Case No. S169195

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CRAIG E. KLEFFMAN,

Plaintiff-Appellant,

v.

VONAGE HOLDINGS CORP., a New Jersey corporation, et al.,

Defendants-Appellants.*

United States Court of Appeals for the Ninth Circuit
Civil Case Nos. 07-56171 and 07-56292
United States District Court for the Central District of California
The Honorable Gary A. Feess, Presiding
Civil Case No. CV-07-2406 GAF (JWJX)

Certified Question from the Ninth Circuit, California Rule of Court 8.548

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* Vonage was the appellee in the Ninth Circuit on the appeal involving the question certified to this Court. It was the appellant only in an unrelated cross-appeal. Vonage here uses the caption as set forth in the Court's order granting review, as requested in the Court's letter of January 28, 2009.

** Pro hac vice application pending.

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I. INTRODUCTION

The Ninth Circuit certified one question to this Court: whether "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.*, 551 F.3d 847, 849 (9th Cir. 2008). The answer to this question is "no."

When emails are sent with accurate "from" lines and header information that is fully traceable to the sender—as in this case—there is nothing in the header that is falsified, misrepresented, or forged. The mere fact of more than one sending domain—which would occur, for example, when more than one marketing firm distributes a common ad campaign—is no basis for a claim under § 17529.5. The purpose behind the use of multiple domains is irrelevant, when the headers are accurate.

If multiple accurate sending domains were deemed to constitute falsified, misrepresented or forged header information that stated a claim under § 17529.5, the § 17529.5 claim would be preempted by the federal CAN-SPAM Act. *See* Controlling the Assault of Non-Solicited Pornography and Marketing ("CAN-SPAM") Act of 2003, 15 U.S.C. §§ 7701-7713.

II. STATEMENT OF FACTS

Petitioner Craig Kleffman set forth the Ninth Circuit's statement of facts in his opening brief ("OB") in this Court. Vonage notes, for clarification, that the Complaint alleged that all of the emails were traceable to and were sent by a third party e-marketer on Vonage's behalf. *See* OB at 7 (sending domains in the emails are "traceable to Vonage's contract spammers"); *see also* Brief of Defendants-Appellees and Cross-Appellants ("Vonage's 9th Cir. Brief") at 2 (describing Complaint). The statement of facts provided by the Ninth Circuit erroneously indicates, contrary to the

Complaint, that "*Vonage* sent the e-mails . . . ." *Kleffman*, 551 F.3d at 849 (emphasis added).

III. ARGUMENT

A. SENDING EMAILS FROM MULTIPLE DOMAINS, WITH FULLY ACCURATE AND TRACEABLE HEADER INFORMATION, DOES NOT CONSTITUTE FALSIFIED, MISREPRESENTED, OR FORGED HEADER INFORMATION UNDER CAL. BUS. & PROF. CODE § 17529.5 (a)(2)

1. Section 17529.5 Requires "Falsified, Misrepresented, or Forged" Header Information

Section 17529.5 imposes liability only when, among other requirements, an email contains "falsified, misrepresented, or forged" header information. Cal. Bus. & Prof. Code § 17529.5 (a)(2). As always, to understand this law, the Court should begin with the language of the statute. *Cummins, Inc. v. Superior Court*, 36 Cal. 4th 478, 487, 30 Cal. Rptr. 3d 823 (2005) ("We look first to the words of the statute, which are the most reliable indications of the Legislature's intent.").

At issue here are emails sent from multiple *accurate* and *traceable* email addresses with distinct domain names. OB at 7 (sending domains in the emails are "traceable to Vonage's contract spammers"); *see also* Vonage's 9th Cir. Brief at 2 (describing Complaint). There is nothing "falsified," which means "forged []or changed after its original complete preparation," *People v. Garfield*, 40 Cal. 3d 192, 197, 707 P.2d 258 (1985), or "forged," which is a false writing done with intent to defraud, *People v. Gaul-Alexander*, 32 Cal. App. 4th 735, 741, 38 Cal. Rptr. 2d 176 (1995), about the email header information. *See* OB at 5, 6-7. The only issue is that there was more than one sending domain, and the only question is whether this makes the emails' header information "misrepresented." Cal. Bus. & Prof. Code § 17529.5; *see* OB at 5, 6-7.

Thus, the starting point to answer the Ninth Circuit's certified question is understanding what "misrepresented" means in the context of § 17529.5. The term "misrepresented" is not unique to § 17529.5. In construing "misrepresented" as used in § 17529.5, the Court should look to the meaning of "misrepresent" in the substantial body of existing California case law regarding the tort of misrepresentation. *See Smith v. Superior Court*, 39 Cal. 4th 77, 83, 45 Cal. Rptr. 3d 394 (2006) (looking to other employment-related areas of the law to construe "discharge" under labor statute). Indeed, while Kleffman relies on various dictionary definitions, the California Legislature is presumed to have relied on the established legal definition of "misrepresent" when it drafted § 17529.5. *Trope v. Katz*, 11 Cal. 4th 274, 282, 45 Cal. Rptr. 2d 241 (1995) ("In the absence of some indication either on the face of [a] statute or in its legislative history that the Legislature intended its words to convey something other than their established legal definition, the presumption is almost irresistible that the Legislature intended them to have that meaning."); *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1155, 278 Cal. Rptr. 614 (1991) ("We generally presume the Legislature is aware of appellate court decisions.").

Under California law, misrepresentation is a species of deceit, and the most fundamental element of a misrepresentation of any type is a false representation of fact. *See* Cal. Civ. Code §§ 1572, 1709, 1710. Absent a false representation, California courts do not allow misrepresentation claims to proceed or succeed. *See, e.g., Linear Tech. Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 132, 61 Cal. Rptr. 3d 221 (2007) (upholding defendants' demurrer because there was no false representation); *Eisenberg v. Alameda Newspapers, Inc.*, 74 Cal. App. 4th 1359, 1389-90, 88 Cal. Rptr. 2d 802 (2000) (holding no fraud because no false statements); *Schneirow v. Las Vegas Land & Bldg. Co.*, 124 Cal. App. 715, 719, 13 P.2d

529 (1932) (same); *Jakovich v. Romer*, 74 Cal. App. 333, 338, 240 P. 39 (1925) (same); *McCord v. Martin*, 47 Cal. App. 717, 721-22, 724, 191 P. 89 (1920) (same).

2. Sending Emails from Multiple Domains, With Fully Accurate and Traceable Header Information, Does Not Constitute "Misrepresented" Header Information under Cal. Bus. & Prof. Code § 17529.5 (a)(2)

Sending email advertisements from multiple domain names, with fully accurate and traceable header information, does not constitute "misrepresented" header information because there is no false representation. As Kleffman acknowledges, each of the emails at issue contains fully accurate and traceable header information. OB at 7; *see also* Vonage's 9th Cir. Brief at 2. Consequently, Kleffman's theory regarding the alleged misrepresented header information is that "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."[1] OB at 7; *see also* OB at 10, 16. This theory does not allege any *misrepresented header information*.[2]

First, whether a firm employs one or multiple domain names to send email advertisements does not alter the accuracy of the header information of any particular email. The header information is either, accurate and

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[1] This assertion is in fact incorrect, and demonstrates Kleffman's lack of understanding of the national and global e-marketing industry addressed by the federal Congress in passing CAN-SPAM. As Kleffman acknowledges in the Complaint, none of the emails at issue were sent by Vonage; rather, an e-marketing firm sent the emails, which contained advertisements for Vonage products. OB at 7; *see also* Vonage's 9th Cir. Brief at 2.

[2] Even if the Court were to rely on dictionary definitions of "misrepresent" that equate it with "mislead," as Kleffman urges, the result would be the same because Kleffman has failed to allege any misleading statements in the header information. Moreover, as explained *infra* Part III.C., to the extent Kleffman's argument is that "mislead" requires something less than "misrepresent," such a claim would be preempted because only claims alleging "falsity or deceit" survive preemption. 15 U.S.C. § 7707(b)(1).

traceable, or it is not. Here, the header information for each email is accurate and traceable. *See* Vonage's 9th Cir. Brief at 2.

Second, Kleffman's claim that multiple domains are nonetheless misleading is beyond the scope of § 17529.5's prohibition on misrepresented *header information*. If permitted, the claim would regulate e-marketing *practices,* not header information. Kleffman's purported claim, if permitted under § 17529.5, would in effect require the use of a single domain name to distribute an advertiser's email advertisements. This is precisely the type of state-based commercial email regulation that CAN-SPAM preempts. *See infra* Part III.C. Indeed, adoption of Kleffman's standard would create insurmountable uncertainty in the law. For example, if only one domain name may be used to send email advertisements, what domain name should be used? Should it reference the advertiser, the e-marketing firm, the ad campaign or something else? If the domain must identify the advertiser (as Kleffman advocates),[3] but the email advertisement is sent by an e-marketing firm, the domain name would falsely represent the advertiser as the sender and would arguably violate federal and state anti-spam laws. As a consequence, advertisers would be required to send all email advertisements themselves from their own domains and could not engage e-marketing firms to offer their promotions. On the other hand, if the domain must identify the e-marketing firm, the advertiser would apparently be precluded from sending its own email advertisements in addition to engaging an e-marketing firm because this would create multiple domains. An advertiser would also apparently be precluded from contracting with more than one e-marketing firm to promote its products and services because advertisements for its products

[3] *See, e.g.*, OB at 11 ("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 . . . .").

and services would then come from multiple domains. Such sweeping regulation of e-marketing practices is well beyond the scope of permissible state claims allowed by CAN-SPAM. *See infra* Part III.C.

Third, it makes no difference that Kleffman repeatedly describes the sending domains as "random" and "nonsensical."[4] A domain registrant may lawfully make up any domain name it likes, just as someone creating an email address can select any combination of letters and numbers to precede the "@" symbol. As long as the stated sending domain in the "from" line of the email is the domain from which the email was sent (as was indisputably the case here), there is no misrepresented header information and no violation of § 17529.5.

Fourth, to the extent Kleffman intends to argue the existence of a duty to disclose in header information that email advertisements relate to Vonage or a Vonage product or service, this is also wrong. The disclosures required by advertisers and senders in email advertisements are regulated by CAN-SPAM. 15 U.S.C. § 7701-7713. CAN-SPAM requires disclosure of particular information in email advertisements, including contact details and opt-out options; it does not require disclosure of the identity of the advertiser in header information. *See* 15 U.S.C. §§ 7704, 7705. Mandated disclosures may be included in the body of the email advertisements, and are not required in the header information as long as the header information is accurate. *See* 15 U.S.C. §§ 7704, 7705.

Here, the header information was accurate and the body of the emails at issue clearly disclosed Vonage. OB at 7; Vonage's 9th Cir. Brief at 2 (describing Complaint). CAN-SPAM does not require more. Kleffman cites no authority for his proposition that the accuracy of header

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[4] The Ninth Circuit did not include the nature of the domain names, as described by Kleffman, in its certified question, but Kleffman repeatedly discusses their "random" nature in his opening brief to this Court.

information must be determinable before an email is opened. *See, e.g.*, OB at 6 ("the misrepresentation occurs before the e-mail advertisements are opened and the recipient can see they are from Vonage"), 15. Indeed, other courts have rejected the premise that, in assessing the possibility of fraud in an email's header, the inquiry should be limited to one particular moment in time, rather than considering all information available to the recipient. *See, e.g., Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, 357 (4th Cir. 2006) (holding that CAN-SPAM preempted claim under state commercial email law because the header information, while technically false, was not a material misrepresentation because the email as a whole was "chock full" of ways to contact the sender).

3. The "Purpose of Bypassing Spam Filters" Does Not Create "Misrepresented" Header Information Under Cal. Bus. & Prof. Code § 17529.5 (a)(2)

The Ninth Circuit's question also asks whether email advertisements sent from multiple domains for the "purpose of bypassing spam filters" can constitute misrepresented header information under § 17529.5. The answer is clearly no. The "purpose of bypassing spam filters" cannot create "misrepresented" header information in email advertisements with otherwise fully accurate and traceable header information because intent does not create a misrepresentation.

Intent, even intent to deceive, does not alone create a misrepresentation. *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC*, 162 Cal. App. 4th 858, 869, 76 Cal. Rptr. 3d 325 (2008) ("an intent to deceive the plaintiff is legally meaningless unless" the other elements of fraud or deceit are met). This is true no matter how sneaky, devious, or scheming the intent of the actor. *Id.*; *see also McCord*, 47 Cal. App. at 724 (shareholder who was to receive $15 per share for his stock did not commit fraud by failing to tell other shareholders, who were getting $5 per share, of

the higher price he was getting, even though "some men of a fine sense of honor would have done such a gracious and altruistic act").

As explained above, to "misrepresent" requires, first and foremost, a misrepresentation, a false statement. *E.g.*, *Linear Tech. Corp.*, 152 Cal. App. 4th at 132; *Eisenberg*, 74 Cal. App. 4th at 1389-90. Intent is distinct from a false statement. *See Alliance Mortgage Co. v. Rothwell*, 10 Cal. 4th 1226, 1239, 44 Cal. Rptr. 2d 352 (1995) (stating elements of intentional misrepresentation); *Wilhelm v. Pray, Price, Williams & Russell*, 186 Cal. App. 3d 1324, 1331, 231 Cal. Rptr. 355 (1986) (each element of fraud is separate). Without a false statement, there can be no misrepresentation. *Linear Tech. Corp.*, 152 Cal. App. 4th at 132; *Eisenberg*, 74 Cal. App. 4th at 1389-90; *Schneirow*, 124 Cal. App. at 719; *Jakovich*, 74 Cal. App. at 338; *McCord*, 47 Cal. App. at 721-22.

Just as this is true for traditional torts, so too it must be true under § 17529.5, which—whether or not it includes all the other elements of the tort of deceit—unquestionably includes at least the element of a false statement or misrepresentation. Here, as explained above, there is no false representation in the emails' header information. A purpose to bypass spam filters does not alter the header information and cannot convert accurate header information into misrepresented header information.[5]

4. Contrary to Kleffman's Assertion, the Internet Engineering Task Force's Request for Comment 2822 Does Not Establish a Misrepresentation

Kleffman argues that the emails contain misrepresented header information because, Kleffman asserts, the emails do not comport with an

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[5] As a practical matter, it is also noteworthy that spam filters are automated processes that can be neither tricked nor deceived. Spam filters act based on incoming data (including, without limitation, header data, content, and character sets and locales), and their treatment of a particular email accurately reflects the email's data. A spam filter cannot be duped to treat an email other than according to its data.

Internet working group protocol document known as Request for Comment 2822. OB at 11-13. The Internet Engineering Task Force ("IETF"), an industry working group, issues and maintains Request for Comment 2822. The IETF is "a large open international community of network designers, operators, vendors, and researchers concerned with the evolution of the Internet architecture and the smooth operation of the Internet. It is open to any interested individual." *See* Overview of the IETF, http://www.ietf.org/overview.html.

Request for Comment 2822 purports to "specif[y] an Internet standards track protocol for the Internet community, and requests discussion and suggestions for improvements." IETF, Request for Comment 2822, at 1 (2001).[6] Request for Comment 2822 plainly is not law and was not referenced by the Legislature in passing § 17529.5. *See* SB 186 Analyses;[7] SB 12 Analyses.[8] It also is not an authoritative treatise. *See, e.g., ACTV, Inc. v. Walt Disney Co.*, 346 F.3d 1082, 1089-90 (Fed. Cir. 2003) (rejecting parties' attempts to have court rely on Requests for Comments, in part because Requests for Comments "were not designed to reflect common usage, but rather to assign language to facilitate further conversation," and hence were not an authoritative treatise).[9] The Court should accord it no weight. *See id.*

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[6] *Available at* http://www.ietf.org/rfc/rfc2822.txt?number=2822.
[7] *Available at* http://leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_186&sess=0304&house=B&author=murray.
[8] *Available at* http://leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_12&sess=0304&house=B&author=bowen.
[9] Request for Comment 2822 also is not factual evidence properly before the Court. Kleffman is seeking to use the Request for Comment as a backdoor to submit evidence. Kleffman cites to portions of his proposed First Amended Complaint that purported to quote from the Request for Comments, but the district court denied his motion for leave to amend and the Ninth Circuit did not include that ruling in its certified question. Thus, the proposed First Amended Complaint is not before this Court.

And in any event, Request for Comment 2822 does not support Kleffman's position. Kleffman argues to this Court that the emails at issue violate the "from" field syntax protocol in Request for Comment 2822 because "the author is Vonage and the person responsible for writing the messages is Vonage." OB at 12. But this contention is flatly contradicted by Kleffman's acknowledgment that Vonage, the advertiser, contracted with third-party marketing agents who sent the messages. OB at 7 ("while the domain names in Vonage's e-mail advertisements may be literally correct (and traceable to Vonage's contract spammers)"); *see also* Vonage's 9th Cir. Brief at 2 (describing Complaint). The only way to reconcile Kleffman's varying assertions is with a rule that Vonage may not use third-party marketing agents to send email advertisements. But no federal or state law imposes such a restriction on advertisers or deals such a deadly blow to the e-marketing industry.

5. The Cases Kleffman Cites Regarding Multiple Sending Domains and Spam Filters Are Irrelevant and Inapposite

At various points in his opening brief, Kleffman cites to cases containing reference to multiple sending domains and spam filters as ostensible authorities supporting his theory that multiple domains were used to bypass his spam filters, and further, that these allegations suffice to state a § 17529.5 claim. *E.g.*, OB at 8-10, 13-14, 17-19. However, the cases are all factually and legally distinct, and constitute neither evidence nor authority relevant to the question before this Court.

Kleffman's first such citation is to *SEC v. Meltzer*, 440 F. Supp. 2d 179 (E.D.N.Y. 2006). OB at 8-9. In this case, the SEC brought securities claims against a penny stock promoter who touted certain stocks over the Internet. *Id.* at 182. In its description of the facts, the court stated that the complaint alleged that the promoter created multiple websites and domains and used them to avoid "detection by web hosts who seek to prevent

Internet spam," and that the parties did not dispute this allegation for purposes of the parties' summary judgment motions. *Id.* The court then went on to discuss whether scienter and materiality had been established on the securities claims. *Id.* at 188-94. The particular fact Kleffman notes—avoiding detection by web hosts—was not further mentioned by the court or used in its analysis, and the case had nothing to do with spam filters or any law from any jurisdiction regarding the sending of email.

Kleffman also cites *America Online, Inc. v. National Health Care Discount, Inc.*, 121 F. Supp. 2d 1255 (N.D. Iowa 2000). OB at 9. In this case, AOL sued the defendants for sending large volumes of unsolicited email to AOL members. *Id.* at 1258. AOL asserted claims under the federal Computer Fraud and Abuse Act and related state statutory and common law claims. *Id.* In its description of the facts, the court stated that an AOL declaration explained that bulk email senders circumvented AOL's spam filters by developing "software to allow the *manipulation* of headers to display false or misleading information concerning a message's author." *Id.* at 1259-60 (emphasis added). A defendant similarly admitted that he "input . . . nonexistent or otherwise inaccurate 'From' information." *Id.* at 1267. Notably, Kleffman makes no allegation of any manipulation or other falsification of the headers of the eleven emails regarding Vonage services. Further, unlike here, the legal issues in the AOL case were whether the defendants' actions constituted unauthorized access and caused any damage. *See id.* at 1272-77. Thus, the case is both factually and legally distinct from the present case.

United States v. Kilbride, 507 F. Supp. 2d 1051 (D. Ariz. 2007), also relied on by Kleffman, OB at 18-19, in fact supports Vonage's position. In *Kilbride*, the federal district court held that the defendants had violated CAN-SPAM's prohibition against "materially falsif[ying]" header information, 18 U.S.C. § 1037(a)(3). 507 F. Supp. 2d at 1065. To reach

this conclusion, the court analyzed whether the header information enabled the recipient to determine the sender. *Id.* at 1057. In *Kilbride*, multiple, random domain names (like those alleged by Kleffman, OB at 18-19) were one small part of an extensive set of facts that led the court to conclude that the defendants had knowingly violated CAN-SPAM by concealing their identities such that they could not be identified through whois look-ups and the like:

> In summary, the deliberately-crafted header information—the bogus user name with the ever-changing domain name, the false return path, and the identity of knllc.net in Amsterdam—concealed Defendants' identities and impaired the ability of email recipients, ISPs, or law enforcement agencies to determine that Defendants were the initiators. Even a trained ISP investigator like Eric Zeller could not identify Defendants.

507 F. Supp. 2d at 1065. Here, in contrast, per the allegations in the Complaint, the eleven emails were fully traceable to the marketing agent who sent them and contained both opt-out links and postal addresses for the marketing agent. Vonage's 9th Cir. Brief at 2 (describing Complaint).

Kleffman cites two other non-§ 17529.5 cases, OB at 18, but they merely state the unremarkable proposition that spammers on occasion attempt to hide their identities and forge header information. *See Ferguson v. Friendfinders, Inc.*, 94 Cal. App. 4th 1255, 1268, 115 Cal. Rptr. 2d 258 (2002); *Verizon Online Servs., Inc. v. Ralsky*, 203 F. Supp. 2d 601, 606 (E.D. Va. 2002). *Ferguson* and *Verizon* discussed domain names manipulated to be fraudulent or false, which is obviously different from the use of multiple accurate and traceable domains at issue here. *Ferguson*, 94 Cal. App. 4th at 1268 ("fraudulent domain names"); *Verizon*, 203 F. Supp. 2d at 607 ("false domain names").

Finally, Kleffman also cites two unpublished trial court decisions. The first such case is an (1) unpublished (2) stipulated judgment from (3) superior court, *Balsam v. TLM Enterprises Group, Inc.*, No. 1-06-CV-066259 (Cal. Super. Ct. Jan. 15, 2008). OB at 13-14. Each of the three factors noted in the prior sentence alone is a reason why this case is entitled to no deference or consideration. *Santa Ana Hosp. Med. Ctr. v. Belshe*, 56 Cal. App. 4th 819, 831, 65 Cal. Rptr. 2d 754 (1997) (declining to consider unpublished trial court opinion); *Roden v. AmerisourceBergen Corp.*, 155 Cal. App. 4th 1548, 1561, 67 Cal. Rptr. 3d 26 (2007) (stipulated judgment is regarded as a contract between the parties); *Neary v. Regents of Univ. of Cal.*, 3 Cal. 4th 273, 282, 10 Cal. Rptr. 2d 859 (1992) ("[T]rial courts make no binding precedents.") (internal quotation marks and citation omitted) (alteration in original).

The second case is the *Silverstein* case, an unpublished federal district court decision dated after the decision of the federal district court in this case. *See Silverstein v. E360Insight, LLC*, No. CV-07-2835-CAS (C.D. Cal. May 5, 2008). OB at 17. In *Silverstein*, the court held that the plaintiff's amended complaint stated a claim under § 17529.5. OB Attachments at 31-32. Kleffman argues that the allegations in *Silverstein* were "exactly like" his own, OB at 17, but that is not accurate. In addition to mentioning multiple domains and the "trick[ing]" of spam filters (which is a nonsequitur as discussed above), the district court in *Silverstein* relied on the fact that the plaintiff "alleg[ed] that the header was deceptive because it purported to identify the sender of the e-mail, but failed to do so." OB Attachments at 31. In contrast, as explained above, on the facts at issue here, the headers of the emails correctly provided the information necessary to trace the emails to their *sender*—Kleffman however contends

that the headers should also or instead have been traceable to the nonsender *advertiser*, Vonage.[10]

B. THE LEGISLATIVE HISTORY OF § 17529.5 SUPPORTS VONAGE'S POSITION

Kleffman attempts to buttress his argument through reference to the legislative history for § 17529.5. OB at 19-26. But the legislative history in fact supports Vonage's position that email advertisements sent from multiple domains do not constitute misrepresented header information under § 17529.5.

1. The Legislature's Goal Was To Eliminate Fraudulent Emails, Not To Improve the Operation of Spam Filters

Kleffman's primary legislative history argument relies on statements by *opponents* of the bill who argued that technology (i.e., spam filters) could solve the problem of unwanted, unsolicited commercial emails. OB at 23-24. Kleffman also relies on the statutory finding that "[s]pam filters have not proven effective," Cal. Bus. & Prof. Code § 17529(f), (i) . OB at 20. But Kleffman then makes a huge and unsupported leap, claiming that because the Legislature noted the ineffectiveness of spam filters, it passed § 17529.5 "so as to permit more effective spam filtering." OB at 20.

Kleffman provides no authority for this conclusion, and there is none in the statute or its legislative history. While the supposed ineffectiveness of spam filters (in 2003) may have been a reason why the Legislature passed § 17529.5, the Legislature's goal was to eliminate fraudulent unsolicited commercial emails in the first instance, and the Legislature evidenced absolutely no concern with improving the operation of spam filters or enacting a prohibition on the circumvention of spam filters.

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[10] Further, without analyzing the specific allegations of the complaint and exhibits mentioned by the *Silverstein* court, it is impossible to know exactly what allegations it found sufficient and how similar they are to this case.

The Legislature could have enacted a statute prohibiting the circumvention of spam filters. It did not. It chose instead to prohibit "falsified, misrepresented, or forged header information." Cal. Bus. & Prof. Code § 17529.5. A California court lacks the "'power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.'" *Cal. Teachers Ass'n v. Governing Bd. of Rialto Unified Sch. Dist.*, 14 Cal. 4th 627, 633, 59 Cal. Rptr. 2d 671 (1997) (quoting *Seaboard Acceptance Corp. v. Shay*, 214 Cal. 361, 365, 5 P.2d 882 (1931)).

2. The Legislature Did Not Intend for Multiple Domain Names To Constitute "Misrepresented" Header Information

In addition, the legislative history demonstrates that the Legislature did not intend for multiple domain names to constitute "misrepresented" header information under § 17529.5. Indeed, Kleffman acknowledges that "[t]he language of Section 17529.5 (a)(2) was not discussed in the Senate or Assembly committee or floor analyses except to repeat [the language] verbatim." OB at 22. Because "'[a] construction or conclusion plainly not contemplated by the legislature should not be given to a statute if it can be avoided[,]'" *Cal. Ins. Guarantee Ass'n v. WCAB*, 112 Cal. App. 4th 358, 367, 5 Cal. Rptr. 3d 127 (2003) (quoting *People v. Ventura Refining Co.*, 204 Cal. 286, 292, 268 P. 347 (1928)), the Court should not construe § 17529.5 to prohibit the use of multiple domain names in connection with otherwise compliant emails.

The legislative history of § 17529.5 shows that that language that ultimately became § 17529.5 (a)(2), with some revision, was introduced as Senate Bill 12 by Senator Bowen on December 2, 2002. SB 12, 2003-2004 Reg. Sess. (as introduced Dec. 2, 2002).[11] Ultimately, this language was added to Senate Bill 186 on July 9, 2003. SB 186, 2003-2004 Reg. Sess.

[11] *Available at* http://leginfo.ca.gov/pub/03-04/bill/sen/sb_0001-0050/sb_12_bill_20021202_introduced.html.

(as amended July 9, 2003).[12] Not once in the nine Senate and Assembly analyses of SB 186 nor in the five such analyses of SB 12 did the Legislature discuss or even mention the use of multiple domains making header information false. *See* SB 186 Analyses;[13] SB 12 Analyses.[14]

Kleffman's emphasis on a letter written by former state Senator Murray purportedly interpreting the scope of § 17529.5, OB at 25-26, is misplaced. First, the letter is equivocal about its list of examples of § 17529.5 violations, stating only that violations of § 17529.5 "could include" the recited examples, not that violations of § 17529.5 *do* include each example. Second, courts may not "consider the motives or understandings of an individual legislator even if he or she authored the statute" when construing a California statute, and letters, like the one touted by Kleffman, have been expressly rejected from consideration for that reason. *E.g.*, *Delaney v. Superior Court*, 50 Cal. 3d 785, 801 n.12, 268 Cal. Rptr. 753 (1990) (refusing to consider letter of intent written by legislation's sponsor); *Williams v. Garcetti*, 5 Cal. 4th 561, 569, 20 Cal. Rptr. 2d 341 (1993) (same). An exception to this rule does exist, but it is not applicable here. As this Court has explained: "These statements about pending legislation are entitled to consideration to the extent they constitute a reiteration of legislative discussion and events leading to adoption of proposed amendments rather than merely an expression of personal opinion." *Martin v. Szeto*, 32 Cal. 4th 445, 450-51, 9 Cal. Rptr. 3d 687 (2004) (internal quotation marks omitted) (court considered letter to the Governor by the bill's Senate sponsor and others urging that the legislation be signed or vetoed, because these letters "consistently explain[ed]" why

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[12] *Available at* http://leginfo.ca.gov/pub/03-04/bill/sen/sb_0151-0200/sb_186_bill_20030709_amended_asm.html.
[13] *Available at* http://leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_186&sess=0304&house=B&author=murray.
[14] *Available at* http://leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_12&sess=0304&house=B&author=bowen.

the amendment was offered). However, unless a letter by a legislator sets forth arguments the legislation's author presented in securing the passage of the amendment or reiterates discussion and events that transpired in the Legislature—which former Senator Murray's letter does not—courts are barred from considering it in determining legislative intent. *Cal. Teachers Ass'n v. San Diego Cmty. Coll. Dist.*, 28 Cal. 3d 692, 699-702, 170 Cal. Rptr. 817 (1981) (refusing to consider letter that presented the author's personal opinion and understanding of the legislation).[15]

Moreover, application of the rule of statutory construction *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), *Wildlife Alive v. Chickering*, 18 Cal. 3d 190, 195, 132 Cal. Rptr. 377 (1976), further shows that the Legislature did not intend for § 17529.5 to include the use of multiple domains. The Legislature's only concern regarding multiple domains was in connection with using "scripts or other automated means to register for multiple electronic email accounts" to be used to send commercial emails. On July 9, 2003, SB 186 was amended to prohibit the "use of scripts or other automated means to register for multiple electronic mail accounts from which to do, or to enable another person to do, either of the following: [initiate or advertise in unsolicited commercial emails sent to or from California]." SB 186, 2003-2004 Reg. Sess., § 1 (as amended July 9, 2003);[16] *see* Cal. Bus. & Prof. Code § 17529.4(c). (Further, as discussed below, while § 17529.4(c) remains on the books, the Legislature has recognized that CAN-SPAM preempts it.)

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[15] Kleffman endeavors to claim that the exception may apply because "[i]t is not clear from the face of the letter the extent to which Senator Murray was reiterating legislative discussion leading to adoption." OB at 26. This assertion is clearly disingenuous, because, as Kleffman himself admits, "[t]he language of Section 17529.5 (a)(2) was not discussed in the Senate or Assembly committee or floor analyses." OB at 22.

[16] *Available at* http://leginfo.ca.gov/pub/03-04/bill/sen/sb_0151-0200/sb_186_bill_20030709_amended_asm.html.

C. IF THE USE OF MULTIPLE DOMAINS TO SEND AN ADVERTISEMENT STATES A CLAIM UNDER § 17529.5, THE CLAIM IS PREEMPTED BY CAN-SPAM

If Kleffman were right about the scope and reach of § 17529.5—if it reaches emails sent from multiple domain names with accurate and traceable header information—then this claim undoubtedly is preempted by CAN-SPAM. Although the question of CAN-SPAM preemption is a question of federal law and as such was not certified to this Court by the Ninth Circuit, given the history of the two statutes, and in particular the California Legislature's clear goal of avoiding CAN-SPAM preemption, it is impossible to definitively determine the full reach of § 17529.5 without understanding CAN-SPAM's preemption provision.

1. CAN-SPAM Preempts All State Laws That Regulate Commercial Email Except Those That Prohibit Falsity or Deception in "Any Portion of" or "Information Attached" to a Commercial Email

Preemption is an integral part of CAN-SPAM. Congress passed CAN-SPAM to create national standards for commercial email. 15 U.S.C. § 7701(a); *Mummagraphics*, 469 F.3d at 354-55. The federal government recognized that commercial email messages "present[] both benefits and burdens." *Mummagraphics*, 469 F.3d at 354-55. Consequently, in CAN-SPAM, Congress struck a "careful balance between preserving a potentially useful commercial tool and preventing its abuse." *Id.* at 354. Part of this balance was CAN-SPAM's preemption of state commercial email laws.

Congress' statutory findings in support of CAN-SPAM explain the need for state preemption:

> Many States have enacted legislation intended to regulate or reduce unsolicited commercial electronic mail, but these statutes impose different standards and requirements. . . . [S]ince an electronic mail address does not

> specify a geographic location, it can be extremely difficult for law-abiding businesses to know with which of these disparate statutes they are required to comply.

15 U.S.C. § 7701(a)(11). As a result, "law-abiding senders would likely have to assume that their messages were governed by the most stringent state laws in effect." *Mummagraphics*, 469 F.3d at 356. And "[t]he strict liability standard imposed by a state . . . would become a de facto national standard, with all the burdens that imposed, even though the CAN-SPAM Act indicates that Congress believed a less demanding standard would best balance the competing interests at stake." *Id.*

To avoid this result, CAN-SPAM preempts all state laws regulating commercial email except to the extent that a state law "prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto." 15 U.S.C. § 7707(b)(1). In full, CAN-SPAM's preemption provision states:

> This chapter [15 U.S.C. ch. 103] supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.

15 U.S.C. § 7707(b)(1) .

Section 17529.5 expressly regulates the use of email to send commercial messages. *See* Cal. Bus. & Prof. Code § 17529.5 (entitled "Unlawful activities relating to commercial e-mail advertisements; additional remedies"). Any claim under § 17529.5 is therefore preempted unless it concerns "falsity or deception" in "any portion" of or "information attached" to the message.

2. CAN-SPAM's "Falsity or Deception" Standard Is Akin to a Tort Standard

Courts have acknowledged that CAN-SPAM's "falsity or deception" preemption provision is akin to a tort standard. "Reading 'falsity' as referring to traditionally tortious or wrongful conduct is the interpretation most compatible" with the CAN-SPAM preemption clause as a whole. *Mummagraphics*, 469 F.3d at 354; *see also Hoang v. Reunion.com, Inc.*, No. C-08-3518 MMC, 2008 WL 5423226, at *2 (N.D. Cal. Dec. 23, 2008) ("Courts that have considered the issue, however, have interpreted 'falsity or deception,' as used in § 7707(b)(1), to refer to the common law tort of misrepresentation or fraud.") (citing cases).

This conclusion is supported by CAN-SPAM's legislative history. A Senate Report explained that, because email addresses do not reveal their geographic origin, it is impossible for senders to know with which state laws they must comply. S. Rep. No. 108-102, at 21-22 (2003), *as reprinted in* 2003 U.S.C.C.A.N. 2348, 2365. Congress therefore preempted all state laws "requiring some or all commercial e-mail to carry specific types of labels, or to follow a certain format or contain specified content." *Id.* Congress viewed differently, however, state laws that prohibit "fraud and deception in e-mail," because they target behavior that legitimate businesses are not engaged in anyway. *Id.*

3. The California Legislature Intended for § 17529.5 to Comply with CAN-SPAM's Preemption Requirement

The California Legislature recognized the reach of CAN-SPAM preemption and intended for § 17529.5 to be limited to those claims that are not preempted. Following the enactment of CAN-SPAM, the Legislature passed Senate Bill 1457 to amend California's commercial email statute to conform to CAN-SPAM. SB 1457, 2003-2004 Reg. Sess. (Cal. 2004); S. Floor Analysis of SB 1457, 2003-2004 Reg. Sess., at 1 (Cal. Aug. 18, 2004) ("This bill modifies recently enacted state law banning e-mail spam

to conform to recently enacted federal law.").[17] The intent of the bill was "to avoid confusion as to what parts of existing state law are preempted by federal law and what parts remain viable," by "creat[ing] a 'stand-alone' code section [§ 17529.5] for *falsified e-mails*." *Id.* at 2 (emphasis added). The previously broader scope of regulation by California was, as the legislators acknowledged, preempted by CAN-SPAM. *Id.*

Specifically, as originally enacted in 2003, § 17529.5 prohibited advertising in an email that "contains or is accompanied by falsified, misrepresented, *obscured*, or forged header information." Cal. Bus. & Prof. Code § 17529.5 (a)(2) (2003) (emphasis added). Later the same year, Congress passed CAN-SPAM with its broad preemption provision. 15 U.S.C. §§ 7701-7713. In response, the California Legislature amended § 17529.5 to eliminate the word "obscured," recognizing that unless the statute required "falsity or deception," it was preempted. *See* S. Floor Analysis of SB 1457, 2003-2004 Reg. Sess., at 2 (Cal. Aug. 18, 2004).[18] The Legislature therefore clearly intended and understood that "misrepresented" as used within § 17529.5 is a form of falsity or deception as required to avoid preemption by CAN-SPAM.

In addition, the Legislature took two actions that demonstrate its understanding that claims based solely on the use of multiple, accurate sending domains—like Kleffman's—are preempted.

First, during passage of SB 1457 to conform the California statute to CAN-SPAM, the Legislature itself declared that Cal. Bus. & Prof. Code § 17529.4, which prohibits the use of automated means to register for multiple email addresses from which to send emails, is preempted by CAN-SPAM: "This bill is amending only some of the provisions that SB 186

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[17] *Available at* http://leginfo.public.ca.gov/pub/03-04/bill/sen/sb_1451-1500/sb_1457_cfa_20040818_164840_sen_floor.html.

[18] *Available at* http://leginfo.public.ca.gov/pub/03-04/bill/sen/sb_1451-1500/sb_1457_cfa_20040818_164840_sen_floor.html.

[the original commercial email bill] put in place. *There are two sections that are being left in existing law even though those provisions are preempted.* Those sections are Business and Professions Code sections § 17529.2 and *17529.4*. To make sure that state law is consistent with the CAN-SPAM Act, the Author may want to consider either repealing the sections or have them sunset." S. Comm. on Bus. & Prof. Analysis of SB 1457, 2003-2004 Reg. Sess., at 4 (Cal. Apr. 12, 2004) (emphasis added).[19]

Second, the Legislature also specifically recognized that a state prohibition on email advertisements sent from multiple email addresses, which is the functional equivalent of email advertisements sent from multiple domain names (multiple sources used to send commercial email advertisements), would be preempted by CAN-SPAM. A proposed amendment to the California statute "would have prohibited anyone from collecting e-mail addresses or *registering multiple e-mail addresses* for purposes of the initiation or advertisement in an unsolicited commercial e-mail advertisement," without any falsity or deception in the emails or email address registration. S. Floor Analysis of SB 1457, 2003-2004 Reg. Sess., at 2 (Cal. Aug. 18, 2004) (emphasis added).[20] The Legislature deleted this amendment because it would be preempted by CAN-SPAM. *Id.* at 2-3.

4. If § 17529.5 Is Construed to Reach Actions That Are Not Akin to a Tort Claim for Falsity or Deception, It Is Preempted

As explained above, Kleffman's claim does not include a misrepresentation as defined under California tort law. If the Court were to hold that "misrepresent" under § 17529.5 means something different than it

[19] *Available at* http://leginfo.public.ca.gov/pub/03-04/bill/sen/sb_1451-1500/sb_1457_cfa_20040413_092548_sen_comm.html.
[20] *Available at* http://leginfo.public.ca.gov/pub/03-04/bill/sen/sb_1451-1500/sb_1457_cfa_20040818_164840_sen_floor.html.

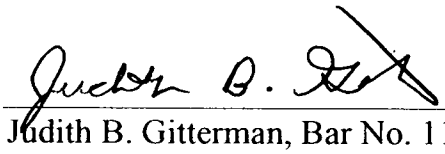
does under California tort law and thus does reach Kleffman's allegations, CAN-SPAM would preempt the claim.

IV. CONCLUSION

For the foregoing reasons, the Court should answer the Ninth Circuit's certified question in the negative: Sending unsolicited commercial email advertisements from multiple domain names for the purpose of bypassing spam filters does *not* constitute falsified, misrepresented, or forged header information under Cal. Bus. & Prof. Code § 17529.5(a)(2).

DATED: March 30, 2009

PERKINS COIE LLP

By: 

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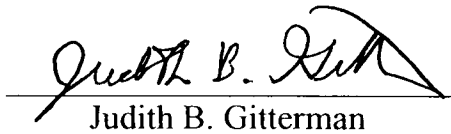
CERTIFICATE OF WORD COURT

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

The text of this Answer Brief on the Merits consists of 6,743 words as counted by the Microsoft Office Word 2003 computer program used to prepare the Answer Brief on the Merits.

Dated: March 30, 2009



Judith B. Gitterman

PROOF OF SERVICE

I, Michelle C. Jackson, declare as follows:

I am over the age of 18, and not a party to this action. My business address is 1620 26th Street, Suite 600 – South Tower, Santa Monica, California 90404.

On March 30, 2009, I served the following document(s):

ANSWER BRIEF ON THE MERITS

in the following manner:

☒ **BY PERSONAL SERVICE:** I caused the document(s) to be delivered by hand.

☐ **BY OVERNIGHT DELIVERY:** I caused such envelopes to be delivered on the following business day by FEDERAL EXPRESS service.

☒ **BY U.S. MAIL:** I am readily familiar with the business practice for collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelopes were sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at Santa Monica, California.

☒ **BY EMAIL:** By electronic mail in PDF format to the email address(es) set forth below.

on the following persons at the locations specified:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that this declaration is executed on March 30, 2009, at Santa Monica, California.

MICHELLE C. JACKSON

SERVICE LIST
In the Supreme Court of California Case No. S169195
Craig E. Kleffman v. Vonage Holdings Corp., et al.

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