directors* (1984) 156 Cal.App.3d 1107, 1117 ["One's intent can be determined by one's acts."]; *In re Maria R.* (1976) 64 Cal.App.3d 731, 735-736 ["[I]n some cases, the injurious effect of intended conduct may be so obvious that a trier of fact properly may infer that an actual intent to harm existed"].)

"As always, we begin with the words of a statute and give these words their ordinary meaning." (*Hoechst Celanese Corp. v. Franchise Tax Board* (2001) 25 Cal.4th 508, 519.) The American Heritage Dictionary (4th ed. 2000) identifies the statutory term at issue, misrepresented, as an inflected form of misrepresent, which it defines: "To give an incorrect or misleading representation of." (Attachments at p. 1.) Similarly, Webster's New World Dictionary (3d college ed. 1994) at page 867 defines

misrepresent as "1. to represent falsely; give an untrue or misleading idea of." (Attachments at pp. 2-3.)

Quite simply, sending e-mail advertisements from multiple random and nonsensical domain names gives the misleading idea that they are from different entities when in fact they are all from Vonage. It is appropriate to focus on the word "misleading" from the definitions cited above as Section 17529.5(a)(2) prohibits "falsified, misrepresented, or forged header information." Because "courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage," the Court should construe "falsified" as something different from "misrepresented." (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 249.) Thus, it is proper to concentrate on the word "misleading" rather than "incorrect," "falsely," or "untrue." For example, while the domain names in Vonage's e-mail advertisements may be literally correct (and traceable to Vonage's contract spammers) they still create the misleading idea that the e-mail advertisements are from multiple different sources when they are actually all from Vonage. And this misrepresentation that Vonage's e-mail advertisements are from different entities affects not only broad based filters employed by ISPs but also individual recipients attempting to filter and control their own private e-mail inboxes.

B. Vonage's multiple random and nonsensical domain names mislead spam filters used by ISPs and recipients.

ISPs block e-mail when a domain name is associated with the sending of high volumes of spam, so the use of multiple random and garbled domain names misrepresents the identity of Vonage in order to bypass spam filters. (ER at Vol. II, p. 92.) The use of multiple random and garbled domain names renders ISPs less likely to identify and block Vonage's unsolicited commercial e-mail advertisements before they reach consumers' computers. (*Ibid.*) Vonage essentially creates multiple deceptive identities, as represented by the multiple deceptive domain names, in order to "spread out" the total volume of unsolicited commercial e-mail advertisements and reduce the volume sent via each domain name. This tricks ISPs into believing there are multiple sources, when in actuality the e-mail advertisements are all for Vonage's broadband telephone services. (*Ibid.*) Because garbled and ever-changing domain names are largely unfilterable, the misrepresentation succeeds in getting ISPs to route e-mail advertisements to recipients, who bear the time and expense of receiving and/or opening them. (§ 17529, subd. (b), (d), (e), (g), (h).)

The SEC, for example, has alleged in a securities fraud case that the defendant "established multiple websites, each with a distinct domain name" and that the defendant's "use of multiple distinct internet identities

allowed [him] to 'flood the Internet with promotional materials' while 'avoiding detection by web hosts who seek to prevent Internet spam.'" (*United States SEC v. Meltzer* (E.D.N.Y. 2006) 440 F.Supp.2d 179, 182.)

And in a computer fraud case, America Online, Inc.'s Chief Mail Systems Architect explained that "AOL's filtering programs look for large numbers of e-mails coming from the same source. This usually can be determined from the message because the sender of an e-mail message ordinarily is identified in a 'header' which is generated automatically by most e-mail software programs." (*America Online, Inc. v. National Health Care Discount, Inc.* (N.D. Iowa 2000) 121 F.Supp.2d 1255, 1259.) But the Chief Mail Systems Architect further explained how these spam filters had been thwarted:

> To circumvent these filters, bulk e-mailers have developed software to allow the manipulation of headers to display false or misleading information concerning a message's author. For example, one program substitutes a random arrangement of numbers and letters for the sender's name each time a message is transmitted. As a result, *each message appears to originate from a different sender when, in fact, the messages are all coming from the same source.*

(*Id.* at pp. 1259-1260 [emphasis added].) And a spammer for the defendant advertiser admitted that he used random header information to sneak past AOL's spam filters:

> At various times during my e-mailing for [defendant], AOL used filtering devices to attempt to stop [unsolicited bulk e-mail]. To get around these filters, I input, either manually or with the assistance of software, nonexistent or otherwise inaccurate 'From' information, as well as other inaccurate information. Most often, the 'From' information consisted of an actual domain name (but not the name of my own internet service provider), such as 'juno.com', and made up prefixes, often random letters and numbers, so the result would look something like '1a2b3c@juno.com.'

(*Id.* at pp. 1266-1267.)[3]

Similarly, when ISPs are unable to block Vonage's unsolicited commercial e-mail advertisements so they instead reach recipients' e-mail inboxes, Vonage's use of multiple domain names continues to misrepresent its identity, which makes it more difficult for the recipients to block. (ER at Vol. II, p. 93.) For example, even if a recipient were to identify urgrtquirkz.com as an unwanted domain name from which Vonage's e-mail advertisements originated and to block future e-mail originating from that

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[3] This spammer admitted to sending hundreds of millions of e-mail advertisements, which generated more than 130,000 of the 393,260 leads for which the defendant advertiser paid its contract spammers $612,577. (*America Online*, 121 F.Supp.2d at 1267; see also *Study Shows How Spammers Cash In*, BBC News (Nov. 10, 2008), available at <http://news.bbc.co.uk/2/hi/technology/7719281.stm> [as of Feb. 24, 2009] [describing study conducted by computer scientists at Berkeley and UCSD who found that spammers are turning a profit despite only getting one response for every 12.5 million e-mail advertisements they send].)

domain name, the recipient would not know to block Vonage's e-mail advertisements originating from the domain name countryfolkgospel.com and openwrldkidz.com. (*Ibid.*)

Vonage's use of multiple random and nonsensical domain names stands in stark contrast with legitimate businesses that use a consistent domain name in their marketing efforts for branding purposes and to ensure that customers can more easily recognize the sender and "whitelist" the domain name, if necessary, to ensure that e-mails are not caught by spam filters and deleted. (ER at Vol. II, p. 92.)

C. Vonage's gross departure from standard internet protocol also demonstrates how its e-mail advertisements misrepresent Vonage's identity as the author.

The deceptive nature of Vonage's conduct is also evidenced by its gross departure from standard internet protocol and current practice of the internet community, of which e-mail users are part, in particular RFC 2822, Internet Mail Format. (ER at Vol. II, p. 40.) Petitioner's proposed First Amended Complaint explains that the "Requests for Comments (RFCs) are a series of notes, started in 1969, about the Internet (originally the ARPANET). The notes discuss many aspects of computing and computer communication focusing on networking protocols, procedures, programs, and concepts, but also including meeting notes, opinion, and sometimes humor. The specification documents of the Internet protocol suite, as

defined by the Internet Engineering Task Force (IETF) and its steering group (the IESG), are published as RFCs." (ER at Vol. II, p. 40).

As defined by RFC 2822, standard internet protocol states that the understood syntax of the "'From:' field specifies the author(s) of the message, that is, the-mailbox(es) of the person(s) or system(s) responsible for the writing of the message."[4] (ER at Vol. II, p. 41.) Vonage's e-mail advertisements flout this syntax by placing in the "from" field phrases such as GreatCallRates.comUpdate, GreatCallRatesNetDeals, and ChooseGreatCallRates. (ER at Vol. II, pp. 106-124.) These phrases are not the author of the message or the persons or systems responsible for writing the message, contrary to well understood internet protocol. Rather, the author is Vonage and the person responsible for writing the messages is Vonage. (ER at Vol. II, p. 41.) So Vonage's violation of standard internet protocol demonstrates how Vonage's e-mail advertisements mislead recipients and their ISPs as to the source of the e-mails prior to their being

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[4] Further, the "'Sender:' field specifies the mailbox of the agent responsible for the actual transmission of the message. For example, if a secretary were to send a message for another person, the mailbox of the secretary would appear in the 'Sender:' field and the mailbox of the actual author would appear in the 'From:' field. If the originator of the message can be indicated by a single mailbox and the author and transmitter are identical, the 'Sender:' field SHOULD NOT be used. Otherwise, both fields SHOULD appear. In all cases, the 'From:' field SHOULD NOT contain any mailbox that does not belong to the author(s) of the message." (ER at Vol. II, p. 41.)

accepted and/or opened, as is precisely Vonage's intention in using multiple random and garbled domain names as (1) superhugeterm.com; (2) formycompanysite.com; (3) ursunrchcntr.com; (4) urgrtquirkz.com; (5) countryfolkgospel.com; (6) lowdirectsme.com; (7) yearnfrmore.com; (8) openwrldkidz.com; (9) ourgossipfrom.com; (10) specialdlvrguide.com; and (11) struggletailssite.com.

Thus, Vonage's use of these multiple random and nonsensical domain names is misleading and violates the plain meaning of Section 17529.5(a)(2), which prohibits sending e-mail advertisements with misrepresented header information.

D. Unlike the federal district court in Kleffman, other courts have properly understood that multiple domain names intended to bypass filters are misleading.

Contrary to the federal district court in *Kleffman*, a Superior Court case and the federal district court in *Silverstein* properly understood that the plain language of Section 17529.5(a)(2) prohibits multiple domain names intended to misrepresent the source of e-mail advertisements.

In a stipulated judgment entered in *Balsam v. TLM Enterprises Group, Inc.* (Super. Ct. Santa Clara County, January 15, 2008, No. 1-06-CV-066259), the defendant admitted to sending unsolicited commercial e-mail from multiple domain names to evade spam filters in violation of Section 17529.5(a)(2):

> Defendant TLM ENTERPRISES, INC. intentionally created multiple domain [names] and sent unsolicited commercial emails from these multiple domain names with the express intent of avoiding spam filters, many of which use the sending domain name as an indicator of unsolicited commercial email. Defendant TLM ENTERPRISES GROUP, INC. understood that sending unsolicited commercial email from multiple domain names signals to recipients and Internet Service Providers, and their spam filters, that multiple entities sent the unsolicited commercial email messages, when in fact all unsolicited commercial emails were sent by the singular entity, Defendant TLM ENTERPRISES GROUP, INC. Defendant knew sending unsolicited commercial email from multiple domain names would result in misrepresented and misleading headers in those email messages in violation of California Business & Profession Code § § 17529 and 17529.5.

(Attachments at pp. 4-6.)

But the district court in *Kleffman v. Vonage* disagreed with the stipulated judgment in *Balsam* that sending e-mail advertisements from multiple random and nonsensical domain names violates Section 17529.5(a)(2)'s prohibition against misrepresented header information.

Critically, the district court ignored the plain language of the statute in finding that "Kleffman does not actually allege that the *content* of Vonage's e-mail was false, misrepresented or forged." (ER at Vol. I, p. 6

[emphasis in original].) The plain language of Section 17529.5(a)(2), however, focuses on header information rather than the message text.

Similarly, the district court also erroneously relied on the fact that the e-mail advertisements, "when opened, clearly and unambiguously identified Vonage and referred the recipient to Vonage's phone services." (ER at Vol. I, p. 3.) But *before* an e-mail advertisement is opened, recipients and their ISPs choose whether or not to accept and/or open it based on header information, such as the domain name from where it originates. The identification of Vonage in the body of its e-mail advertisements provides no useful information for a computer generated filter programmed to determine which domain names are the source of disproportionate amounts of email. Vonage and its marketing agents have no legitimate reason to use multiple domain names that misrepresent their identity to spam filters such as (1) superhugeterm.com; (2) formycompanysite.com; (3) ursunrchcntr.com; (4) urgrtquirkz.com; (5) countryfolkgospel.com; (6) lowdirectsme.com; (7) yearnfrmore.com; (8) openwrldkidz.com; (9) ourgossipfrom.com; (10) specialdlvrguide.com; and (11) struggletailssite.com. (ER at Vol. II, pp. 90-93).[5]

[5] The district court also opined that the "failure to send mail from a single domain name that includes the word 'Vonage' is simply not a misrepresentation in any ordinary sense of the word." (ER at Vol. I, p. 7.)

The district court also erred in stating that Petitioner "points to nothing misleading about any single given e-mail." (ER at Vol. I, p. 6.) Vonage's e-mail advertisements with random and nonsensical domain names in the header information are misleading in and of themselves, but the plain language of the statute does not necessarily require this, especially in light of other subsections. For example, one e-mail advertisement sent with the subject line "You are the only one to receive this offer!" would not violate section 17529.5, subdivision (a)(3)'s prohibition against misleading subject lines, but 10 others sent saying the same thing would render them all misleading.

The district court's determination that the plain language of the statute does not prohibit the implicit representation "I am not from the same source as the others," ER at Vol. I, p. 6, is likewise incorrect. "I am not from the same source as the others" is exactly the misrepresentation Vonage creates by sending its e-mail advertisements from multiple random and nonsensical domain names. The district court does not explain why a statute prohibiting misrepresented header information would permit this misrepresentation created by Vonage's header information.

But this was an extreme characterization of Petitioner's claim, and Petitioner clarified in his First Amended Complaint that his claim makes no such requirement of Vonage.

Indeed, another federal district court in the Central District of California came to the opposite conclusion. In *Silverstein v. E360Insight, LLC et al.* (C.D. Cal., No. CV-07-2835-CAS), the court initially granted the plaintiff leave to amend to further describe the allegations of deceptive conduct in response to the defendant's motion to dismiss. (June 25, 2007 Order at p. *15, attachments at pp. 7-27.) Then in the court's subsequent October 1, 2007 ruling, it denied a motion to dismiss allegations exactly like those of Petitioner Kleffman:

> The Court concludes that plaintiff has sufficiently pled the nature of the misconduct alleged. As this Court advised in its June 25, 2007 order, the FAC specifies the manner in which the header and subject lines were false or misleading. Plaintiff sufficiently identifies the nature of the fraud by alleging that the header was deceptive because it purported to identify the sender of the email, but failed to do so. [Citations omitted.] ***The FAC alleges that the header information included multiple domain names in order to deceive the spam filters in an attempt to trick the recipient into opening and reading the e-mail.*** Plaintiff's allegations give defendants sufficient notice to enable them to defend against the misconduct alleged.

(October 1, 2007 Order at pp. *4-5 [emphasis added], attachments at pp. 28-39.) The *Silverstein* court's understanding that multiple domain names can create deception as to the source of e-mail advertisements is also shared by courts in various cases not involving Section 17529.5(a)(2).

E. Non-Section 17529.5(a)(2) caselaw has recognized that the use of multiple random and nonsensical domain names misrepresents the source of e-mail advertisements.

The California Court of Appeal has acknowledged that "by disguising the nature and origin of their messages, spammers evade attempts to filter out their messages." (*Ferguson v. Friendfinders, Inc.* (2002) 94 Cal.App.4th 1255, 1268.) So have other courts around the country. (*Verizon Online Servs. v. Ralsky* (E.D. Va. 2002) 203 F.Supp.2d 601, 606 ["ISPs have responded to spam by attempting to filter out the domain names that are the apparent source of the [unsolicited bulk e-mail]. Spammers, in turn, have countered with various techniques to conceal their identities."].)

For example, in *United States v. Kilbride* (D. Ariz. 2007) 507 F.Supp.2d 1051, among other evidence of the defendants' wrongdoing, the court recounted their efforts to evade spam filters with multiple random and nonsensical domain names. A computer programmer hired by the defendants testified that his program "would swap out domain names frequently, making it difficult for an ISP to track the sender." (*Id.* at p. 1062.) Another employee of the defendants "created approximately 200 domain names. She did so by combining two words to make nonsensical phrases such as 'shoulderticks,' 'unthinkableflu,' 'salvationfling,' and 'carnagesupport.'" (*Id.* at p. 1063.) And she "would use them in the 'from'

line of the emails she sent, changing them frequently." (*Ibid.*) While the court acknowledged that "many persons and entities register multiple domain names for a variety of legitimate purposes," here there was "an element of fraud." (*Id.* at p. 1067.) The court concluded that the "deliberately-crafted header information," including the "ever-changing domain name," concealed the defendants' identity and impaired the ability of recipients and ISPs to determine that the defendants were the initiators of the e-mail advertisements in violation of CAN-SPAM. (*Id.* at p. 1065; see also Annot., Validity, Construction, and Application of Federal and State Statutes Regulating Unsolicited E-mail or "Spam" (2008) 10 A.L.R. 6th 1, section 6.) Thus, caselaw not addressing Section 17529.5(a)(2) has recognized that the use of multiple random and nonsensical domain names misrepresents the source of e-mail advertisements, which violates the plain language of Section 17529.5(a)(2).

II. Statutory Findings Buttress the Conclusion That Section 17529.5(a)(2) Disallows Using Multiple Domain Names to Misrepresent the Source of E-mail Advertisements

That the plain meaning of Section 17529.5(a)(2) prohibits the use of multiple random and nonsensical domain names to create a misleading idea as to the source of e-mail advertisements is reinforced by the statutory findings that introduce the California Act. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 ["[T]he 'plain meaning' rule does not prohibit a court

from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute....each sentence must be read not in isolation but in light of the statutory scheme."].)

In particular, section 17529, subdivision (f) states the Legislative finding that "[s]pam filters have not proven effective." Section 17529, subdivision (i) explains why: "Many spammers...are so technologically sophisticated that they can adjust their systems to counter special filters and other barriers against spam." In section 17529, subdivision (m) the Legislature concludes that "[b]ecause of the above problems, it is necessary...that commercial advertising e-mails be regulated as set forth in this article." Indeed, were header information truthful, un-misrepresented, and un-forged in compliance with Section 17529.5(a)(2), spam filters could operate effectively.

Thus, the Legislature recognized that spam filters are routinely evaded by spammers, and, in order to combat that abuse, the Legislature prohibited misrepresented information in headers so as to permit more effective spam filtering. The statutory finding that spam filters are rendered ineffective by spammers' ability to bypass them supports the conclusion that Section 17529.5(a)(2)'s prohibition against e-mail advertisements

containing misrepresented header information disallows e-mail advertisements from multiple random and nonsensical domain names intended to bypass spam filters.

III. The Legislative History, Though Unnecessary to Review, Is Consistent with the Plain Language and Supports Petitioner's Claim

Because Section 17529.5(a)(2)'s "language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature." (*Lungren,* 45 Cal.3d at p. 735.) However, the legislative history does support Petitioner's application of Section 17529.5(a)(2) to Vonage's conduct, if for no other reason than it mirrors the statutory language. Moreover, Section 17529.5(a)(2) should be read to combat the problems identified in the findings, in particular the finding that spammers were bypassing filters, which finding seemed to overcome the opposition to the bill. Further, the legislative history of a subsequent bill indicates that the Legislature understood the language of Section 17529.5(a)(2) in terms of its ordinary meaning.

First, the legislative history consistently reflected the language of Section 17529.5(a)(2) as passed. Senate Bill No. 186 became section 17529 et seq. At the time that Senate Bill No. 186 was percolating in the Legislature so was another bill addressing unsolicited commercial e-mail advertisements. And as introduced, Senate Bill No. 12 contained the

language of Section 17529.5(a)(2) as signed by the Governor on September 23, 2003.[6] (*Compare* Sen. Bill No. 12 (2003-2004 Reg. Sess.) as introduced Dec. 2, 2002, at <http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0001-0050/sb_12_bill_20021202_introduced.html> [as of Feb. 25, 2009], *with* Sen. Bill No. 186 (2003-2004 Reg. Sess.) as chaptered Sept. 24, 2003, at <http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0151-0200/sb_186_bill_20030924_chaptered.html> [as of Feb. 25, 2009].) The language from Senate Bill No. 12 was added to Senate Bill No. 186 on July 9, 2003, again in the exact form that passed. (Sen. Bill No. 186 (2003-2004 Reg. Sess.) as amended Jul. 9, 2003, at <http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0151-0200/sb_186_bill_20030709_amended_asm.html> [as of Feb. 25, 2009].) The language of Section 17529.5(a)(2) was not discussed in the Senate or Assembly committee or floor analyses except to repeat verbatim the language being added as Section 17529.5(a)(2). (E.g., Sen. B. & P. Com., 3d reading analysis of Sen. Bill

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[6] After passage of Senate Bill No. 186 the Legislature passed Senate Bill No. 1457, which, inter alia, amended the language of Section 17529.5(a)(2) to delete the word "obscured" from subsection (a)(2) because it was "vague." (Assem. B. & P. Com., Analysis of Sen. Bill No. 1457 (Reg. Sess. 2003-2004), as amended Jun. 9, 2004, p. 4, at <http://www.leginfo.ca. gov/pub/03-04/bill/sen/sb_1451-1500/sb_1457_cfa_20040613_185546_ asm_comm.html> [as of Feb. 25, 2009].) The statute then read as it currently does to prohibit any e-mail advertisement that "contains or is accompanied by falsified, misrepresented, ~~obscured,~~ or forged header information."

No. 186 (2003-2004 Reg. Sess.) as amended August 18, 2003, p. 2, at <http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0151-0200/sb_186_cfa_20030904_114452_asm_floor.html> [as of Feb. 25, 2009].)

Moreover, Section 17529.5(a)(2) should be read to combat the problem identified in the findings that seemed to overcome the opposition to the bill. For example, the Senate Republicans opposed Senate Bill No. 186 and encouraged members to consider whether it "would be better to rely on technology to solve the problem of spam." (Sen. Republican Floor Commentaries on Sen. Bill No. 186 (Reg. Sess. 2003-2004) dated September 10, 2003, p. 55, attachments at pp. 40-41.) And the Enrolled Bill Report states that "it could be argued that this bill is unnecessary because: There are software programs available to consumers that filter unsolicited e-mail." (Enrolled Bill Report for Sen. Bill No. 186 (Reg. Sess. 2003-2004) dated September 19, 2003, p. 9, attachments at pp. 42, 44.) But it also recognized that "[d]espite the increasing deployment of anti-spam services and technology, the number of spam messages, and their size, continues [to] rapidly increase." (*Id.* at p. 5, attachments at p. 43.) And again the statutory findings made by the Legislature in passing Senate Bill No. 186 include that "spammers...are so technologically sophisticated that they can adjust their systems to counter special filters." (§ 17529, subd.

(i).) Thus, the Legislature seems to have passed Senate Bill No. 186 over opposition that spam filters were sufficient to combat the problem precisely because those spam filters had been rendered ineffective by the scheming of spammers. Section 17529.5(a)(2) should be read to combat the problems identified in the findings—especially the finding that seemed to overcome the opposition to the bill.

In addition, the legislative history of a subsequent bill indicates that the Legislature understood the language of Section 17529.5(a)(2) in terms of its ordinary meaning. The Legislature subsequently passed Senate Bill No. 1457 to clarify that Section 17529.5 was not preempted by CAN-SPAM though other sections, e.g. § 17529.2[7] and § 17529.4[8], were preempted. In so doing the legislative history of Senate Bill No. 1457 provides description of 17529.5(a)(2): "Although the federal measure preempted California's complete prohibition of spam, it did not preempt the

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[7] Section 17529.2 prohibits the sending of unsolicited commercial e-mail regardless whether misleading or deceptive.

[8] Similarly, regardless whether misleading or deceptive, Section 17529.4 prohibits the collection of e-mail addresses posted on the Internet to which to send e-mail advertisements, the use of e-mail addresses obtained by automated guesswork to which to send e-mail advertisements, or the use of scripts or other automation to register for multiple e-mail accounts from which to send e-mail advertisements. (See *Facebook, Inc. v. ConnectU LLC* (N.D. Cal. 2007) 489 F.Supp.2d 1087, 1094 [holding that Section 17529.4 is preempted because it does not require "falsity or deception as an element of the statutory violation"].)

private right of action consumers and ISPs have against those who send spam *with misleading or falsified headers*." (Assem. B. & P. Com., Analysis of Sen. Bill No. 1457 (Reg. Sess. 2003-2004), as amended Jun. 9, 2004, p. 4, at <http://www.leginfo.ca.gov/pub/ 03-04/bill/sen/sb_1451-1500/sb_1457_cfa_20040613_185546_asm_ comm.html> [as of Feb. 25, 2009] [emphasis added].) So the Legislature's shorthand for "misrepresented, or forged" seems to be "misleading."

Likewise, the sponsor of both Senate Bill No. 186 and Senate Bill No. 1457, Senator Kevin Murray, wrote a letter explaining the above-stated reason for the adoption of Senate Bill No. 1457. And in that letter he explained that Section 17529.5(a)(2) prohibits "falsity, misrepresentation, or deception in any part of the email header" and summarized examples that the Legislature intended to prohibit by enacting Section 17529.5. (Sen. Murray, sponsor of Sen. Bill Nos. 186 and 1457 (2003-2004 Reg. Sess.), letter dated Oct. 5, 2004, at ER at Vol. II, pp. 103-104.) One such example was the "use of multiple email addresses and/or domain names created for the sole purpose of bypassing spam-filters and blacklists." (*Id.* at p. 104.)

Though there is case law holding that courts generally do not consider statements by an individual legislator, "[a]n exception exists, however, when the letter constitutes a 'reiteration of legislative discussion

and events leading to adoption.'" (*People v. Superior Court* (2006) 132 Cal.App.4th 1525, 1533.) It is not clear from the face of the letter the extent to which Senator Murray was reiterating legislative discussion leading to adoption, but, in any event, Petitioner wanted the Court to have the benefit of all potentially relevant legislative history materials.

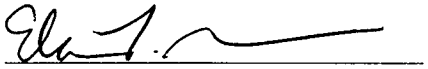
Senator Murray's letter aside, the plain language of the statute and the statutory findings in support of its passage, especially in light of legislative history regarding opposition to its passage, compel the conclusion that a prohibition on misrepresented header information includes a prohibition on multiple random and nonsensical domain names intended to bypass spam filters.

CONCLUSION

For the reasons stated above, this Court should answer the certified question in the affirmative.

DATED: February 27, 2009

HAGENS BERMAN SOBOL SHAPIRO LLP
STEVE W. BERMAN
REED R. KATHREIN
ELAINE T. BYSZEWSKI

By: 
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(c)(1))

The text of this brief contains 4,926 words as counted by the Microsoft Office Word 2003 program used to generate the brief.

DATED: February 27, 2009

Elaine T. Byszewski

Attachments

Index to Attachments

Reference > American Heritage® > Dictionary

misreport misrule

CONTENTS · INDEX · ILLUSTRATIONS · BIBLIOGRAPHIC RECORD

The American Heritage® Dictionary of the English Language: Fourth Edition. 2000.

misrepresent

SYLLABICATION: mis·rep·re·sent

PRONUNCIATION: ˌmĭs-rĕpˈrĭ-zĕntˈ

TRANSITIVE VERB: Inflected forms: **mis·rep·re·sent·ed**, **mis·rep·re·sent·ing**, **mis·rep·re·sents**
1. To give an incorrect or misleading representation of. **2.** To serve incorrectly or dishonestly as an official representative of.

OTHER FORMS: **mis·repˈre·sen·taˈtion** —NOUN
mis·repˈre·senˈta·tive (-zĕnˈtə-tĭv) —ADJECTIVE
mis·repˈre·sentˈer —NOUN

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misreport misrule

Webster's New World Dictionary®

Third College Edition

undeserving object **3** MISLAY —**mis·place′ment** *n.*

mis·play (*for v.* mis plā′, mis′plā′; *for n.* mis′plā′) ***vt.***, ***vi.*** to play wrongly or badly, as in games or sports —☆***n.*** a wrong or bad play

mis·plead (mis plēd′, mis′plēd′) ***vt.***, ***vi.*** **-pled′**, **-plead′ing** to plead incorrectly

mis·plead·ing (-iŋ) ***n.*** *Law* an incorrect statement or an omission in pleading, as a misstatement of a cause of action

mis·price (mis prīs′) ***vt.*** **-priced′**, **-pric′ing** to price incorrectly

mis·print (mis print′; *for n., usually* mis′print′) ***vt.*** to print incorrectly —***n.*** an error in printing

mis·pri·sion (mis prizh′ən) ***n.*** ‖ ME *mesprision* < OFr < pp. of *mesprendre,* to take wrongly < *mes-,* MIS-[1] + *prendre* < L *prehendere,* to take: see PREHENSILE ‖ **1** a mistake, now especially one due to misreading, either deliberate or unintended, or to misunderstanding **2** scorn; contempt **3** *Law a)* misconduct or neglect of duty, esp. by a public official *b)* act of contempt against a government or court

misprision of felony (or **treason**) *Law* the offense of concealing knowledge of a felony (or treason) by one who has not participated or assisted in it

mis·prize (mis′prīz′) ***vt.*** **-prized′**, **-priz′ing** ‖ ME *mesprisen* < OFr *mesprisier* < *mes-,* MIS-[1] + *prisier* < LL *pretiare,* to value < L *pretium,* a PRICE ‖ to despise or undervalue

mis·pro·nounce (mis′prō nouns′, -prə-) ***vt.***, ***vi.*** **-nounced′**, **-nounc′ing** to give (a word or words) a pronunciation different from any of the accepted standard pronunciations; pronounce incorrectly —**mis′pro·nun′ci|a′tion** (-nun′sē ā′shən) ***n.***

mis·quote (mis′kwōt′) ***vt.***, ***vi.*** **-quot′|ed**, **-quot′ing** to quote incorrectly —**mis′quo·ta′tion** ***n.***

mis·read (-rēd′) ***vt.***, ***vi.*** **-read′** (-red′), **-read′ing** (-rēd′iŋ) to read wrongly, esp. so as to misinterpret or misunderstand

mis·reck|on (-rek′ən) ***vt.*** to reckon or calculate incorrectly

mis·re·mem·ber (mis′rē mem′bər) ***vt.***, ***vi.*** **1** to make an error in remembering **2** [Dial.] to forget

mis·re·port (-rē pôrt′) ***vt.*** to report incorrectly or falsely —***n.*** an incorrect or false report

mis·rep·re·sent (mis′rep rē zent′) ***vt.*** **1** to represent falsely; give an untrue or misleading idea of **2** to be an improper or bad representative of —**mis′rep·re·sen·ta′tion** ***n.***

mis·rule (*for v.* mis′rōōl′, mis′-; *for n.* mis′rōōl′, mis′rōōl′) ***vt.*** **-ruled′**, **-rul′ing** to rule badly or unjustly ; misgovern —***n.*** **1** misgovernment **2** disorder or riot

miss[1] (mis) ***vt.*** ‖ ME *missen* < OE *missan,* akin to Ger *missen* < IE base **meit(h)-,* to change, exchange > L *mutare,* to change ‖ **1** to fail to hit or land on (something aimed at) **2** to fail to meet, reach, attain, catch, accomplish, see, hear, perceive, understand, etc. **3** to overlook; let (an opportunity, etc.) go by **4** to escape; avoid *[*he just *missed* being struck*]* **5** to fail or forget to do, keep, have, be present at, etc. *[*to *miss* an appointment*]* **6** to notice the absence or loss of *[*to suddenly *miss* one's wallet*]* **7** to feel or regret the absence or loss of; want *[*to *miss* one's friends*]* **8** to be without; lack: now used only in present participle *[*this book is *missing* a page*]* —***vi.*** **1** to fail to hit something aimed at; go wide of the mark **2** to fail to be successful **3** to misfire, as an engine **4** [Archaic] to fail to obtain, receive, etc.: with *of* or *in* —***n.*** a failure to hit, meet, obtain, see, etc. —**a miss is as good as a mile** missing by a narrow margin has the same practical effect as missing by a wide one —**miss one's guess** to fail to guess or predict accurately

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Attorneys for Plaintiff
DANIEL L. BALSAM

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA (UNLIMITED JURISDICTION)

DANIEL L. BALSAM, Plaintiff, v. TLM ENTERPRISES GROUP, INC., *et al.*, Defendants.	Case No.: 1-06-CV-066259 **STIPULATED JUDGMENT OF COURT *NUNC PRO TUNC***

1. Defendant TLM ENTERPRISES GROUP, INC. was properly served with a copy of the summons and complaint.

2. Defendant TLM ENTERPRISES GROUP, INC. failed to appear and defend the action within the time allowed by law.

3. Judgment was entered by the Court upon plaintiff's application.

4. The parties stipulate to amend the judgment as follows:

5. Judgment is for Plaintiff DANIEL L. BALSAM and against Defendant TLM ENTERPRISES GROUP, INC.

6. Defendant TLM ENTERPRISES GROUP, INC named in item 5 above may satisfy the judgment by paying $ 2,500.00 (US) before October 31, 2007, with 10% interest per annum accruing from the original date of entry of judgment.

7. Defendant TLM ENTERPRISES GROUP, INC. sent unsolicited commercial email advertising.

8. Defendant TLM ENTERPRISES GROUP, INC. intentionally created multiple domain and sent unsolicited commercial emails from these multiple domain names with the express intent of avoiding spam filters, many of which use the sending domain name as an indicator of unsolicited commercial email. Defendant TLM ENTERPRISES GROUP, INC. understood that sending unsolicited commercial email from multiple domain names signals to recipients and Internet Service Providers, and their spam filters, that multiple entities sent the unsolicited commercial email messages, when in fact all unsolicited commercial emails were sent by the singular entity, Defendant TLM ENTERPRISES GROUP, INC. Defendant knew sending unsolicited commercial email from multiple domain names would result in misrepresented and misleading headers in those email messages in violation of California Business & Professions Code §§ 17529 and 17529.5.

9. Defendant TLM ENTERPRISES GROUP, INC. is hereby enjoined for purposes the Unfair Business Practices Act and the Unfair Advertising Practices Act and required to henceforth use only a single domain name and a single Internet Protocol address when sending email advertising.

//

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WALTON & ROESS LLP

Date: 1-7-08

By: Tim Walton
Timothy Walton
Attorneys for Plaintiff DANIEL L. BALSAM

TLM ENTERPRISES GROUP, INC.

Date: 1/2/08

By:
Scott Carrabis
President

IT IS SO ORDERED, ADJUDGED AND DECREED.

Date: JAN 15 2008

JAMES C. EMERSON
Judge of the Superior Court

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JS-2/JS-3
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 07-2835 CAS (VBKx)	Date	June 25, 2007
Title	WILLIAM SILVERSTEIN v. E360INSIGHT, LLC, BARGAIN DEPOT ENTERPRISES, LLC, AKA BARGAINDEPOT.NET, DAVID LINHARDT, and individual, MONIKER ONLINE SERVICES, LLC, and DOES 1-50; inclusive.		

Present: The Honorable	CHRISTINA A. SNYDER	
YVETTE LOUIS	LAURA ELIAS	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorney Present for Plaintiff:	Attorney Present for Defendants:
Fari Nejadpour	Joseph Kish

Proceedings: **DEFENDANTS' MOTION TO DISMISS (filed May 7, 2007)**

PLAINTIFF'S MOTION TO STRIKE AND MOTION TO REMAND (filed May 29, 2007)

I. BACKGROUND AND INTRODUCTION

Plaintiff William Silverstein is an individual who provides internet web hosting and e-mail services as a sole proprietorship. Compl. ¶ 1. Plaintiff alleges that defendants E360Insight, LLC ("E360"), Bargain Depot Enterprises, LLC, aka bargaindepot.net ("Bargain Depot"), David Linhardt ("Lindhardt"), and Moniker Online Services, LLC ("Moniker"), are engaged in the business of sending illegal, unsolicited commercial e-mail, otherwise known as "spam." On March 16, 2006, plaintiff filed a complaint in the Los Angeles County Superior Court, asserting claims against all defendants for: (1) violation of California Business and Professions Code § 17529.5 et seq.; and (2) violation of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("the CAN-SPAM Act"), pursuant to 15 U.S.C. § 7702. Plaintiff seeks injunctive relief, statutory damages of $1,000 for each of the complained of e-mails in accordance with California Business and Professions Code § 17529.5, statutory damages of $123 per e-mail under the CAN-SPAM Act, aggravated damages of $375 per e-mail in accordance with 15 U.S.C. § 7706(g)(3)(C), general damages to be determined at trial,

punitive damages in an amount no less than $11,700,000, and attorneys' costs and fees. On April 30, 2007, defendants removed the action to this Court based on federal question jurisdiction under the CAN-SPAM Act and diversity jurisdiction.[1]

On May 7, 2007, defendants Linhardt, Moniker, E360 and Bargain Depot filed a motion to dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6). Defendants also request that portions of the Complaint be stricken pursuant to Federal Rule of Civil Procedure 12(f). Plaintiff filed an opposition to defendants' motion on June 12, 2007. Defendants filed a reply thereto on June 18, 2007.

On May 29, 2007, plaintiff filed a motion to strike defendants' notice of interested parties, and a motion to remand. Defendants filed an opposition to plaintiff's motions on June 11, 2007. Plaintiff filed a reply thereto on June 18, 2007.

A hearing was held on June 25, 2007.

II. DEFENDANTS MONIKER AND LINHARDT'S MOTION TO DISMISS PURSUANT TO 12(b)(2)

A. Legal Standard for Motion to Dismiss Pursuant to Rule 12(b)(2)

1. General Jurisdiction

Depending on the nature of the contacts between the defendant and the forum state, personal jurisdiction is characterized as either general or limited. California's long-arm jurisdictional statute is coextensive with federal due process requirements, so that the jurisdictional analysis under state law and federal due process are the same. Roth, 942 F.2d at 620. In order for a court to exercise personal jurisdiction over a nonresident defendant, that defendant must have "minimum contacts" with the forum state so that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). "The Supreme Court has bifurcated this due process determination into two inquiries, requiring, first, that the defendant have the requisite contacts with the forum state to render it subject to the forum's jurisdiction, and second, that the

[1] The parties do not appear to object to this Court's jurisdiction based on diversity of citizenship. Even if the parties are not diverse, the Court would have subject matter jurisdiction because of plaintiff's claim under the CAN-SPAM Act.

UNITED STATES DISTRICT COURT
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CIVIL MINUTES - GENERAL

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assertion of jurisdiction be reasonable." Unocal, 248 F.3d at 925 (quoting Amoco Egypt Oil v. Leonis Navigation Co., Inc., 1 F.3d 848, 851 (9th Cir. 1993)(citations omitted)). A court may have general jurisdiction over a nonresident defendant when that defendant's activities within the forum state are "substantial" or "continuous and systematic," even if the cause of action is "unrelated to the defendant's forum activities." Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 446-47 (1952); Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280, 1287 (9th Cir. 1977).

2. Specific Jurisdiction

A court may assert limited jurisdiction over a cause of action that arises out of a defendant's forum-related activities. Rano v. Sipa Press, Inc., 987 F.2d 580, 588 (9th Cir. 1993). The test for limited personal jurisdiction has three parts:

(1) the defendant must perform an act or consummate a transaction within the forum, purposefully availing himself of the privilege of conducting activities in the forum and invoking the benefits and protections of its laws;
(2) the claim must arise out of or result from the defendant's forum-related activities;
(3) exercise of jurisdiction must be reasonable.

Id.; see also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76 (1985).

The third prong, reasonableness, requires the Court to balance seven factors: (1) the extent of the defendant's purposeful availment, (2) the burden on the defendant, (3) conflicts of law between the forum state and the defendant's state, (4) the forum's interest in adjudicating the dispute, (5) judicial efficiency, (6) the plaintiff's interest in convenient and effective relief, and (7) the existence of an alternative forum. Roth v. Garcia Marquez, 942 F.2d 617, 623 (9th Cir. 1996).

Where, as here, the court decides a motion to dismiss for lack of personal jurisdiction without an evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdictional facts to withstand the motion to dismiss. Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995); Doe v. Unocal Corp., 27 F. Supp. 2d 1174, 1181 (C.D. Cal. 1998), aff'd, 248 F.3d 915 (9th Cir. 2001). Plaintiffs' version of the facts is taken as true for purposes of the motion if not directly controverted, and conflicts between the parties' affidavits must be resolved in plaintiffs' favor for purposes of deciding whether a prima facie case for personal jurisdiction exists. AT&T v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir. 1996).
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B. Discussion as to Moniker

1. General Jurisdiction

In his complaint, plaintiff alleges that Moniker is a limited liability corporation, duly organized in Florida, with its principal place of business in Florida. Compl. ¶ 2. Plaintiff further alleges that Moniker "operates highly interactive web sites that are specifically programmed to conduct business with California residents." Compl. ¶ 14.

Moniker contends that plaintiff has failed to meet his burden of demonstrating that Moniker is subject to the general jurisdiction of this Court because plaintiff has not alleged that Moniker has had "continuous and systematic contacts with the forum." Mot. at 7. Moniker submits a declaration from Eric Harrington ("Harrington"), President of Domain Systems, Inc., the managing member of Moniker. Mot. at 20. In his declaration, Harrington states that Moniker does not own, use or possess any real property in California; does not pay taxes in California; does not maintain an account with a California bank; is not registered to do business in California; and is not licensed or regulated by any government agency in California. Decl. of Eric Harrington ("Harrington Decl.") at ¶¶ 5,6. Additionally, Harrington states that Moniker has never had employees in California; that it has no office; mailing address post office box or telephone directory listing in California; that Moniker does not advertise in California; and that the corporation has never made a general appearance in an action in any state or federal court in California. Harrington Decl. ¶¶ 7-9.

Plaintiff responds that Moniker is subject to general jurisdiction of this Court because it "owns the domain names that were advertised by the spam at issue in this case. Moniker then leased these domains to the other [d]efendants." Opp'n at 4. Plaintiff contends that Moniker's privacy service operates by "taking ownership of the domain name, and then leasing the domain name to their customer for a fee, while keeping the identity of the actual and current domain name lessor a secret." Id. Additionally, plaintiff asserts that Moniker has not disputed that it "regularly and systematically solicit[s] business from and conducts business with California residents" or that it "operates highly interactive web sites that are specifically programmed to conduct business with California residents." Id. Finally, plaintiff argues that Moniker has sent sales people to trade shows in California to solicit business. Opp'n at 4-5.

With respect to general jurisdiction, Moniker responds that although plaintiff asserts that Moniker owns the domain names from which the alleged spam was sent, such allegation is not contained in the Complaint, and is not supported by an affidavit, declaration or any other document by which the Court can attribute the e-mails to Moniker. Reply at 3. Additionally, Moniker contends that plaintiff cannot meet

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his burden of establishing general jurisdiction by vaguely asserting that Moniker "regularly and systematically solicits business from and conducts business with California residents" or that it "operates highly interactive web sites that are specifically programmed to conduct business with California residents without asserting particular facts to establish the connection between Moniker and this forum state." Reply at 3 (citing Greenspun v. Del. E. Webb Corp., 634 F.2d 1204, 1208 (9th Cir. 1980)). Finally, Moniker argues that its presence at the trade show does not establish general jurisdiction.[2] Reply at 3-4.

2. Specific Jurisdiction

With respect to specific jurisdiction, Harrington states that Moniker was not involved in the acts complained of in the Complaint, and that Moniker did not send, authorize or have knowledge of the emails complained of the Complaint. Harrington Decl. ¶¶ 11-12.

Plaintiff responds that Moniker is subject to specific jurisdiction because "[t]he harm complained of in this case arises from the illegal spam being sent to [p]laintiff through [p]laintiff's servers located in Los Angeles[,] California[,] advertising [d]efendants' web sites." Opp'n at 5. Additionally, plaintiff argues that, even if the alleged facts did not connect Moniker to this jurisdiction, Moniker contracted with ICANN (the international organization that licenses all internet domain registrars) that it would accept liability for illegal use of their domain name where Moniker fails to identity the current lessor of the domain name where reasonable evidence of actionable harm is provided by the requesting party. Opp'n at 5 (contract not provided in record).

Moniker responds that the e-mails were not sent on behalf of Moniker. Harrington Decl. ¶ 13. Moniker points out that, in the Complaint, plaintiff alleges that "Moniker's only involvement in the activities complained of herein is Moniker's concealment of the identity of [d]efendants." Mot. at 4 (citing Compl. ¶ 4). Additionally, Moniker argues that even if the alleged conduct is true, it is "insufficient for this court to exercise personal jurisdiction over Moniker." Reply at 4.

Neither party asserts facts regarding the other factors which the Court must balance such as, the burden on the defendant, conflicts of law between the forum state and the defendant's state, the forum's

[2] Moniker also requests that the "Wagner Declaration" on which plaintiff relies to establish Moniker's presence at the trade show should be stricken because the operative representation merely states that Moniker "appeared" to be "soliciting business," an unsubstantiated statement. Reply at 4. The Court does not rely on the "Wagner Declaration" because it appears that plaintiff failed to file the declaration with the Court.

interest in adjudicating the dispute, judicial efficiency, the plaintiff's interest in convenient and effective relief, and the existence of an alternative forum.

Although "[u]sing e-mail to communicate with other computer users may subject a non-resident to local personal jurisdiction," the Court must consider the extent of the contact with the forum. Judge William W. Schwarzer, Judge A. Wallace Tashima, and James M. Wagstaffe, Federal Civil Procedure Before Trial 3:221 (The Rutter Group 2007) ("Federal Civil Procedure Before Trial"). For example, "[t]ransmitting data through interstate communication facilities does not normally constitute a sufficiently 'continuous, systematic' activity to subject the sender to unlimited (general jurisdiction) wherever the transmissions are received." Federal Civil Procedure Before Trial 3:222 (citing Naxos Resources (U.S.A.) Ltd v. Southam Inc., 1996 WL 662451 (C.D. Cal. 1996)). However, it has been suggested by some courts that "'substantial, ongoing' advertising on the Internet could subject a nonresident advertiser to general jurisdiction locally (i.e., on claims unrelated to the advertising)." Id. (citing EDIAS Software Int'l, L.L.C. v. BASIS Int'l, Ltd., 947 F. Supp. 413, 417 (D. Ariz. 1996); Mieczkowski v. Masco Corp., 997 F. Supp. 782, 787-88 (E.D. Tex. 1998)). Business transactions which are conducted via the internet, may subject the defendant to specific jurisdiction and are subject to the same analysis as traditional business transactions. Federal Civil Procedure Before Trial 3:235 (citing Zippo Mfg. Co. v. Zippo Dot. Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Penn. 1997) ("Traditionally, when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper . . . Different results should not be reached simply because business is conducted over the Internet.").

Based on the record before it, the Court cannot determine whether it would be proper to assert general or specific jurisdiction over Moniker. Therefore, the Court continues Moniker's motion to dismiss for lack of personal jurisdiction for 45 days to enable the parties to conduct jurisdictional discovery.

C. Discussion as to Linhardt

1. General Jurisdiction

Linhardt states that he is the President of e360, and that he is a resident of Lake County, Illinois. Decl. of David Linhardt ("Linhardt Decl.") at 1. Additionally, Linhardt states that: his only place of business is in Cook County, Illinois; he does not own, use or possess any real property in California; he does not pay taxes in California; he does not maintain an account with a California bank; he is not registered to do business in California; he is not licensed or regulated by an government agency in California; he does not and never has had employees in California; he has no mailing address, post office box or telephone directory listing in California; he has never made a general appearance in an action in any

state or federal court in California; he does not advertise in California; and he has never personally conducted business in California or, to the best of his knowledge, with a California resident. Linhardt Decl. ¶¶ 2-9.

Plaintiff responds that Linhardt maintains an office in Laguna Hills, has appointed an agent of service for process at that office, and was served at that office. Opp'n at 6. Plaintiff further contends that Linhardt uses a commercial mail receiving agent ("CMRA") in Laguna Hills as his California office, and therefore in contracting with the CMRA, he knowingly and willfully accepted California jurisdiction pursuant to California Business and Professions Code § 17538.5(f) (mandating that a CMRA within the state must obtain written acceptance of such jurisdiction from its customers). Opp'n at 6. Because Linhardt has been served at his Laguna Hills office, plaintiff contends that he is subject to jurisdiction in California. Opp'n at 6 (citing to Burnham v. Superior Court of California, 495 U.S. 604) (referring to Decl. of Lisa Coleston and proofs of service in Ex. B, and "Decl. of Arin, Ex. G" which is not filed with the Court).

Additionally, plaintiff asserts that through his counsel, Linhardt has filed a sworn declaration in a "separate by related federal case," e360 Insight, LLC and David Linhardt v. The Spamhaus Project, Cas No. 06-CV-03958 (N.D. of Ill.), "to the effect that he personally lost business and business opportunities in California due to acts of [d]efendants in that separate case." Opp'n at 6 (no citation to the N.D. Ill. Linhardt Decl.).[3] Plaintiff argues that, based on the statements in his affidavit, Linhardt "makes abundantly clear . . . that he personally conducts business with, and solicits business from California residents." Opp'n at 7.

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[3] Plaintiff attaches the affidavit of David Linhardt, purportedly filed in the Northern District of Illinois. However, there is no authenticating declaration. In the affidavit, Linhardt states that "e360 and I have suffered disastrous consequences as a direct result of being placed" on an ISP blacklist targeted at spammers, "e360 and I have had active and pending contracts cancelled as a result of" being placed on the list, and "e360 and I have lost numerous opportunities to obtain future work as a result of [defendant's] conduct." Linhardt Affidavit ¶¶ 31-33. Linhardt further attests that these lost business opportunities include "Net Blue, Cogent, Habeas, [and] Yipes," which plaintiff asserts have principal places of business in California. Linhardt Affidavit ¶ 33 (exhibits attached attached but no authenticating declaration). Linhardt further states that his reputation has suffered significantly. Linhardt Affidavit ¶ 35.

2. Specific Jurisdiction

Linhardt states that he was not personally involved in the acts complained of in the Complaint, and therefore argues that has not purposefully availed himself to this forum. Linhardt Decl. ¶ 9.

Additionally, Linhardt argues that he is not subject to this Court's jurisdiction because of his actions as President of e360 and Bargain Depot, a division of e360. Mot. at 8. Linhardt argues that, for jurisdictional purposes, "the acts of officers and directors of an entity are considered the acts of the entity exclusively and are not material for purposes of establishing minimum contacts as to the officers and directors." Mot. at 8 (citing Shearer v. Superior Court, 70 Cal. App. 3d 424, 430 (Cal. Ct. App. 1977)). Because corporations must act through agents, Linhardt contends that "[a]cts performed by the corporate agents, in their official capacity, cannot reasonably [be] attributed to the agent creating personal jurisdiction." Id. at 8-9 (citing Colt Studio, Inc. v. Badpuppy Enterprises, 75 F. Supp. 2d 1104, 1119 (C.D. Cal. 1999)). Therefore, Linhardt argues that personal jurisdiction cannot attach to him because of his actions as an authorized agent of e360 and Bargain Drepot. Mot. at 8-9.

Plaintiff asserts that the Complaint alleges that Linhardt was personally involved in the actions complained of which took place through plaintiff's servers, located in California. Opp'n at 7 (citing Seagate Technology v. A.J. Kogyo Co., 219 Cal. App. 3d. 696, 701-702 (Cal. Ct. App. 1990) ("Directors are jointly liable with the corporation and may be joined as defendants if they personally directed or participated in the tortious conduct."); (citing also Compl. ¶¶ 5,8).[4]

Linhardt responds that "there are no allegations that even remotely demonstrate that Linhardt acted in any capacity other than in an official one." Reply at 7. Therefore, Linhardt argues that "personal jurisdiction cannot attach to [him] merely because of his actions as an authorized agent of e360Insight and Bargain Depot," and therefore he must be dismissed from the suit. Id.

Neither party asserts facts concerning the other factors which the Court must balance such as, the burden on the defendant, conflicts of law between the forum state and the defendant's state, the forum's

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[4] The Complaint alleges that "Linhardt actively conrol[lled], managed, and approved all activities complained of herein." Compl. ¶ 5. Additionally paragraph 8 alleges that "all [d]efendants are doing the things hereinafter mentioned were acting within the course and scope of their authority as such agents, servants, and employees with the permission, consent, and encouragement of their co-[d]efendants." Compl. ¶ 8.

interest in adjudicating the dispute, judicial efficiency, the plaintiff's interest in convenient and effective relief, and the existence of an alternative forum.

As with Moniker, the Court cannot determine from the record before it whether it would be proper for this Court to assert general or specific personal jurisdiction over Linhardt. Therefore, the Court continues Lindhardt's motion to dismiss for lack of personal jurisdiction for 45 days to enable the parties to conduct limited jurisdictional discovery.

III. DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

A. Legal Standard for Rule 12(b)(6) Motion to Dismiss

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in a complaint. A court must not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 338 (9th Cir. 1996).

In considering a motion pursuant to Fed. R. Civ. P. 12(b)(6), a court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from them. Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998); Cahill, 80 F.3d at 338. The complaint must be read in the light most favorable to the plaintiff. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001); Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). However, a court need not accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. Sprewell, 266 F.3d at 988; Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

Dismissal pursuant to Rule 12(b)(6) is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988).

Furthermore, unless a court converts a Rule 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). In re American Continental Corp. v. Lincoln Sav. & Loan Sec. Litig., 102 F.3d 1524, 1537 (9th Cir. 1996), rev'd on other grounds *sub nom* Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998). A court may, however, consider exhibits submitted with or alleged in the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. In

re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999); Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989).

For all of these reasons, it is only under extraordinary circumstances that dismissal is proper under Rule 12(b)(6). United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981).

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be denied "when the court determines that other facts consistent with the challenged pleading could not possibly cure the deficiency." Schreiber Distributing Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986); Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000).

B. Discussion

1. Whether the Claims Must be Pled With Requisite Particularity

Defendants contend that the motion to dismiss is proper because plaintiff has failed to plead his claims with requisite particularity. Mot. at 12 (citing Khoury v. Maly's of Cal., Inc., 14 Cal. App. 4th 612, 619 (1993) for the proposition that a plaintiff alleging a violation under Cal Bus. & Prof. Code § 17500, of which Section 17529.5 is a subpart, requires a statement with reasonable particularity as to the facts supporting the statutory elements of the violation). Defendants assert that the Complaint fails to state who sent the e-mails, how all of the defendants violated the Code, and what was false in the headers and subject lines at issue. Mot. at 13. Defendants also note that, although plaintiff alleges that he has received 87 illegal e-mails, he has failed to attach any to the Complaint. Id.

Defendants further argue that, pursuant to Federal Rule of Civil Procedure 9(b) ("Rule 9(b)"), plaintiff must plead "all averments of fraud or mistake" and "the circumstances constituting fraud or mistake" with particularity. Mot. at 13. Defendants rely on Asis Internet Services v. Optin Global, Inc., 2006 U.S. Dist. LEXIS 46309 at *15 (N.D. Cal. 2006), wherein the district court held that some of plaintiff's claims had not met the Rule 9(b) particularity requirement.

Plaintiff responds that the heightened pleading requirements of Rule 9(b) do not apply because his allegations are not grounded in fraud. Opp'n at 10. Plaintiff asserts that a comparison of the elements required to establish violations of Section 17529.5 and the CAN-SPAM Act with the elements required to establish fraud make plain that the alleged violations of the statutes do not constitute "averments of fraud or mistake" that would trigger the applicability of Rule 9(b). Opp'n at 11. Specifically, plaintiff argues

that the statutes do not require anyone to actually rely on the misinformation provided in a particular e-mail, unlike a claim for fraud. Id. Additionally, plaintiff argues that, unlike a claim for fraud, the statutes do not require that the person sending the e-mail do so with the "intent to deceive." Id. at 12. In short, plaintiff argues that Section 17529.5 and the CAN-SPAM Act "require virtually none of the scienter, intent, damages, or interplay between the actors, that are all required in an action for fraud." Id. Plaintiff asserts that, instead, the statutes are prospective and impose strict liability for violations. Id. As such, plaintiff argues that requiring him to meet the heightened pleading requirements of Rule 9(b) would force him to plead numerous facts that he would not be required to prove at trial. Id.

In his Complaint, plaintiff alleges that, in violation of California Business and Professions Code § 17529.5 ("Section 17529.5") defendants have sent e-mails which "contained or [were] accompanied by falsified, misrepresented, or forged header information.' Compl. ¶ 43. Plaintiff alleges that, in violation of the CAN-SPAM Act, defendants "sent spam to [p]laintiff that contain[ed], or was accompanied by, header information that is materially false or materially misleading" and that defendants "engaged in a pattern or practice of sending spam containing subject lines intended to, and likely to, mislead recipients, acting reasonably under the circumstances, about a material fact regarding the contends or subject matter of the message." Compl. ¶¶ 53, 54. Additionally, plaintiff alleges that many of the complained of spam e-mails contain different domain names within the advertised hyperlink and/or within the e-mail address header, that there is "no valid reason for [d]efendants to use multiple domain names," and as such, plaintiff believes that "the only purpose for the multiple domain names is to deceive the spam filters in an attempt to trick the recipient into opening and reading the e-mail." Compl. ¶¶ 33-34. Based on the foregoing allegations, the Court finds that plaintiff has alleged that defendants engaged in some fraudulent conduct, and therefore, plaintiff must plead these allegations with particularity, as required by Rule 9(b). See Asis Internet Services v. Optin Global Inc. et al., 2006 U.S. Dist. LEXIS 46309 (N.D. Cal. June 30, 2006) (finding that while neither the CAN-SPAM Act nor Section 17529 include all of the elements of common law fraud, plaintiff is required the plead with Rule 9(b) specificity where plaintiff has alleged either some fraudulent conduct or a unified course of fraudulent conduct).

Federal Rule of Civil Procedure 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). "A pleading is sufficient under rule 9(b) if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations." Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th cir. 1989). "Averments of fraud must be accompanied by the who, what, when, where, and how of the misconduct alleged." Vess, 317 F.3d at 1106 (internal quotation marks and citations omitted). It is not sufficient merely to identify the transaction. Rather "[t]he plaintiff must set forth what is false or misleading about a statement and why it is false." Id. (citations omitted).

In the Complaint, plaintiff provides the following details: "that each of the 'From:' field[s] in the complained of spam do not [] accurately identify the sender," including using such names as "Brighton Handbags," "Prada & Fendi," "6for48Shades," "Louis Vuitton," "Cheaper Oakleys," "Compare to Oakley," and "Designer Eyewear" in the "From:" field of the e-mail; that"Brighton Handbags" did not send the e-mails complained of; and that each of the spam e-mails fail to include the valid physical postal address of the sender. Compl. ¶¶ 35, 36. However, plaintiff does not provide details as to why the headers and subject lines in the complained of e-mails were false or misleading. See Asis Internet Services, 2006 U.S. Dist. LEXIS 46309 at *15. In short, plaintiff fails to allege the "who, what, when, where and how of the misconduct alleged." Vess, 317 F.3d at 1106. Based on the foregoing, the Court GRANTS with leave to amend defendants' motion to dismiss the Complaint because plaintiff has failed to plead his allegations under Section 17529.5 and the CAN-SPAM Act with particularity, as required by Rule 9(b).

2. Preemption of Cal. Bus. and Prof. Code § 17529.5 by CAN-SPAM

Defendants argue that Section 17529.5 is preempted by CAN-SPAM, and therefore the claims under Section 17529.5 should be dismissed. Mot. at 11. Plaintiff responds that claims based on Section 17529.5 fit within the exception provided for in the CAN-SPAM Act preemption provision. Opp'n at 17-20.

The CAN-SPAM Act provides:

> This Act supersedes any statute, regulation, or rule of State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.
>
> 15 U.S.C. § 7707(b)(1).

The pertinent provisions of Section 17529.5 provide:

> (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 email address under any of the following circumstances: . . .
>
> > (2) The e-mail advertisement contains or is accompanied by falsified, misrepresented, or forged header information . . .

> (3) The e-mail advertisement has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

State law may be preempted by federal law under the Supremacy Clause, U.S. Const. art. VI, cl. 2 in three ways:

> (1) express preemption, where Congress explicitly denies the extent to which its enactments preempt state law; (2) field preemption, where state law attempts to regulate conduct in a field that Congress intended the federal law exclusively to occupy; and (3) conflict preemption, where it is impossible to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the fully purpose and objections of Congress.

Industrial Truck Ass'n v. Henry, 125 F.3d 1305, 1209 (9th Cir. 1997) (citing English v. General Elec. Co., 496 U.S. 72, 78-80 (1990); Southern Pac. Transp. Co. v. Public Util. Comm'n, 9 F.3d 807 (9th Cir. 1993)).

Here, defendants contend that Congress explicitly preempted the state regulation at issue.

A court's determination of the scope of a preemption clause is shaped by two presumptions. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). First, courts begin with "the basic presumption that Congress did not intend to displace state law," Maryland v. Louisiana, 451 U.S. 725, 746 (1981), and that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," Medtronic, 518 U.S. at 485 (citations omitted). The second consideration is that Congress's purpose is the "ultimate touchstone" of the preemption clause, and therefore, courts must seek "a fair understanding of congressional purpose," considering "the language of the pre-emption statute and the statutory framework surrounding it," while also considering "the structure and purpose of the statute as a whole." Id. at 485-86 (citations emphasis and internal quotations omitted); see also, Omega World Travel,, Inc., et al. v. Mummagraphics, Inc., et al., 469 F.3d 348, 352-53 (4th Cir. 2006).

Few courts in the Ninth Circuit have addressed whether the CAN-SPAM Act preempts Section 17529.5. In Kleffman v. Vonage Holdings Corp., et al., plaintiff asserted claims based on allegations that defendant sent e-mails containing different headers, each with some variation of the words "GreatCallRates" in the subject line and each sent from a different domain name. Kleffman v. Vonage Holdings Corp., et al., 2007 U.S. Dist. LEXIS 40487 at * 2 (C. D. Cal. May 22, 2007). The district court found, as an initial matter,

that plaintiff did not properly assert a claim under Section 17529.5 because he did not "actually allege that the content of Vonage's email was false, misrepresented or forged," and did not point to anything that was misleading about a single e-mail. Kleffman, 2007 U.S. Dist. LEXIS 40487 at * 3. The district court further found that, even if Section 17529.5 provided a cause of action based on an "implicit misrepresentation" theory, the CAN-SPAM Act would preempt such a claim because the Act "left states room only to extend traditional fraud and deception prohibitions into cyberspace." Kleffman, 2007 U.S. Dist. LEXIS 40487 at * 4. The district court reasoned that in providing an exception to federal preemption "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," Congress intended "falsity" or "deception" to refer only to the traditional, tort-like concepts. Kleffman, 2007 U.S. Dist. LEXIS 40487 at * 7-8. Therefore, because plaintiff had not alleged a traditional tort theory, or that he was mislead at any point by the email headers and subject lines, the district court dismissed plaintiff's claim under Section 17529.5.

The district court in Gordan v. Impulse Marketing Group, Inc., approached the preemption analysis differently, comparing the state statutes at issue with the CAN-SPAM Act, as opposed to the Kleffman court's approach of analyzing whether a particular claim was preempted. Gordon v. Impulse Marketing Group, Inc. 375 F. Supp. 1040 (E.D. Wash. 2005). In Gordan, defendant contended that plaintiff's claims under Washington' Commercial Electronic Mail Statute, RCW § 19.190 et seq, and Washington's Consumer Protection Act, RCW § 19.86 et seq., were preempted under the CAN-SPAM Act. Gordon v. Impulse Marketing Group, Inc. 375 F. Supp. at 1045. The district court noted that both federal and state statutes regulated misrepresentations in e-mail headers and subject lines. Id. at 1045. However, the court found that the Washington statutes were not preempted by the CAN-SPAM Act, relying on the provision in the CAN-SPAM Act which provides an exception to the preemption rule for the extent to which "any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic e-mail message or information attached thereto." Id. (quoting 15 U.S.C. § 7707(b)(1)). The court reasoned that, because Washington's Commercial Electronic Mail Act prohibited "misrepresentation" in the subject line, transmission path or in identifying the point of origin, it was excepted from federal preemption because it prohibited "falsity and deception." Id. at 1045-46. Additionally, because the relevant provision in the Washington Consumer Protection Act provided that it is a violation "to conspire with another person to initiate the transmission or to initiate the transmission of a commercial electronic mail message" containing "false or misleading information in the subject line," the court determined that the state statute was also excepted from federal preemption. Id. at 1046.

Both parties in the instant case assert arguments about the applicability of the Fourth Circuit Court of Appeals decision in Omega World Travel, Inc., et al. v. Mummagraphics, Inc., 469 F.3d 348 (4th Cir. 2006)). In Omega World Travel, the Court of Appeals determined that Oklahoma statutes pertaining to e-mail headers

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 07-2835 CAS (VBKx)	Date	June 25, 2007
Title	WILLIAM SILVERSTEIN v. E360INSIGHT, LLC, BARGAIN DEPOT ENTERPRISES, LLC, AKA BARGAINDEPOT.NET, DAVID LINHARDT, and individual, MONIKER ONLINE SERVICES, LLC, and DOES 1-50; inclusive.		

and subject lines were preempted to the extent that they applied to immaterial misrepresentations. Id. at 353. The Court determined that, although "falsity or deception" was not defined in the CAN-SPAM Act, "deception" requires more than bare error, and that "deception" conveyed an element of tortiousness or wrongfulness. Id. at 354. The Court reasoned that, under the canon of statutory construction *noscitur a sociis* ("a word is generally known by the company it keeps"), Congress intended "falsity" to be linked to "deception," "one of the several tort actions based upon misrepresentations." Id. at 354 (citing Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961); Neal v. Clark, 95 U.S. 704, 708-709 (1977)). Additionally, the Court noted that other sections of the CAN-SPAM Act did not support a "bare-error reading" of "falsity." Id. In particular, the Court noted that in Section 7704(a)(1), the provision of the Act creating a civil cause of action, Congress "affixed the title 'Prohibition of false or misleading transmission information' to a section that prohibits only 'header information that is materially false or materially misleading." Id. (quoting with emphasis 15 U.S.C. § 7704(a)(1)).

The Court finds that the CAN-SPAM Act was not intended to preempt claims based on California Business & Professions Code § 17529.5, to the extent that the claims are based on allegations of fraudulent or deceptive conduct. The legislative history of the Act demonstrates that Congress did not intend to preempt State laws targeting fraudulent or deceptive headers, subject lines or content. As explained in Senate Report 108-102 (2003),

> Section 8(a)(1) sets forth the general rule concerning the preemption of State law by the legislation. The legislation would preempt State and local statutes, regulations, and rules that expressly regulate the use of e-mail to send commercial messages except for statutes, regulations, or rules that target fraud or deception in such e-mail. Thus a State law requiring some or all commercial e-mail to carry specific types of labels, or to follow a certain format or contain specified content, would be preempted. By contrast, a state law prohibiting fraudulent or deceptive headers, subject lines, or content in a commercial e-mail would not be preempted. Given the inherently interstate nature of e-mail communications, the Committee believes that this bill's creation of one national standard is a proper exercise of the Congress's power to regulate interstate commerce that is essential to resolving significant harms from spam faced by American consumers, organizations, and businesses throughout the United States. This is particularly true because, in contrast to telephone numbers, e-mail addresses do not reveal the State where the holder is located. As a result, a sender of e-mail has no easy way to determine with which State law to comply. Statutes that prohibit fraud and deception in the e-mail do

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 07-2835 CAS (VBKx)	Date	June 25, 2007
Title	WILLIAM SILVERSTEIN v. E360INSIGHT, LLC, BARGAIN DEPOT ENTERPRISES, LLC, AKA BARGAINDEPOT.NET, DAVID LINHARDT, and individual, MONIKER ONLINE SERVICES, LLC, and DOES 1-50; inclusive.		

not raise the same concern, because they target behavior that a legitimate business trying to comply with relevant laws would not be engaging in anyway.

Senate Report 108-102 (2003) (available at: http://thomas.loc.gov/, website for the Library of Congress).

California Business & Professions Code § 17529.5 appears to fall squarely within the intended preemption exception to the CAN-SPAM Act, as it regulates falsified, misrepresented, or forged header information and misleading subject lines.[5] Therefore, the Court cannot say as a matter of law that the CAN-SPAM Act preempts California Business & Professions Code § 17529.5. However, like the Kleffman Court, this Court finds that there is a limit to the claims that a plaintiff may bring under Section 17529.5, without running afoul of Congress's intent to provide a national standard for commercial e-mail, specifically with respect to non-fraudulent activity. To the extent that plaintiff's claims are not based on material misrepresentations that sound in tort, plaintiff's claims may infringe upon the areas that Congress has explicitly reserved for the federal government, such as proper labeling, formatting, or content. Therefore, the question before the Court is whether plaintiff has alleged a claim based on material misrepresentations suggesting that defendants engaged in tortious fraud and/or deception. In light of the fact that the Court has found that plaintiff has failed to plead his claims with the requisite specificity, the Court is unable to determine whether plaintiff's claims are based on material or immaterial misrepresentations. Therefore, the Court DENIES defendants' motion to dismiss based on preemption by the CAN-SPAM Act, without prejudice to it being renewed upon a more detailed complaint and/or record.

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[5] Section 17529.5 provides in pertinent part:

(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 email address under any of the following circumstances:

. . .

(2) The e-mail advertisement contains or is accompanied by falsified, misrepresented, or forged header information . . .

(3) The e-mail advertisement has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

3. Allegations that Moniker and Linhardt Violated Cal. Bus. and Prof. Code § 17529.4 and CAN-SPAM

Defendants contend that plaintiff's claims against Moniker and Linhardt should be dismissed for failure to state a claim upon which relief may be granted. Mot. at 9-10. Defendants contend that plaintiff fails to allege that Linhardt and Moniker transmitted any of the e-mail messages at issue. Mot. at 9. Instead, defendants note that the Complaint generally avers that "defendants" sent the allegedly offending e-mails, "which is illogical as all of the [d]efendants cannot be 'initiating' the same e-mails, and the Complaint is devoid of any allegations that Lindhardt or Moniker 'procured' any of the e-mails." Id. Additionally, with respect to plaintiffs' claims against Linhardt and Moniker under Section 17529.4, defendants argue that the plain language of the statute requires defendants to "initiate" the e-mails, and that "initiate" is defined in the statute as "transmit or cause to be transmitted." Id. Defendants assert that plaintiff has failed to allege that Linhardt and Moniker "actually participate[d]" in sending the spam. Id. at 10. Defendants further argue that "the only evidence before the Court is that [d]efendants Linhardt and Moniker did not send, nor did they cause to be sent, the allegedly offending e-mails." Id.

In considering a motion to dismiss, the Court does not consider evidence offered in declarations and other material outside of the four corners of the Complaint. Because of the Court's finding that plaintiff has failed to plead his claims with Rule 9(b) particularity as to all defendants, the Court also concludes that plaintiff has failed to state claims against Linhardt and Moniker upon which relief may be granted. Thus the Court GRANTS with leave to amend defendants' motion to dismiss the claims asserted against Linhardt and Moniker.

IV. DEFENDANTS' MOTION TO STRIKE

Defendants seek to strike plaintiff's request for punitive damages. Mot. at 14 (referring to Compl. at 9).

A. Legal Standard for Rule 12(b)(7) Motion to Strike

A motion to strike material from a pleading is made pursuant to Fed. R. Civ. P. 12(f). Under Rule 12(f), the Court may strike from a pleading any "insufficient defense" or any material that is "redundant, immaterial, impertinent or scandalous." A Rule 12(f) motion is not a motion to dismiss for failure to state a claim upon which relief may be granted, and, where not involving a purportedly insufficient defense, simply tests whether a pleading contains inappropriate material. The Court may also strike under Rule 12(f) a prayer for relief which is not available as a matter of law. Tapley v. Lockwood Green Engineers, 502 F.2d 559, 560

(8th Cir. 1974). The essential function of a Rule 12(f) motion is to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other grounds, 510 U.S. 517 (1994). Because of "the limited importance of pleadings in federal practice," motions to strike pursuant to Rule 12(f) are disfavored. Bureerong v. Uvawas, 922 F. Supp. 1450, 1478 (C.D. Cal. 1996).

B. Discussion

1. Availability of Punitive Damages Under Cal. Bus. and Prof. Code § 17500

Defendants contend that punitive damages are not recoverable under California Business and Professions Code § 17500, because "[t]he California legislature has not provided for the recovery of punitive damages under [Section] 17500 et seq." Mot. at 14-15. (citing Anuziato v. eMachines, Inc., 402 F. Supp. 2d 1133, 1137 (C.D. Cal. 2005). Additionally, defendants argue that, where the legislature has specifically provided for a civil penalty, plaintiff cannot recover punitive damages. Id. (citing Freeman v. Alta Bates Summit Med. Ctr. Campus, 2004 U.S. Dist. LEXIS 21402, at *9 (N.D. Cal. Oct. 12, 2004). Defendants refer the Court to California Business and Professions Code § 17529.5, which provides a civil penalty of $1,000 per e-mail in addition to actual damages. Id. Finally, with respect to California law, defendants contend that "a plaintiff who relies solely on a statutory violation is deemed to have waived entitlement to punitive damages." Id. at 15 (citing Freeman, 2004 U.S. Dist. LEXIS at * 9). Therefore, defendants argue that because plaintiff relies solely on the California Business and Professions Code § 17529.5 violation, plaintiff cannot maintain a claim for punitive damages. Id.

Plaintiff argues that by not explicitly prohibiting recovery for punitive damages, as provided for by California Civil Code § 3294, the legislature tacitly approved of recovery for punitive damages in drafting Section 17529.5. Opp'n at 21.

California Business & Professions Code § 17529.8 provides that

> [i]n addition to any other remedies provided by this article or by any other provisions of law, a recipient of an unsolicited commercial e-mail advertisement transmitted in violation of this article, and electronic mail service provider, or the Attorney General mail 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 . . . .

Punitive damages are not listed as a form of recovery for violations of Section 17529.5. Cal. Bus. & Prof. Code § 17529.8. Additionally, Section 17529.5 is a subpart of California Business and Professions Code § 17500 et seq., which does not allow for recovery of punitive damages. Annunziato v. eMachines, Inc., 402 F. Supp. 2d 1133, 1137 (C.D. Cal. 2005). Based on the foregoing, the Court GRANTS defendants' motion to strike plaintiff's request for punitive damages under Section 17529.5.

2. Availability of Punitive Damages Under CAN-SPAM

Defendants argue that punitive damages are also not recoverable under the CAN-SPAM Act because the statute allows for treble damages pursuant to 15 U.S.C. § 7706(g)(3)(c). Mot. at 15 (citing Doran v. Embassy Suites Hotel, 2002 U.S. Dist. LEXIS 16116 at *4 (N.D. Cal. Aug. 20, 2002) for the proposition that where a statute allows for treble damages, and it the treble damages are meant to be punitive, plaintiff may not recover punitive damages). Defendants contend that Section 7706(g)(3)(6) "makes clear that it is designed to punish defendants for violating the statute 'willfully' and 'knowingly,'" and therefore punitive damages in this case would be "duplicative" and "not recoverable." Mot. at 15.

Plaintiff responds that the provision for treble damages under 15 U.S.C. § 7706(g)(3)(c) is intended to deter specific behavior and to aid in enforcement, but it is not penal in nature. Opp'n at 219 (relying on Kelly v. Yee, 213 Cal. App. 3d 336, 341-42 (Cal. Ct. App. 1989), wherein the California Court of Appeal held that the treble damages provision under the San Francisco Rent Control Ordinance § 37.4(f) was not preempted by the punitive damages provided for in California Civil Code § 3294).

In assessing the purpose of statutorily-provided damages, courts determine whether the treble damages were intended to be more compensatory or punitive in nature. PacifiCafe Health Sys. v. Book, 538 U.S. 401 (2003) (stating that "[o]ur cases have placed different statutory treble-damages provisions on different points along the spectrum between purely compensatory and strictly punitive damages") (citations omitted)). Here, the CAN-SPAM Act provides for "recovery of damages in an amount equal to the greater of ... actual monetary loss incurred by the. . . as a result of such violation" or statutory damages according to the scheme outlined in § 7706(g)(3) of the law. 15 U.S.C. § 7706(g)(1)(B). The law's statutory damages provision allows recovery of $ 100.00 per email for violations of § 7704(a)(1) and $ 25.00 per email for violations of any other provision of § 7704. 15 U.S.C. § 7706(g)(3). Additionally, the Act provides that

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> [t]he court may increase a damage award to an amount equal to not more than three times the amount otherwise available under this paragraph if-- (i) the court determines that the defendant committed the violation willfully and knowingly; or (ii) the defendant's unlawful activity included one or more of the aggravated violations set forth in section 5(b) [15 USCS § 7704(b)].
>
> 15 U.S.C. § 7706.

The statutory damages provisions indicate that Congress was concerned with the "relative wrongfulness of the defendant's actions," suggesting that the damages were meant to be punitive. Phillips v. Netblue, Inc., 2006 U.S. Dist. LEXIS 92573 at *9 (D. Cal. 2006). By giving the plaintiff "the right to collect the 'greater of' actual damages or statutory damages indicates that Congress was more concerned with the spammer being appropriately punished than with the plaintiff being made whole." Id. (citing 15 U.S.C. § 7706(g)(1)). "Similarly, the Act's provisions governing a court's decision whether to reduce or increase the amount of statutory damages turn on a determination of the relative wrongfulness of the defendant's actions." Phillips, 2006 U.S. Dist LEXIS 92583 at * 10 (citing 15 U.S.C. §§ 7706(g)(3)(C), (D)). The Court finds that the treble damages provision in the CAN-SPAM Act was intended to be punitive in nature, and therefore, plaintiff cannot seek a separate claim for punitive damages under the Act. Based on the foregoing, the Court GRANTS defendants' motion to strike plaintiff's request for punitive damages.

V. PLAINTIFF'S MOTION TO STRIKE NOTICE OF INTERESTED PARTIES AND MOTION TO REMAND

Plaintiff seeks to strike defendants' Notice of Interested Parties, arguing that it violates Local Rule 7-1.1.[6] Specifically, plaintiff contends that defendants failed to list their parent corporation, Maverick, and The Spamhaus Project ("Spamhaus"), against whom e360 and Linhardt received an injunction in a defamation suit in the Northern District of Illinois for Spamhaus' actions in publicly describing e360 and Linhardt as spammers. Pl.'s Mot. to Strike and to Remand at 4-5 (referring to e360 Insight, LLC and David Linhardt v. The Spamhaus Project, Case No. CV-01305 (N.D. Ill)). Plaintiff argues that defendants have conducted a fraud on the Court, and therefore this action should be remanded.

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[6] Local Rule 7-1.1. requires all non-governmental parties to file with their first appearance a Notice of Interested Parties, which lists "all persons, associations of persons, firms, partnerships and corporations (including parent corporations clearly identified as such) which may have a pecuniary interest in the outcome of the case . . . ."

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 07-2835 CAS (VBKx)	Date	June 25, 2007
Title	WILLIAM SILVERSTEIN v. E360INSIGHT, LLC, BARGAIN DEPOT ENTERPRISES, LLC, AKA BARGAINDEPOT.NET, DAVID LINHARDT, and individual, MONIKER ONLINE SERVICES, LLC, and DOES 1-50; inclusive.		

Defendants deny that there are other entities or individuals that would have a pecuniary interest in the litigation. Opp'n to Pl.'s Mot. to Strike and to Remand at 3. Additionally, defendants contend that any deficiency in the Notice may be cured by an amendment. Id. at 3, 6. Defendants further argue that the disclosure requirements of Local Rule 7.1-1 is not jurisdictional in nature, and that there is no case law or statute "that makes the adequacy of the notice of interested parties germane in determining whether a court has jurisdiction . . . ." Id. at 6.

Even if defendants' Notice of Interested Parties is insufficient, this Court has original jurisdiction over the action because one of plaintiff's claims rises under the CAN-SPAM Act, a federal law. 28 U.S.C. § 1332(a); see also 15 U.S.C. § 7706 (directing state enforcement to be brought in a district court of the United States). Plaintiff has not set forth a sufficient basis for remanding the action to state court. Based on the foregoing, the Court DENIES plaintiff's motion to strike the Notice of Interested Parties and plaintiff's motion to remand the action to state court.

VI. CONCLUSION

The Court continues the hearing on defendants Moniker and Linhardt's motion to dismiss for lack of personal jurisdiction until August 6, 2007, to enable the parties to conduct limited jurisdictional discovery. Plaintiff is to file a supplemental brief, not to exceed 10 pages, by July 27, 2007. Defendants' response brief, also not to exceed 10 pages, is to be filed by August 3, 2007.

The Court GRANTS with leave to amend defendants' motion to dismiss the Complaint for failure to plead with sufficient particularity. The Court GRANTS with leave to amend defendants' motion to dismiss the Complaint against Moniker and Linhardt. As requested by plaintiff's counsel at the hearing, plaintiff will have 30 days to amend his complaint to cure the defects. The Court also GRANTS defendants' motion to strike plaintiff's request for punitive damages. Finally, the Court DENIES plaintiff's motion to strike defendants' Notice of Interested Parties and plaintiff's motion to remand the action to state court.

IT IS SO ORDERED.

Initials of Preparer _____

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 07-2835 CAS (VBKx)	Date	October 1, 2007
Title	WILLIAM SILVERSTEIN, an individual v. E30INSIGHT, LLC, BARGAIN DEPOT ENTERPRISES, LLC, AKA BARGAINDEPOT.NET, DAVID LINHARDT, an individual, MONIKER ONLINE SERVICES, LLC, And DOES 1-50; inclusive		

Present: The Honorable	CHRISTINA A. SNYDER, JUDGE	
CATHERINE JEANG	Laura Elias	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
F. Bari Nejadpour	Joseph Kish

Proceedings: **Defendant's Motion to Dismiss the First Amended Complaint and Motion to Strike Plaintiff's Claim for Punitive Damages**
(filed August 24, 2007)

Plaintiff's Motion for Reconsideration of Order Dismissing David Linhardt for Lack of Jurisdiction
(filed August 24, 2007)

I. INTRODUCTION & BACKGROUND

Plaintiff William Silverstein provides internet web hosting and e-mail services as a sole proprietorship. FAC ¶ 1. Plaintiff alleges that defendants E360Insight, LLC ("E360"), Bargain Depot Enterprises, LLC, aka bargaindepot.net ("Bargain Depot"), David Linhardt ("Linhardt"), and Moniker Online Services, LLC ("Moniker"), are engaged in the business of sending illegal, unsolicited commercial e-mail, otherwise known as "spam." On March 16, 2006, plaintiff filed a complaint in the Los Angeles County Superior Court, asserting claims against all defendants for: (1) violation of California Business and Professions Code § 17529.5 et seq.; and (2) violation of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("the CAN-SPAM Act"), pursuant to 15 U.S.C. § 7702. Plaintiff seeks injunctive relief, statutory damages of $1,000 for each of the complained of e-mails in accordance with California Business and Professions Code § 17529.5, statutory damages of $123 per e-mail under the CAN-SPAM Act, aggravated damages of $375 per e-mail in accordance with 15 U.S.C. § 7706(g)(3)(C), general damages to be determined at trial, punitive damages in an amount no less than $11,700,000, and attorneys' costs and fees. On April 30, 2007, defendants removed the action to this Court based on federal question jurisdiction under the CAN-SPAM Act and diversity jurisdiction.

On June 25, 2007, this Court dismissed the complaint pursuant to Fed. R. Civ. P 9(b) for failure to plead his claims with sufficient particularity, but granted plaintiff leave to amend. The Court also granted with leave to amend, defendants' motion to dismiss the complaint against Moniker and Linhardt. On August 6, 2007, after allowing jurisdictional discovery, the Court denied Moniker's renewed motion

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CENTRAL DISTRICT OF CALIFORNIA

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Case No.	CV 07-2835 CAS (VBKx)	Date	October 1, 2007
Title	WILLIAM SILVERSTEIN, an individual v. E30INSIGHT, LLC, BARGAIN DEPOT ENTERPRISES, LLC, AKA BARGAINDEPOT.NET, DAVID LINHARDT, an individual, MONIKER ONLINE SERVICES, LLC, And DOES 1-50; inclusive		

to dismiss him for lack of personal jurisdiction, but granted Linhardt's renewed motion to dismiss him for lack of personal jurisdiction.

On July 24, 2007, plaintiff filed his First Amended Complaint ("FAC") adding claims for (1) trespass to chattels; (2) violation of California Penal Code § 502; (3) negligence per se; and (4) libel per se.

On August 24, 2007, defendants filed the instant motion to dismiss the FAC. Plaintiff filed an opposition to defendants' motion on September 7, 2007. On September 24, 2007, defendants filed their reply.

Also on August 24, 2007, plaintiff filed his motion for reconsideration of this Court's August 6, 2007 order. Defendant Linhardt filed an opposition to plaintiff's motion on September 17, 2007. Plaintiff filed a reply thereto on September 24, 2007.

A hearing was held on October 1, 2007. After carefully considering the arguments set forth by the parties, the Court finds and concludes as follows.

II. LEGAL STANDARDS

A. MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 9(b)

Federal Rule of Civil Procedure 9(b) requires that the circumstances constituting a claim for fraud be pled with particularity. A pleading is sufficient under Fed. R. Civ. P. 9(b) if it "[identifies] the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." Walling v. Beverly Enterprises, 476 Fed.2d 393, 397 (9th Cir. 1973). Thus, "[a]verments of fraud must be accompanied by the who, what, when, where, and how of the misconduct alleged." Vess v. Ciba-Geigy Corp. U.S.A., 317 F.3d at 1106 (internal quotation marks and citations omitted).

B. MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

A Fed. R. Civ. P. 12(b)(6) motion tests the legal sufficiency of the claims asserted in a complaint. A court must not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 338 (9th Cir. 1996).

In considering a motion pursuant to Fed. R. Civ. P. 12(b)(6), a court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from them. Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998); Cahill, 80 F.3d at 338. The complaint must be read in the light most favorable to the plaintiff. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001); Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). However, a court need not accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual

allegations. Sprewell, 266 F.3d at 988; Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

Dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988).

Furthermore, unless a court converts a Fed. R. Civ. P. 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). In re American Continental Corp. v. Lincoln Sav. & Loan Sec. Litig., 102 F.3d 1524, 1537 (9th Cir. 1996), rev'd on other grounds *sub nom* Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998). A court may, however, consider exhibits submitted with or alleged in the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999); Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989).

For all of these reasons, it is only under extraordinary circumstances that dismissal is proper under Fed. R. Civ. P. 12(b)(6). United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981).

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be denied "when the court determines that other facts consistent with the challenged pleading could not possibly cure the deficiency." Schreiber Distributing Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986); Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000).

C. MOTION FOR RECONSIDERATION

Local Rule 7-18 sets forth the bases upon which this Court may reconsider a previous order. The Rule provides as follows:

A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise or reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

L.R. 7-18.
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 07-2835 CAS (VBKx)	Date	October 1, 2007
Title	WILLIAM SILVERSTEIN, an individual v. E30INSIGHT, LLC, BARGAIN DEPOT ENTERPRISES, LLC, AKA BARGAINDEPOT.NET, DAVID LINHARDT, an individual, MONIKER ONLINE SERVICES, LLC, And DOES 1-50; inclusive		

D. MOTION TO STRIKE PURSUANT TO FED. R. CIV. P. 12(f)

A motion to strike material from a pleading is made pursuant to Fed. R. Civ. P. 12(f). Under Rule 12(f), the Court may strike from a pleading any "insufficient defense" or any material that is "redundant, immaterial, impertinent or scandalous." A Rule 12(f) motion is not a motion to dismiss for failure to state a claim upon which relief may be granted, and, where not involving a purportedly insufficient defense, simply tests whether a pleading contains inappropriate material. The Court may also strike under Rule 12(f) a prayer for relief which is not available as a matter of law. Tapley v. Lockwood Green Engineers, 502 F.2d 559, 560 (8th Cir. 1974). The essential function of a Rule 12(f) motion is to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other grounds, 510 U.S. 517 (1994). Because of "the limited importance of pleadings in federal practice," motions to strike pursuant to Rule 12(f) are disfavored. Bureerong v. Uvawas, 922 F. Supp. 1450, 1478 (C.D. Cal. 1996).

III. DISCUSSION

A. MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 9(b)

Defendants request that the Court dismiss plaintiff's FAC with prejudice pursuant to Fed. R. Civ. P. 9(b) for failure to plead with sufficient particularity. Defendants assert that plaintiff fails to identify who sent the e-mails at issue, how the e-mails violated Cal. Bus. & Prof. Code § 17529.5 and the CAN-SPAM Act and what was false in the headers and subject lines at issue. Def. Mem. of P. & A. in Supp. of Mot. at 1, 3-4. Defendants further argue that the complaint is deficient because plaintiff fails to state "how *all* of the Defendants violated the statutes at the same time." Id. at 3 (emphasis in original). Defendants state that plaintiff again fails to attach any offending e-mail to the FAC or to otherwise provide defendants' with the same, despite their requests. Id. at 4. Defendants argue that plaintiff's third, fourth and fifth claims for relief should similarly be dismissed with prejudice because these claims require plaintiff to plead and prove that defendants are responsible for the allegedly illegal e-mails. Id. at 5.

In their reply, defendants further argue that plaintiff's attachment of examples is inadequate because it "is list of unknown origin that Plaintiff purports includes the 'from' and 'subject' lines of 99 allegedly offending e-mails." Def. Reply at 3 (referring to FAC, Ex. A (Examples of Deceptive Subject & Header Lines). Defendants further argue that plaintiff provides "no factual support" that the allegedly illegal e-mails lacked a valid return address. Id. (citing Pl. Opp'n at 5). Defendants contend that plaintiff's refusal to produce the e-mails "raises an inference that must be construed against Plaintiff." Def. Reply at 3.

The Court concludes that plaintiff has sufficiently pled the nature of the misconduct alleged. As this Court advised in its June 25, 2007 order, the FAC specifies the manner in which the header and subject lines were false or misleading. Plaintiff sufficiently identifies the nature of the fraud by alleging that the header was deceptive because it purported to identify the sender of the e-mail, but failed to do

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so. FAC ¶¶ 42, 60, 28; Ex. A (Examples of Deceptive Subject & Header Lines). The FAC alleges that the header information included multiple domain names in order to "deceive the spam filters in an attempt to trick the recipient into opening and reading the e-mail." FAC ¶¶ 48-51. Additionally, plaintiff alleges that the subject lines are deceptive because they falsely indicate that defendants are selling discounted brand name products, when in fact defendants are selling counterfeit products. FAC ¶¶ 61-62. Plaintiff also attaches examples of deceptive subject and header lines. FAC, Ex. A (Examples of Deceptive Subject & Header Lines). Plaintiff's allegations give defendants sufficient notice to enable them to defend against the misconduct alleged. Accordingly, the Court DENIES defendants' motion to dismiss plaintiff's FAC for failure to plead with particularity.

B. MOTION TO DISMISS PURSUANT TO 12(b)(6)

1. FIRST (CAL. BUS. & PROF. CODE § 17529.5) AND SECOND CLAIMS (CAN-SPAM ACT) FOR RELIEF

Defendants argue that this Court should dismiss plaintiff's second claim for relief because there is no private right of action under the CAN-SPAM Act. Def. Mem. of P. & A. in Sup. of Mot. at 5. According to defendants, plaintiff's allegations demonstrate that he seeks "to remedy an individual harm," because they all reference e-mails sent to plaintiff's personal e-mail account. Id. at 5-6 (citing FAC ¶ 38).

The CAN-SPAM Act creates a private right of action for providers of Internet access service. 15 U.S.C. § 7706(g). "The term 'Internet access service' means a service that enables users to access content, information, electronic mail, or other services offered over the Internet . . . ." 47 U.S.C. § 231(e)(4). Plaintiff alleges that operating as a sole proprietor, he utilizes computers that he owns and maintains to "[provide] registered users the ability to send or receive electronic mail." FAC ¶¶ 1-3. Plaintiff further alleges that "Defendants used Plaintiff's servers to relay spam without authorization." FAC ¶ 90. Based on the foregoing, the Court concludes that plaintiff has sufficiently stated a claim for relief under the CAN-SPAM Act. Defendants' arguments to the contrary are better addressed on a motion for summary judgment. Accordingly, the Court DENIES defendants' motion to dismiss the plaintiff's second claim for relief under the CAN-SPAM Act.

Defendants further argue that the first and second claims should in any event be dismissed as to defendant Moniker. Def. Mem. of P. & A. in Sup. of Mot. at 6.[1] Defendants contend that Cal. Bus. & Prof. Code § 17529.5 requires a defendant to "actually send the alleged spam or cause it to be sent." Id. Defendants claim that the "the Declaration of Eric Harrington makes clear that Plaintiff's specious allegations cannot be inferred to mean that Defendant Moniker sent or caused to be sent the allegedly offending emails." Id. Defendants further argue that plaintiff nowhere alleges that Moniker

[1] The second claim for relief is not alleged against defendant Moniker. FAC at 14 ("Against All Defendants, Except Moniker"). Accordingly, the Court DENIES defendants' motion to dismiss the second claim for relief as against defendant Moniker as moot.

"advertised" in the illegal e-mails. Id. at 7-8.

California Business and Professions Code § 17529.5(a)(2) provides that "[i]t is unlawful for any person or entity to advertise in a commercial e-mail advertisement either sent from California or sent to a California electronic mail address . . . [which] contains or is accompanied by falsified, misrepresented, or forged header information." "'Commercial e-mail advertisement' means any electronic mail message initiated for the purpose of advertising . . . ." Cal. Bus. & Prof. Code § 17529.1. In Asis Internet Servs. v. Optin Global Inc., Case No. C 05-5124 CW, 2006 U.S. Dist. LEXIS 46309 *21 (N.D. Cal. 2006), the court stated that "the language of the statute . . . appears to extend liability to anyone who 'advertises' in a commercial e-mail containing a misleading header or subject line, regardless of whether the advertiser was also the one who sent the spam or caused it to be sent. Cf. Cal. Bus. & Prof. Code § 17529.2 (prohibiting the initiation or advertisement in unsolicited commercial emails sent from or to California)." Thus, whether or not Moniker sent or caused the e-mail to be sent, it would be liable if it advertised in the prohibited e-mail. Plaintiff alleges that Moniker is liable under Cal. Bus. & Prof. Code § 17529.5 because the illegal e-mails advertise domain names that are registered and/or owned by Moniker. Pl. Opp'n at 3 (citing FAC ¶ 57, 79).[2] Based on these allegations the Court DENIES defendants' motion to dismiss the first claim for relief as against defendant Moniker without prejudice to defendants' brining a motion for summary judgment on a complete evidentiary record.

2. THIRD CLAIM FOR RELIEF (TRESPASS TO CHATTELS)

Defendants argue that plaintiff's third claim for relief should be dismissed because plaintiff does not allege that defendants interfered or threatened to interfere with "an ISP's computer system functionality." Def. Mem. of P. & A. in Supp. of Mot. at 8. Defendants argue that a claim for trespass to chattel cannot be predicated on the misconduct alleged in the FAC: sending illegal e-mails "that passed through Plaintiff's computer" and caused injury because of their content. Id. (citing Intel Corp. v. Hamidi, 71 P.3d 296, 302 (Cal. 2003). Defendants further argue that the trespass to chattels claim should be dismissed because plaintiff fails to allege that he suffered more than nominal damages. Id. at 9 (citing Intel Corp. v. Hamidi, 71 P.3d at 302).

Plaintiff responds that his claim for trespass to chattel is not predicated on a content based injury, but instead, "on lack of permission." Pl. Opp'n at 8. Plaintiff argues that "Defendants' unauthorized use of Plaintiff's [computer] system caused or threatened to cause harm." Id. Plaintiff further argues that he need not be an ISP to state a claim for trespass to chattel. Id. at 9.

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[2] Plaintiff also appears to argue that his first claim for relief should not be dismissed as against defendant Moniker because Moniker's activities subject it to liability under 18 U.S.C. § 1037(4). Pl. Opp'n at 3. Count One does not allege a violation of 18 U.S.C. § 1037(4), nor could it because as plaintiff concedes, 18 U.S.C. § 1037(4) is a criminal statute under which he has not private right of action. Pl. Opp'n at 12.

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Defendants reply that plaintiff "does not, and cannot, allege [that he sustained] any physical damage." Def. Reply at 6.

"Trespass to chattel . . . lies where an intentional interference with the possession of personal property has proximately caused injury." Thrifty-Tel, Inc. v. Bezenek, 54 Cal. Rptr. 2d 468, 473 (Cal. Ct. App. 1996). "Defendant's interference . . . must . . . have caused some injury to the chattel or plaintiff's right to it." Intel Corp. v. Hamidi, 71 P.3d 296, 301 (Cal. 2003). However, the mere sending of unsolicited e-mail with objectionable content, without harm to the computer system or its functioning, does not give rise to a claim for trespass to chattel. Id at 300. In the present case, plaintiff alleges that defendants' misconduct caused harm to, overburdened and impaired the functioning of his computer systems. FAC ¶¶ 99-104. Defendants cited cases, Intel Corporation and Omega World Travel v. Mummargraphics, Inc., 469 F.3d 348 (4th Cir. 2006), both arose in connections with motions for summary judgment. The Court finds that defendants' arguments are better addressed on a motion for summary judgment. Because the FAC alleges that defendants' commercial e-mail messages burdened plaintiff's computer systems and caused damage, plaintiff has stated a claim for trespass to chattel. The Court therefore DENIES defendants' motion to dismiss plaintiff's third claim for relief without prejudice to defendants' bringing a motion for summary judgment on a complete evidentiary record.

3. FOURTH CLAIM FOR RELIEF (CAL. PENAL CODE § 502)

Defendants argue that plaintiff's claim under Cal. Penal Code § 502 should be dismissed. Defendants argue that the FAC does not allege that they "[accessed] Plaintiff's computers as that term is defined in Cal. Penal Code § 502, since "[a]t most, Plaintiff received e-mails he did not want, and nothing more." Def. Mem. of P. & A. in Supp. of Mot. at 11. Defendants state that "'access' means 'to gain entry to, instruct, or communicate with the logical, arithmetical, or memory function resources of a computer, computer system or computer network.'" Id. at 10 (citing Cal. Bus. & Prof. Code § 502(b)(1)). Defendants further argue that "[n]o court has concluded that [Cal. Penal Code] § 502 applies to the conduct alleged in this case." Def. Mem. of P. & A. in Supp. of Mot. at 11. Defendants claim that because Cal. Bus. & Prof. Code § 17529.5 addresses the activities alleged in the FAC, the legislature could not have intended Cal. Penal Code § 502 to apply to those same activities. Id. Finally, defendants argue that the FAC does not allege that they sent or authorized the sending of any illegal e-mail. Id.

Plaintiff responds that "Defendants, without authorization, communicated with Plaintiff's computer system, instructed Plaintiff's server to create a copy of their spam and deposit it into a mailbox for the user to retrieve," in violation of Cal. Penal Code § 502(c). Pl. Opp'n at 10. Plaintiff argues that defendants fail to cite authority prohibiting the application of Cal. Penal Code § 502(c) to the present situation. Id. at 11. Plaintiff further argues that both Cal. Bus. & Prof. Code § 17529.5 and Cal. Penal Code § 502 can and do prohibit the misconduct alleged in the present case. Id.

Defendants reply that "[i]t is axiomatic that the California legislature would not enact two separate laws to address the same wrong." Def. Reply at 6. Defendants argue that in any event, plaintiff fails to state a claim under Cal. Penal Code § 502, because the FAC does not allege the statutory elements of "'access'" or "'injury'" as those terms are defined in the statute. Id.

California Penal Code § 502(a) states that "[i]t is the intent of the Legislature in enacting this section to expand the degree of protection afforded to individuals, businesses, and governmental agencies from tampering, interference, damage, and unauthorized access to lawfully created computer data and computer systems." Thus, Cal. Penal Code § 502(e)(1) provides a private right of action for persons who "[suffer] damage or loss by reason of a violation of any of the provisions of [Cal. Penal Code § 502(c)]." A plaintiff may utilize the statute to proceed against transmitters of unsolicited bulk e-mail, but only if the plaintiff suffered "damage or loss." See Lily Zhang, Note, The CAN-SPAM Act: An Insufficient Response to the Growing Spam Problem, 20 Berkeley Tech. L.J. 301, 316 n107 (2005) (stating Cal. Penal Code § 502(e)(1) "[allows] individuals to bring a private cause of action against spammers"); David E. Sorkin, Technical and Legal Approaches to Unsolicited Electronic Mail+, 35 U.S.F. L. Rev. 325, (Winter 2001) (noting that Cal. Penal Code § 502 punishes "spammers"). Plaintiff alleges that he "suffered damages as a result of Defendant's wrongful conduct." FAC ¶ 104 (incorporated into plaintiff's fourth claim for relief through FAC ¶ 108). The Court therefore DENIES defendants' motion to dismiss plaintiff's fourth claim for relief.

4. FIFTH CLAIM FOR RELIEF (NEGLIGENCE PER SE)

Defendants argue that plaintiff's claim for negligence per se should be dismissed because "Defendants have not violated any of the statutes or codes on which Plaintiff seeks to hold Defendants liable." Def. Mem. of P. & A. at 11-12.

Because the Court has not dismissed plaintiff's other claims for relief, plaintiff has sufficiently pled a claim for negligence per se. Accordingly, the Court DENIES defendants' motion to dismiss plaintiff's fifth claim for negligence per se.

5. SIXTH CLAIM FOR RELIEF (LIBEL PER SE)

Defendants further seek to dismiss plaintiff's sixth claim for relief against E360 and Linhardt for libel per se. Defendants argue that the FAC makes no allegations against E360, but only against Linhardt individually. Def. Mem. of P. & A. in Supp. of Mot. at 12. Defendants argue that Fed. R. Civ. P. 15 contemplates that "amendments will be based on the same transactions and occurrences," however, plaintiff's libel per se claim is unrelated to the allegations in the original complaint. Id at 13 (citing Fed. R. Civ. P. 15(a), (c); Martell v. Trilogy, 872 F.2d 322, 325 (9th Cir. 1989)). Defendants further contend that plaintiff has "misrepresented the allegedly libelous statement" and therefore provide the Court with full statement in their motion. Def. Mem. of P. & A. in Supp. of Mot. at 13-16.[3] According to defendants, the statement refers to "[the] audience at large . . . as 'criminal vigilantes,'" and this "reference . . . necessarily excludes Plaintiff." Id. at 17.

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[3] In considering a motion to dismiss, the Court does not consider evidence offered in material outside of the four corners of the Complaint.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 07-2835 CAS (VBKx)	Date	October 1, 2007
Title	WILLIAM SILVERSTEIN, an individual v. E30INSIGHT, LLC, BARGAIN DEPOT ENTERPRISES, LLC, AKA BARGAINDEPOT.NET, DAVID LINHARDT, an individual, MONIKER ONLINE SERVICES, LLC, And DOES 1-50; inclusive		

In their reply defendants argue that plaintiff's failure to plead the necessary elements of "*respondeat superior*" is fatal to his libel per se claim against E360. Def. Reply at 8-9.

Under Federal Rule of Civil Procedure 15(d), "[u]pon motion of a party[,] the court may . . . permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Plaintiff filed the FAC and added new claims in response to the Court's June 25, 2007 order dismissing plaintiff's complaint with leave to amend. Therefore, the Court concludes that plaintiff has properly added the sixth claim for relief in the FAC.

Moreover, plaintiff has sufficiently identified the allegedly libelous statement. "'The general rule is that words constituting an alleged libel must be specifically identified, if not pleaded verbatim, in the complaint.'" Vogel v. Felice, 26 Cal. Rptr. 3d 350, 359 n.3 (Cal. Ct. App. 2005) (citing Kahn v. Bower, 284 Cal. Rptr. 244, 253 n.5 (Cal. Ct. App. 1999)). Plaintiff alleges that "[o]n June 28, 2007, Linhardt [, "acting in his official capacity as president of e360,"] published a statement onto Usenet, using Google News, that plaintiff is a 'criminal vigilante,'" and implying that plaintiff illegally used E360's servers to send pornographic e-mails to E360's clients. FAC ¶¶ 135, 138, 146. Accordingly, the Court concludes that plaintiff sufficiently pleads a claim for liber per se against E360. The Court therefore DENIES defendants' motion to dismiss plaintiff's sixth claim for relief as against defendant E360.

This Court dismissed defendant Linhardt for lack of personal jurisdiction through its August 6, 2007 order. The Court also denies plaintiff's motion for reconsideration of that order below. Therefore, the Court DENIES defendants' motion to dismiss plaintiff's claim against Linhardt as moot.

C. MOTION TO STRIKE PLAINTIFF'S REQUEST FOR PUNITIVE DAMAGES

Defendants argue that plaintiff's claim for punitive damages should be stricken since each of his other claims on which punitive damages is predicated, fails to state a claim for relief. Def. Mem. of P. & A. in Supp. of Mot. at 18.

In light of the Court's other rulings herein, the Court DENIES defendants' motion to strike plaintiff's request for punitive damages.

D. PLAINTIFF'S MOTION FOR RECONSIDERATION

By the present motion, plaintiff requests that the Court find defendant Linhardt subject to this Court's jurisdiction. Plaintiff argues that exercising personal jurisdiction is appropriate in light of Goldhaber v. Kohlenberg, 395 N.J. Super. 380 (NJ. Super. Ct. App. Div. 2007), wherein the court exercised personal jurisdiction over a nonresident defendant who posted defamatory statements on a Internet newsgroup. Pl. Mot. at 6-7. Plaintiff further argues that because defendant Linhardt argued in E360Insight, LLC and David Linhardt v. Mark James Ferguson, et. al., Case No. 07 L 004983 (Ill. Cir. Ct. 2007), that "a newsgroup posting made by a person with no ties to Illinois is subject to Jurisdiction

UNITED STATES DISTRICT COURT
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[sic] in Illinois where the internet posting would be read by an Illinois resident," he is judicially estopped from taking a contrary position in the present action. Id. at 4, 7, 10. Plaintiff also contends that Linhardt would not have standing to bring suit in E360 Insight, LLC and David Linhardt v. The Spamhaus Project, Case No. 06-CV-03958 (N.D. of Ill.), unless he personally suffered loss of business and business opportunities. Id. at 9. Plaintiff further contends that Linhardt is judicially estopped from arguing lack of personal jurisdiction because he sought damages in The Samphaus Project while acting in an individual capacity. Id. 9-10. Plaintiff argues that the Court failed to address this issue in its August 6, 2007 order. Id. at 8-9.

Defendants respond that plaintiff does not address "new" law because Goldhaber relies upon judicial precedent predating the Court's August 6, 2007 ruling. Def. Opp'n at 2.[4] Defendants further argue that Goldhaber is distinguishable because the defendant "'not only knew that the plaintiffs resided in New Jersey, he knew the municipality in which they resided and made specific disparaging reference to that municipality in many of his positing . . . [sic] made insulting comments about that municipality's police department . . . [sic] referred to plaintiff's neighbors in the apartment complex in which they resided and at one point even posted their addresses." Id. at 3 (citing Goldhaber, 395 N.J. Super. at 389-90). Defendants argue that in the present case Linhardt made a single posting and did not purposely target or otherwise make reference to the state of California. Def. Opp'n at 3. Defendants further argue that estoppel is not applicable because Linhardt was not "successful" in taking a position contrary to the one taken in the instant case since the court dismissed the Ferguson action. Id. at 4. Finally, defendants contend that this Court already determined that Linhardt's participation in Spamhaus did not confer personal jurisdiction over him in the present action. Id. at 5.

Plaintiff replies that because E360 and Linhardt voluntarily dismissed the case in Ferguson judicial estoppel still applies. Pl. Reply at 2. Plaintiff further argues that Goldhaber is not only "new" law, because it was decided just two days prior to this Court's August 6, 2007 ruling, but it is "the first appellate case (that Plaintiff is aware of) that applies [Calder v. Jones, 465 U.S. 783 (1984)] to a USENET newgroup posting – as opposed to a website." Id. at 3. Plaintiff argues that a unlike a website that remains at "one location on the internet," a "USENET posting is . . . replicated to other servers around the world." Id. Plaintiff further argues that unlike in Blakely v. Continental Airlines, 164 N.J. 38, 64 (N.J. Supp. 2000), where the website was only accessible by Continental employees, Linhardt's posting was accessible to the general public. Id. (citing Blakely, 164 N.J. at 48). Plaintiff contends that the Goldhaber court referred to the specific municipality mentioned in the newsgroup posting because "the municipality indicates the precise knowledge of where the harm is directed," but "failing to specify the municipality would [not] have divested New Jersey of jurisdiction." Pl. Reply at 3. Plaintiff further argues that Linhardt made the libelous statements with knowledge that plaintiff resided in the state of California and that he would therefore suffer harm in the same. Id.

[4] Defendants contend that in reaching its decision the Goldhaber court applies Calder v. Jones, 465 U.S. 783 (1984), and Blakely v. Continental Airlines, 164 N.J. 38 (N.J. Supp. 2000). Def. Opp'n at 2-3.

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In Goldhaber, the court applied traditional principles to analyze whether the "'defendant's conduct and connection with the forum State [were] such that he should [have] reasonably [anticipated] being haled into court there.'" Goldhaber, 395 N.J. Super at 386-87. Thus, the court focused on whether the defendant sufficiently targeted or directed his activities at the forum state. Id. at 388-90. The court determined that the evidence demonstrated the defendant "[targeted]" the forum state with his defamatory statements. Id. at 389-390. The court reasoned, defendant

> not only knew that plaintiffs resided in New Jersey, he knew the municipality in which they resided and made specific disparaging references to that municipality in many of his postings. Certain of his postings were made in response to plaintiffs' replies to the offending comments. He also made insulting comments about the municipality's police department. In addition, he referred to plaintiffs' neighbors in the apartment complex in which they resided and at one point even posted their address.

Id. Based on this conduct, the court concluded that "[defendant] should reasonably [have] anticipate[d] being haled into court" in New Jersey. Id. In the present case, the Court is urged to find purposeful availment on two evidentiary grounds: (1) defendant's knowledge that plaintiff resides in the state of California and (2) defendant's use of a server located in the forum state. This Court has already stated that the latter fact is insufficient. See June 25, 2007 Order; August 6, 2007 Order; but see Bochan v. La Fontaine, 68 F. Supp. 2d 692, 699 (E.D. Va. 1999) (exercising jurisdiction under long-arm statute conferring jurisdiction where a defendant "[causes] tortious injury by an act or omission in [the forum]," where online defamatory postings were transmitted through a server in the forum state). Moreover, mere knowledge of a person's residence, without conduct reaching out and into the forum state, does support a finding of specific jurisdiction. The Court concludes that plaintiff's proffered evidence does not suggest that Linhardt sufficiently directed or focused the allegedly defamatory statements to the state of California.

The Court finds plaintiff's additional arguments similarly unpersuasive. The Court has already considered Linhardt's participation in The Spamhaus Project, and found that it did not subject Linhard to this Court's jurisdiction. Moreover, judicial estoppel cannot be properly invoked to subject Linhardt to jurisdiction based on his representations in Ferguson. While judicial estoppel "is not confined to inconsistent positions in the same litigation," its application is limited to cases where the "court has relied on the party's previously inconsistent statement." Rissetto v. Plumbers & Steam Fitters Local 343, 94 F.3d 597, 605 (9th Cir. 1996); Interstate Fire & Casualty Co. v. Underwriters at Lloyd's, London, 139 F.3d 1234, 1239 (9th Cir. 1998) (citing Masayesva v. Hale, 118 F.3d 1371, 1382 (9th Cir. 1997)). Plaintiff concedes that the Ferguson court did not "rely" on defendant's " inconsistent position." See Pl. Opp'n at 2; Interstate Fire & Casualty Co., 139 F.3d at 1239. In accordance with the foregoing, the Court hereby DENIES plaintiff's motion for reconsideration.

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IV. CONCLUSION

The Court DENIES defendants' motion to dismiss plaintiff's FAC for failure to plead with particularity. The Court further DENIES defendants' motion to dismiss the plaintiff's second claim for relief under the CAN-SPAM Act. The Court DENIES defendants' motion to dismiss the first claim for relief as against defendant Moniker without prejudice to defendants' bringing a motion for summary judgment on a complete evidentiary record. The Court similarly DENIES defendants' motion to dismiss plaintiff's third claim for relief without prejudice to defendants' bringing a motion for summary judgment on a complete evidentiary record. The Court DENIES defendants' motion to dismiss plaintiff's fourth claim for relief under Cal. Penal Code § 502. The Court further DENIES defendants' motion to dismiss plaintiff's fifth claim for negligence per se. The Court DENIES defendants' motion to dismiss plaintiff's sixth claim for libel per se against defendant E360. The Court also DENIES defendants' motion to dismiss plaintiff's claim against defendant Linhardt as moot. The Court DENIES defendants' motion to strike plaintiff's request for punitive damages. Finally, the Court DENIES plaintiff's motion for reconsideration of its August 6, 2007 order dismissing Linhardt for lack of personal jurisdiction.

IT IS SO ORDERED.

00 : 10

Initials of Preparer

SB 186 (Murray) **Oppose**
File Item # 47
Senate Floor: 24-12 (6/2/03)
(AYE: Aanestad, Brulte; NO: Ackerman, Ashburn, Denham, Hollingsworth, Johnson, Knight, Margett, McClintock, McPherson, Morrow, Oller, Poochigian; ABS: Battin)
Assembly Floor: 71-7 (9/8/03)
(AYE: Aghazarian, Bates, Benoit, Bogh, Cox, Daucher, Dutton, Garcia, Harman, Shirley Horton, Houston, Keene, Leslie, Maddox, Maldonado, Maze, McCarthy, Nakanishi, Pacheco, Plescia, Richman, Spitzer, Strickland, Wyland; NO: Campbell, Cogdill, Haynes, La Malfa, La Suer, Mountjoy, Samuelian; ABS: Runner)
Vote requirement: 21
Version Date: 9/5/03

Quick Summary

Assembly Amendments essentially rewrites and *greatly* expands the bill albeit on the same subject matter. The following commentary reflects the bill as amended in the Assembly.

This bill prohibits advertisers from sending unsolicited commercial e-mail advertisements in California.

Fiscal Effect

SIGNIFICANT COSTS / (Potentially) MAJOR REVENUE INCREASE

State. Enforcement / Litigation costs for the Department of Justice are likely in excess of $150,000 annually. These costs may be offset by reimbursement for attorney fees.

Trial Court costs are unknown, but likely in excess of $150,000.

Fiscal Consultant: Thomas L. Sheehy, Dave Harper

Digest

Restricts the sending of unsolicited commercial e-mail advertisements, also knows as "*spam.*"

Prohibits an advertiser located in California from using an unsolicited commercial e-mail advertisement to advertise.

While spam can certainly be a problem, members should consider whether government is really the best answer to the problem. It would be better to rely on technology to solve the problem of spam, rather than having the government attempt to solve the problem. Internet service providers have the greatest incentive to block spam, since it is such an important issue for their customers. A state ban seems unlikely to be effective in regulating spam that originates outside the state or outside the U.S.

The liquidated damages, of $1,000 for each unsolicited e-mail advertisement transmitted in violation, or $1,000,000 per incident, whichever is less, could **generate a substantial number of frivolous and marginal lawsuits against business enterprises.**

This is just the first step in creating a crazy quilt of state-by-state legislative requirements that could be inconsistent, or worse, contradictory. National and global entities would find it difficult, if not impossible, to comply with such a maze of statutory or regulatory requirements.

Support & Opposition Received

Support:
Microsoft.

Opposition:
California Alliance for Consumer Protection
California Chamber of Commerce
Consumer Action
Internet Alliance
Privacy Rights Clearinghouse.

Senate Republican Office of Policy/*Richard Paul*

STATE AND CONSUMER SERVICES AGENCY

ENROLLED BILL REPORT

CONFIDENTIAL-Government Code §6254(l)		
Department:/Board Consumer Affairs	**Bill Number/Author:** SB 186 (Murray)	
Sponsor: Author ☐ Admin Sponsored Proposal No.	**Related Bills** AB 567 (2003), SB 12 (2003), SB 342 (2003), AB 1769 (2003), AB 2944 (2003), AB 1358 (2002), AB 1629 (1998), AB 1676 (1998), AB 2438 (1992)	**Chaptering Order (If known)** ☐ Attachment
Subject: Unsolicited electronic mail advertising		

SUMMARY

This bill would prohibit sending unsolicited e-mail, with certain exemptions for existing business relationships, and would create stronger penalties and legal recourse for consumers who receive unsolicited e-mail. Additionally, this bill would allow for penalties to be served on the advertisers themselves as opposed to the spammers, resulting in increased deterrence.

PURPOSE OF THE BILL

According to the author, this bill is intended to address a problem well known to all e-mail users, the proliferation of unsolicited e-mail advertisements, or spam. The bill would strengthen existing law, which allows for unsolicited e-mail to be sent as long as certain disclosures are included, by prohibiting sending any unsolicited e-mail, unless a pre-existing relationship exists between the consumer and the advertiser. The author states that this bill will create a cause of action for the consumer, the e-mail service provider, or the Attorney General, to sue for violations of this bill's restrictions and prohibitions. This bill permits the plaintiff to seek actual damages, or liquidated damages of $1,000 per advertisement, up to $1,000,000 per incident, defined as a single transmission of substantially similar content. Where a defendant could show that it implemented practices designed to effectively prevent unsolicited commercial e-mail advertisements, the liquidated damages available would be a maximum of $100 per

Departments That May Be Affected				
☐ New / Increased Fee	☐ Governor's Appointment	☐ Legislative Appointment	☐ State Mandate	☐ Urgency Clause

Dept/Board Position	Agency Secretary Position
☒ Sign	☒ Sign
☐ Veto	☐ Veto
☐ Defer to:	☐ Defer to:
Director /Chair Date Kathleen Hamilton 9/19/03	Agency Secretary Date 9/22/03

09/19/03

to bring a cause of action against the offending sender and may seek a maximum of $2500 per violation. SB 186 would strengthen existing law by prohibiting the sending of unsolicited e-mail unless a pre-existing business relationship is in place.

Additionally, SB 186 would increase the legal recourse that consumers have against spammers by allowing lawsuits challenging spam to be filed by individual recipients, Internet service providers (ISP's) or the state Attorney General. Lawsuits challenging illegal spam may seek actual damages, or may elect to recover liquidated damages of $1,000 for each unsolicited commercial e-mail advertisement or $1 million per incident. No cause of action would exist where the recipient of spam has a preexisting or current business relationship with the sender.

This bill would make legal action more effective by enabling advertisers to be sued for unsolicited e-mail. Currently, the advertisers who use spam are not regulated and action may only be taken against the internet service provider or the spammer. SB 186 would allow for the advertiser to be sued, providing a strong deterrent to advertisers who rely heavily on unsolicited e-mail.

SB 186 would provide consumers with the same protections against unsolicited commercial electronic mail (commonly referred to as "spam") that they currently enjoy against unsolicited facsimile advertisements.

What is "spam"?

"Spam" is unsolicited commercial e-mail or "junk e-mail' that is usually sent on a massive scale to Internet users. The "spammers' usually obtain e-mail addresses by "scavenging" which is the practice of automatically collecting e-mail addresses from webpages or electronic bulletin boards or by purchasing them from list brokers who compile lists by "harvesting" addresses from the Internet.

This issue has gained increased public attention as the volume of spam has risen dramatically in recent years. A recent study conducted by Jupiter Research shows that in 2001, more than 140 billion pieces of spam were received by U.S. e-mail users, but in 2002, that number increased to 261 billion for an 86 percent increase.

How does "spam" harm businesses?

The research cited in this bill was conducted by Ferris Research and released in January 2003. The research states that spam costs U.S. businesses an estimated $8.9 billion each year and, as previously stated, will cost U.S. businesses over $10 billion in 2003.

For U.S.-based Internet service providers, it estimates that 30% of inbound e-mail is spam, while at U.S.-based corporate organizations, spam accounts for 15% to 20% of all inbound e-mail. Spam consumes computing resources, e-mail administrator and helpdesk personnel time, and reduces workers' productivity. Despite the increasing deployment of anti-spam services and technology, the number of spam messages, and their size, continues rapidly increase.

ARGUMENTS

Pro:

- This bill would provide consumers with greater protections and remedies against interference with their Internet use and the potential economic harm that unsolicited commercial e-mail can cause by taking up valuable storage space on their personal computers or spreading computer viruses.
- This bill would provide protections similar to those that currently exist against unsolicited advertisements transmitted to facsimile machines and cell phones.

Con:

While there is no known opposition to SB 186, it could be argued that this bill is unnecessary because:

- There are software programs available to consumers that filter unsolicited e-mail to give them more control over their Internet mailboxes.

VOTES

Senate Concurrence: **29-8 (All Republican "No" votes)**
Assembly Floor: **71-7 (All Republican "No" votes)**
Senate Floor: **24-12 (All Republican "No" votes)**

LEGISLATIVE STAFF CONTACT

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DECLARATION OF SERVICE

In the Supreme Court of California

Case Number: S169195

Case Title: Craig E. Kleffman v. Vonage Holdings Corp.

I, the undersigned, declare:

That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 700 South Flower Street, Suite 2940, Los Angeles, California 90017.

On February 27, 2009, I served the foregoing document(s) described as:

Opening Brief on the Merits

on all interested parties in this action.

[X] **BY MAIL**

By placing a true copy thereof enclosed in seal envelopes address as follows: **Please See the Attached Service List**. That there is a regular communication by mail between the place of mailing and the places so addressed. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, this document will be deposited with the U.S. Postal Service on this date with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

[X] **BY E-MAIL**

I caused the above listed documents to be served by E-MAIL from Jennifer Bain to the email addresses set forth on the attached service list.

[X] **VIA MESSENGER**

By placing a true copy thereof enclosed in sealed envelopes address as follows: **Please See the Attached Service List**. After sealing said envelope, declarant caused same to be delivered to the aforementioned by a qualified messenger service for same day delivery.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 27th day of January 2009, at Los Angeles, California.

Jenni Bain

SERVICE LIST

In the Supreme Court of California
Case Number: S169195
Case Title: Craig E. Kleffman v. Vonage Holdings Corp., et al.

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