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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

SECONDARY SOURCES

LEGISLATIVE HISTORY MATERIALS

MISCELLANEOUS

STATEMENT OF ISSUE

"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 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 thereby deceive 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, so the fact that the content of each identifies Vonage as the advertiser of broadband telephone services is irrelevant.

Rather than address Petitioner's theory head on, Vonage uses much of its Answer Brief to restate it in a way that can be more readily attacked.

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

For instance, Vonage states that 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." (Answer Br. at p. 1.) Petitioner agrees. It is not the sending of e-mail advertisements from multiple domain names in and of itself that creates the violation of Section 17529.5(a)(2). Rather, it is the random and nonsensical nature of Vonage's multiple domain names that serves no purpose but to bypass spam filters and thereby deceives recipients and their ISPs as to the actual single authorship of the e-mail advertisements.

Vonage also claims that 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." (*Ibid.*) Though that question is not before this Court, Petitioner agrees that a ban on multiple domain names without more would be preempted. But again Petitioner's case is about e-mail advertisements sent from domain names that are not only multiple but also garbled and nonsensical to create the misrepresentation that Vonage's e-mail advertisements are from different entities when they are all from Vonage—which misrepresentation indisputably serves no other purpose but to permit the e-mail advertisements to bypass spam filters.

ADDITIONAL FACTUAL BACKGROUND

Vonage contends that the "statement of facts provided by the Ninth Circuit erroneously indicates, contrary to the Complaint, that 'Vonage sent the emails....'" (Answer Br. at p. 2.) The Ninth Circuit is correct, however, because Petitioner does allege that Vonage, through its marketing agents, sent the e-mail advertisements. (ER at Vol. II, pp. 36-37, 90-91.)[2]

LEGAL DISCUSSION

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

A. The plain meaning of Section 17529.5(a)(2) should be construed in terms of similar false advertising statutes in the Business & Professions Code to disallow using multiple domain names to deceive 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).)

Sending e-mail advertisements from multiple random and nonsensical domain names, with the sole purpose being to create the misperception they are from multiple entities in order to bypass spam filters, constitutes misrepresented header information because recipients

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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.

and their ISPs are misled into receiving and/or opening e-mail advertisements that would have otherwise been filtered.

Petitioner does not disagree that the California Legislature is presumed to have relied on the established legal definition of "misrepresented" when it drafted Section 17529.5(a)(2), *see* Answer Br. at p. 3, but Petitioner disagrees with Vonage on the proper source of that legal definition.

To begin with, Petitioner makes a statutory claim based on misrepresented header information for liquidated damages—not a common law claim for fraud or intentional misrepresentation. The statutes that Vonage relies on to construe "misrepresented," including Civil Code section 1572, which defines "actual fraud," and Civil Code sections 1709-1710, which define "fraudulent deceit," have been recognized as continuations of the common law. (See, e.g., *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1091-1092.)

Rather than look to Civil Code sections codifying the common law of fraud, more apt are other statutory claims in the false advertising sections of the Business and Professions Code, such as section 17200, which prohibits fraudulent business practices, and section 17500, which prohibits false or misleading advertising. The former is in the same division

("General Business Regulations") of the Business and Professions Code as Section 17529.5(a)(2) and the latter is also in the same part ("Representations to the Public") and chapter ("Advertising"). Indeed, the case cited by Vonage, *Smith v. Super. Ct.* (2006) 39 Cal.4th 77, looked to other provisions of the Labor Code to construe the meaning of a term used in section 201 of the Labor Code. (*Id.* at pp. 85-86.)

The reason this matters is that Vonage uses the statutes continuing and the cases interpreting the common law of fraud to erroneously construe "misrepresented" to require a false statement.[3] (Answer Br. at pp. 3-4, 8.) At the same time, Vonage does not and cannot refute Petitioner's contention that because "courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage," this Court should construe "misrepresented" as something different from "falsified," another term used in Section 17529.5(a)(2). (Opening Br. at p. 7, citing *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 249.) This makes a difference to Petitioner's claim because, while the domain names in Vonage's e-mail advertisements may be literally correct, their varied and nonsensical nature create the misleading or deceptive

[3] To the extent that Vonage is contending that the Court should construe "misrepresented" as used in Section 17529.5(a)(2) to require all the elements of common law fraud, *cf.* Answer Br. at p. 8, it is misguided for the same reasons.

impression that they are from different entities when in fact they are all from Vonage.

Liability under sections 17200 and 17500, conversely, "does not refer to the common law tort of fraud but requires only a showing members of the public 'are likely to be deceived.'" (*Day v. AT&T Corp.* (1998) 63 Cal.App.4th 325, 332.) Significantly, these statutes "may be invoked where the advertising complained of is not actually false, but thought likely to mislead or deceive, or is in fact false. By their breadth, the statutes encompass not only those advertisements which have deceived or misled *because* they are untrue, but also those which may be accurate on some level, but will nonetheless tend to mislead or deceive." (*Ibid.* [emphasis in original].) So Vonage's repeated assertion that the domain names in the header information of its e-mail advertisements are "accurate," see, e.g., Answer Br. at p. 4, does not mean that they are not still deceptive.

Moreover, courts regularly apply sections 17200 and 17500 to claims of "misrepresentation." (See, e.g., *Belton v. Comcast Cable Holdings, LLC* (2007) 151 Cal.App.4th 1224, 1241 [holding that to establish a violation of section 17200 the plaintiffs must show that the "alleged two types of misrepresentations" were false or likely to have misled reasonable consumers]; *Aaron v. U-Haul Co. of Cal.* (2006) 143

Cal.App.4th 796, 806-807 [holding that the plaintiff's allegation that the defendant "deceptively misrepresents" its fueling fee was sufficient to state a claim under section 17200 because it "would be misleading to a reasonable consumer"]; *People v. Toomey* (1984) 157 Cal.App.3d 1, 16-17 [holding that the defendant's advertisements "misrepresented the nature and value of the product" and therefore were "likely to deceive" consumers in violation of sections 17200 and 17500].) Likewise, courts have held that the Consumers Legal Remedies Act applies to claims of misrepresentation and requires only a showing that misrepresentations are likely to deceive a reasonable consumer. (See, e.g., *Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1360-1362; see also Cal. Civ. Code §1770(a)(2)-(7) [proscribing enumerated misrepresentations].)

Thus, the presumption raised by Vonage is inapplicable when premised on the meaning of misrepresentation found in the statutes of the Civil Code codifying the common law of fraud. (*DeLaney v. Baker* (1999) 20 Cal.4th 23, 41-42 ["[T]he presumption does not apply when the same or a similar phrase appears in a different statutory scheme with distinct designs and objections."].) But the presumption rightly applies when premised on the meaning found in the other false advertising statutes of the Business and Professions Code. (*Day*, 63 Cal.App.4th at p. 332 [explaining

that sections 17200 and 17500 "are meant to protect the public from a wide spectrum of improper conduct in advertising"]; *see also* §17529, subd. (c), (h) & (l).) In short, this Court should construe "misrepresented header information" to mean header information that is "likely to deceive," in accordance with related false advertising statutes, or that "gives a misleading idea," in accordance with the lay dictionary definitions discussed by Petitioner in his Opening Brief.[4]

B. Vonage's multiple random and nonsensical domain names deceive spam filters used by recipients and their ISPs despite the fact the e-mail ads are traceable to Vonage.

The 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. 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

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[4] Whether the Court looks to dictionary definitions that are lay or legal, the outcome is the same here. Black's Law Dictionary (6th ed. 1990) at page 1001 defines misrepresentation as "[a]ny manifestation by words...that, under the circumstances, amounts to an assertion not in accordance with the facts." (Attachments hereto at p. 1.) E-mail advertisements with header information reflecting that they were sent from multiple random and nonsensical domain names creates the misrepresentation, or "assertion not in accordance with the facts" (*ibid.*), or "misleading idea" (Opening Br. at pp. 6-7), that they are from different entities when in fact they are all from Vonage.

bypass spam filters. (Opening Brief at pp. 8-11, ER at Vol. II, pp. 38-39, 92.) 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 from Vonage. (*Ibid.*; *see generally United States SEC v. Meltzer* (E.D.N.Y. 2006) 440 F.Supp.2d 179, 182; *America Online, Inc. v. National Health Care Discount, Inc.* (N.D. Iowa 2000) 121 F.Supp.2d 1255, 1259-1260, 1266-1267.) 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).)

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, pp. 39, 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

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 businesses that use consistent domain names 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.)

This is *not* to say, as Vonage pretends Petitioner does, that Section 17529.5(a)(2) "would in effect require the use of a single domain name to distribute an advertiser's email advertisements." (Answer Br. at p. 5.) Section 17529.5(a)(2) permits e-mail advertisements sent from multiple domain names as long as they are not deceptive by virtue of their utterly random and nonsensical nature. For example, it is plain to see that these multiple domain names are *not* deceptive: (1) anaheimangels.com, (2) angelsbaseball.com, (3) losangeles.angels.mlb.com, and (4) angels.mlb.com; or (1) saks.com, (2) saksfifthavenue.com, (3) saksfifthave.com, (4) saks5thave.com, and (5) saks5thavenue.com; or (1) verizonwireless.com, (2) verizon.com, and (3) vzw.com. Likewise,

there are endless possibilities of multiple domain names that marketing agents could use that would not effect a misrepresentation in violation of Section 17529.5(a)(2). On the other hand, there is no legitimate reason for Vonage's e-mail advertisements to be sent from these multiple random and nonsensical domain names: (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. The parade of horribles that follows from Vonage's misstatement of Petitioner's position, *see* Answer Br. at pp. 5-6, is thus averted. Moreover, there need not be a requirement that a company, or a product, or a service be included in a domain name, *see* Answer Br. at p. 6, for one to see that the domain names used to send Vonage's e-mail advertisements and reflected in their header information are deceptive. And Vonage assumes its conclusion when it states that it can use "any domain name it likes" to send its e-mail advertisements—to the extent these domain names misrepresent its identity in violation of Section 17529.5(a)(2) it cannot.

The only response Vonage has to Petitioner's contention that the misrepresentation occurs before the e-mail advertisements are opened,

rendering worthless the fact that the content of each identifies Vonage as the advertiser, is to cite a single factually and legally inapposite case for the proposition that courts have rejected the premise that "the inquiry should be limited to one particular moment in time." (Answer Br. at p. 7.) Significantly, *Omega World Travel, Inc. v. Mummagraphics, Inc.* (4th Cir. 2006) 469 F.3d 348, did not involve a claim of multiple random and nonsensical domain names alleged to cause deception prior to their receipt as here. Rather, the court concluded that isolated inaccuracies in the header information amounted to "bare error" based on the entirety of information available to the plaintiff and therefore the defendant did not violate CAN-SPAM. (*Ibid.*)

Lastly, Vonage has it backwards when it asserts that intent to bypass spam filters cannot create a misrepresentation. (Answer Br. at pp. 7-8.) Again, Petitioner agrees. Instead, it is the nature of the random and nonsensical domain names in the header information of Vonage's e-mail advertisements that create the misrepresentation regarding the actual single authorship of the advertisements. And this in turn renders spam filters ineffective and reveals Vonage's intent to bypass them. (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 short, although the content of Vonage's e-mail advertisements identify it as the advertiser of broadband services, the multiple random and nonsensical domain names included in the header information of the e-mails deceive the spam filters of the recipients and their ISPs as to the singular authorship of the e-mail advertisements prior to their being received and/or opened.

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 the Internet Engineering Task Force's ("IETF's") Request for Comment ("RFC") 2822, Internet Mail Format. (Opening Brief at pp. 11-13, ER at Vol. II, p. 40.)[5] 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." (ER at Vol. II, p. 41.) Vonage's e-mail

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[5] Contrary to Vonage's assertion at page 9, footnote 9, of its Answer Brief, the IETF's Request for Comment 2822 is properly before the Ninth Circuit. (ER at Vol. I., Index to Appellant's Excerpts of Record at fn. 1.)

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.)

Vonage erroneously contends that this Court should accord the IETF's RFC 2822 no weight because the court in *ACTV, Inc. v. Walt Disney Co.* (Fed. Cir. 2003) 346 F.3d 1082, held that the RFC in that case could not be relied on as an authoritative treatise in constructing the disputed meaning of a claim term in the plaintiff's patent because it was "not designed to reflect common usage, but rather to assign language to facilitate further conversation." *Id.* at 1089. But what Vonage fails to mention is that the RFC in *ACTV* was the product of an entirely different organization than the RFC relied on by Petitioner.

In *ACTV* the plaintiff proffered an RFC from the World Wide Web Consortium ("W3C") in support of its position that the term "URL" should properly be construed to include both absolute and relative URLs. (*Id.* at p. 1088.) The defendant then proffered a different RFC from the same

organization to show that URLs encompass only absolute URLs. (*Ibid.*) The seeming contradiction between the W3C's RFCs was not surprising given that its members include "various industry groups, manufacturers, and others, each with their own conceivable interests in the agenda" and the RFCs were each generated "by one subset, or working group, within W3C" in efforts to select language to facilitate a common understanding rather than to reflect common usage. (*Id.* at p. 1089.) The court instructed, however, that "there is no general prohibition on the use of publications from standards-setting organizations....[w]here such a document reflects common usage by those skilled in the relevant art." (*Id.* at p. 1090.)

The IETF's RFCs known as "standards track documents," relied on by Petitioner, are "official specifications of the Internet protocol suite defined by the Internet Engineering Task Force (IETF) and its steering group the IESG." (Overview of RFC Document Series, at <http://www.rfc-editor.org/RFCoverview.html> [as of Apr. 10, 2009].); see also ER at Vol. II, p. 40). A "proposed standard" is "generally stable, has resolved known design choices, [and] is believed to be well-understood." (RFC 2026 at p. 11, at < ftp://ftp.rfc-editor.org/in-notes/bcp/bcp9.txt> [as of Apr. 10, 2009].) A "draft standard" indicates " a strong belief that the specification is mature[,]....well-understood and known to be quite stable....[a] draft

standard is normally considered to be a final specification." (*Id.* at pp. 12-13.) Thereafter the specification becomes known simply as an "internet standard." (*Id.* at p. 13.)[6]

RFC 2822, a proposed standard "specif[ying] a syntax for text messages that are sent between computer users, within the framework of 'electronic mail' messages," thus meets the criteria of the *ACTV* court, in particular because it updated an earlier RFC "to reflect current practice." (RFC 2822 (2001) at p. 1, at <http://www.rfc-editor.org/rfc/rfc2822.txt> [as of Apr. 10, 2009].)[7] Moreover, since the completion of briefing before the Ninth Circuit, RFC 2833 was elevated to a draft standard, known as RFC 5322, updating RFC 2822 "to reflect current practice." (RFC 5322 (2008) at p. 1, at <http://www.rfc-editor.org/rfc/rfc5322.txt> [as of Apr. 10, 2009].)[8] Notably, the portions of RFC 2822 cited by Petitioner in his

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[6] The equivalent of the W3C's RFC in *ACTV* seems to be the IETF's RFCs known as "best current practices," which are "official guidelines and recommendations, but not standards, from the IETF." (Overview of RFC Document Series, at <http://www.rfc-editor.org/RFCoverview.html> [as of Apr. 10, 2009].)

[7] See also RFC Index Search Engine Result for RFC 2822, at <http://www.rfc-editor.org/cgi-bin/rfcsearch.pl?searchwords=rfc2822&opt=All+fields&num=25&format=ftp&orgkeyword=2822&filefmt=pdf&search_doc=search_all&match_method=entire&abstract=absoff&keywords=keyoff&sort_method=older> [as of Apr. 16, 2009] [status is proposed standard].

[8] See also RFC Index Search Engine Result for RFC 5322, at <http://www.rfc-editor.org/cgi-bin/rfcsearch.pl?searchwords=rfc5322&opt=All+

Proposed First Amended Complaint remain the same in RFC 5322. (*Id.* at pp. 21-22.) Thus, *ACTV* supports Petitioner's reliance on the IETF's RFCs known as standards track documents to show the deceptive nature of Vonage's conduct as evidenced by its gross departure from standard internet protocol.

Vonage then mistakenly argues that its e-mail advertisements do not flout the "from" field protocol of RFC 2822 because its third-party marketing agents sent them. But regardless who sent, or transmitted, the e-mail, according to standard internet protocol the "from" field should contain the author of the message, which is Vonage. (ER at Vol. II, p. 41 ["In all cases, the 'From:' field SHOULD NOT contain any mailbox that does not belong to the author(s) of the message."].) And when there is a separate entity responsible for actually sending, or transmitting, the e-mail, as here, standard internet protocol specifies that the "sender" field should also be used. (ER at Vol. II, p. 41.) Thus, when Vonage asserts that Petitioner would require "a rule that Vonage may not use third-party marketing agents to send email advertisements," Answer Br. at p. 10, it is again misstating Petitioner's position to more easily attack it.

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fields&num=25&format=ftp&orgkeyword=2822&filefmt=pdf&search_doc=search_all&match_method=entire&abstract=absoff&keywords=keyoff&sort_method=older> [as of Apr. 16, 2009] [status is draft standard].

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

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. (Opening Brief at pp. 13-17.)

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). Vonage makes the obvious point that superior court decisions do not create binding precedent. (Answer Br. at p. 13.) But they may "be cited for their persuasive value and are occasionally followed in the absence of controlling higher authority." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 486.)

Similarly, in *Silverstein v. E360Insight, LLC et al.* (C.D. Cal., No. CV-07-2835-CAS), the court denied a motion to dismiss allegations 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], Opening Brief attachments at pp. 28-39.) Vonage puts its own unsupported spin on the case when it asserts that in permitting the plaintiff's multiple domain name claim the court "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.'" (Answer Br. at p. 13.) The *Silverstein* court did not, however, condition allowance of the plaintiff's multiple domain name claim on the lack of traceability of the e-mail advertisements to the sender. And Vonage misstates Petitioner's position yet again when it states that he would require the domain names to be traceable "to the nonsender *advertiser*, Vonage." (Answer Br. at p. 14 [emphasis in original].) Saying that the traceability to Vonage's marketing agents of the domain names used to send its e-mail advertisements does not absolve Vonage from liability for the deceptive multiple and nonsensical nature of the those

domain names is not remotely the same as saying that the domain names must be traceable to Vonage.

Lastly, Vonage does not attempt to explain how 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 tenable. "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.

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.

Various cases not involving Section 17529.5(a)(2) share the *Silverstein* court's understanding that multiple domain names can create deception as to the source of e-mail advertisements. (Opening Brief at pp. 18-19.) 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.)

Vonage attempts to distinguish this case with the again irrelevant fact that its e-mail advertisements are traceable to its marketing agents who sent them. But so did the defendants, to no avail, in *Kilbride*: "Defendants argue that the header information was not false because it accurately led to Ganymede, the true registrant of the domain names. But the technical accuracy of this one fact does not cure the numerous misleading components of Defendants' header information." (*Id.* at p. 1065.) 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 misrepresent the source of e-mail advertisements is reinforced by the statutory findings that introduce the California Act. In particular, section 17529, subdivisions (f) and (i) state the Legislative findings that "[s]pam filters have not proven effective" because "[m]any 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."

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. Vonage asserts that the "Legislature could have

enacted a statute prohibiting the circumvention of spam filters. It did not." (Answer Br. at p. 15.) But this is precisely what it did do, *inter alia*, in prohibiting "falsified, misrepresented, or forged header information" in Section 17529.5(a)(2). 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

The legislative history supports 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. Vonage does not specifically address these arguments, so Petitioner will not further discuss them here. (See Opening Br. at pp. 21-26.)

Vonage does wrongly contend that the Court should not construe Section 17529.5(a)(2) to prohibit multiple random and nonsensical domain names that misrepresent the source of e-mail advertisements because "[n]ot 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." (Answer Br. at p. 16.) But Vonage fails to note that none of these analyses provided *any* examples of header information that would violate Section 17529.5(a)(2)'s prohibition against falsified, misrepresented, or forged header information. According to Vonage, then, no advertisers could violate Section 17529.5(a)(2) because the Legislature did not contemplate their specific type of deceptive header information. (Answer Br. at pp. 15-16.) Because the Legislature did not discuss any specific types of Section 17529.5(a)(2) violations in its analyses, absence of discussion regarding deceptive multiple domain names is completely inconclusive.

Likewise, because the analyses do not document any discussion that occurred regarding specific types of header information that would violate Section 17529.5(a)(2), it is impossible to know from these materials whether Senator Murray's letter, which cited deceptive multiple domains

names as an example of prohibited header information, reiterated discussion that occurred in the Legislature. (Answer Br. at pp. 16-17.)

Finally, Vonage's attempt to apply the rule of statutory construction *expressio unius est exclusio alterius* based on a different section of the California Act is misplaced. (Answer Br. at p. 17.) Regardless whether misleading or deceptive, section 17529.4, subdivision (c), prohibits the use of scripts or other automation to register for multiple e-mail accounts from which to send e-mail advertisements. But Section 17529.5(a)(2) does not purport to list examples of deceptive header information from which omission of multiple domain names would be meaningful in relation to that section itself or in relation to section 17529.4, subdivision (c)'s mention of multiple e-mail accounts. Thus, for the reasons stated here and in Petitioner's Opening Brief, the legislative history supports application of Section 17529.5(a)(2) to Vonage's e-mail advertisements.

IV. A Claim That Multiple Random and Nonsensical Domain Names Violates Section 17529.5(a)(2) Would Not Be Preempted—Though That Question Is Not Before This Court

True to form, Vonage premises its preemption argument on an overstatement of Petitioner's position: "if [Section 17529.5(a)(2)] reaches emails sent from multiple domain names with accurate and traceable header information—then this claim undoubtedly is preempted by CAN-SPAM." (Answer Br. at p. 18.) Petitioner agrees that a ban on multiple domain

names without more would be preempted. But again Petitioner's case is about e-mail advertisements sent from domain names that are not only multiple but also garbled and nonsensical to create the misrepresentation that Vonage's e-mail advertisements are from different entities when they are all from Vonage—which misrepresentation serves no other purpose but to permit the e-mail advertisements to bypass spam filters. Though the Ninth Circuit is reviewing whether Petitioner's claim against Vonage under Section 17529.5(a)(2) would be preempted, it did not certify that issue to this Court. In any event, Petitioner will respond to Vonage's argument.

A. CAN-SPAM explicitly permits state statutes prohibiting deception in any portion of a commercial e-mail message.

CAN-SPAM specifically preserves state statutes regulating deceptive commercial e-mails:

> This Act 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) [emphasis added]; see generally *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485 ["the historic police powers of the States [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress."].)

The plain language of Section 17529.5(a)(2)'s prohibition against "falsified, misrepresented, or forged" header information falls within CAN-SPAM's savings clause. And, as applied, Petitioner's Section 17529.5(a)(2) claim against Vonage is not preempted because it prohibits Vonage's use of random and nonsensical domain names to create the misrepresentation that Vonage's e-mail advertisements are from different entities when in fact they are all from Vonage to bypass spam filters and deceive recipients and their ISPs into receiving and/or opening them. (ER at Vol. II, pp. 90-93.)

At page 20 of its Answer Brief, Vonage cites to cases that have required a state statute to demand a showing of traditional tortious or fraudulent conduct to avoid CAN-SPAM preemption, but other cases have not so required. (See, e.g., *Gordon v. Impulse Mrktg. Group Inc.* (E.D. Wash. 2005) 375 F. Supp. 2d 1040, 1045-46; *Infinite Monkeys & Co., LLC v. Global Res. Sys. Corp.* (Cal. Super. Ct., Sept. 14, 2005, No. 1-05-CV039918) at p. *2, attachments hereto at pp. 2-5.)

Moreover, Congress permitted the States to extend their traditional tort prohibitions to the realm of commercial e-mails in a separate provision, which shows its intent not to circumscribe the preemptive scope of section 7707(b)(1) in terms of "tort law." In section 7707(b)(2), Congress stated:

> The Act shall not be construed to preempt the applicability of State laws *that are not specific to electronic mail, including* State trespass, contract, or *tort law.*

15 U.S.C. § 7707(b)(2) (emphasis added). Because Congress specifically described the preemptive scope of CAN-SPAM in terms of "tort law" in § 7707(b)(2), one would expect Congress to have also used the term to demarcate the preemptive scope of CAN-SPAM in § 7707(b)(1) had it so intended. (*Bates v. United States* (1997) 522 U.S. 23, 29-30 ["Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."].) Using the descriptor "tort law" in § 7707(b)(2) but not in § 7707(b)(1) indicates Congressional intent that the preemptive effect of the latter not be circumscribed in terms of "tort law."

In any event, Petitioner's claim is like traditional tort claims, contrary to the district court's opinion. (ER at Vol. I, p. 8 ["it is clear that [Congress] meant these terms to refer to traditional, tort-type concepts and not to innovative theories such as [Petitioner]'s."].) Indeed, "traditional" is a relative term based on timing, perspective, and exposure to new social ills. Receipt of junk faxes was probably once considered an "innovative" claim, but the California Legislature has no problem likening advertising

spam thereto. (§ 17529, subd. (e).) The California Legislature also recognized that the "cost shifting" of advertising spam from deceptive spammers to Internet business and e-mail users is akin to sending junk mail with postage due or making telemarketing calls to someone's pay-per-minute cellular phone. (§ 17529, subd.(h).) Deceiving someone and/or their agent into accepting something they do not want and requiring them to cover the associated costs is consistent with traditional notions of consumer protection tort theory. E-mail advertisements with misrepresented header information that facilitate the unwanted and costly receipt of advertising spam seems a prime example of what Congress intended the States to be able to prohibit in passing § 7707(b)(1).

Moreover, it is far from clear how a legitimate business could unwittingly send e-mail advertisements from such nonsensical and random multiple domain names as superhugeterm.com, formycompanysite.com, ursunrchcntr.com, urgrtquirkz.com, countryfolkgospel.com, lowdirectsme.com, yearnfrmore.com, openwrldkidz.com, ourgossipfrom.com, specialdlvrguide.com, and struggletailssite.com. (*Cf.* Rep. No. 108-102 (2003), 108th Cong., 1st session 2, at pp. 21-22, reprinted in, 2004 U.S.S.C.A.N. 2348, at p. 2349 ["statutes that prohibit fraud and deception in email do not raise the same concern (of consistency), because

they target behavior that a legitimate business trying to comply with relevant laws would not be engaging in anyway."].) In short, CAN-SPAM specifically saves state statutes, such as Section 17529.5(a)(2), that regulate deceptive commercial e-mail advertisements and prohibit Vonage from deceiving recipients as to the single authorship of multiple e-mail advertisements with random and nonsensical domain names intended to bypass spam filters.

B. The Legislature's subsequent passage of Senate Bill 1457 clarified that Section 17529.5(a)(2) was not preempted.

The Legislature passed Senate Bill No. 1457 to clarify that Section 17529.5 was not preempted by CAN-SPAM though other sections, e.g. § 17529.2 and § 17529.4, were preempted. Section 17529.2 prohibits the sending of unsolicited commercial e-mail regardless whether misleading or deceptive. 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.[9] The Legislature

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[9] Vonage also confusingly asserts that this was a new proposal in Senate Bill 1457. (Answer Br. at p. 22.) But Senate Bill 1457, as introduced, explained that "*[e]xisting state law* prohibits a person or entity from

explained: "Although this federal measure preempted California's complete prohibition of spam, it did not preempt the 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].)[10] Section 17529.5 was deemed by the Legislature not to be preempted because it permitted claims of "falsity or deception," such as Petitioner's, which had been explicitly preserved by CAN-SPAM.

To the extent that Vonage relies on a selective reading of the legislative history of the California Act to incorrectly assert that Section 17529.5(a)(2) is limited to falsity claims, it is mistaken. (Answer Br. at p. 21, quoting Sen. Rules Com., Floor Analysis of Sen. Bill No. 1457 (2003-

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collecting e-mail addresses or registering multiple e-mail addresses for purposes of the initiation or advertisement in an unsolicited commercial e-mail advertisement." (Sen. Bill No. 1457 (2003-2004 Reg. Sess.) as introduced Feb. 19, 2004, at <http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1451-1500/sb_1457_bill_20040219_introduced.html> [as of Apr. 13, 2009] [emphasis added].)

[10] The Legislature also 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].)

2004 Reg. Sess.) August 18, 2004, p. 2, at <http://info.sen.ca.gov/pub/03-04/bill/sen/sb_1451-1500/sb_1457_cfa_20040818_164840_sen_floor.html> [as of Apr. 13, 2009] ["This bill creates a 'stand-alone' code section [17529.5] for falsified e-mails."]) Of course, Vonage has no authority for the proposition that legislative history can override the plain language of Section 17529.5(a)(2), which prohibits "falsified, misrepresented, or forged header information." Indeed, this Court has held that the opposite presumption applies to interpretation of California statutes: "We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent." (*Hassan v. Mercy American River Hosp.* (2003) 31 Cal.4th 709, 715; *see also Arnett v. Dal Cielo* (1996) 14 Cal. 4th 4, 22 ["Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage."].) In short, Petitioner's claim that Vonage violates Section 17529.5(a)(2)'s prohibition against misrepresented header information because it uses multiple random and nonsensical domain names to deceive recipients and their ISPs as to the single source of the e-mail advertisements is not preempted by CAN-SPAM.

CONCLUSION

The plain language of the statute and the legislative findings in support of its passage compel the conclusion that Section 17529.5(a)(2)'s prohibition on misrepresented header information includes a prohibition on multiple random and nonsensical domain names intended to bypass spam filters. For all the reasons stated above, this Court should answer the certified question in the affirmative.

DATED: April 17, 2009

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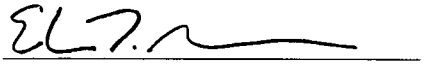
REED R. KATHREIN
ELAINE T. BYSZEWSKI

By: 
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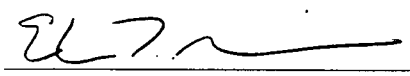
CERTIFICATE OF WORD COUNT

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

The text of this brief contains 6,463 words as counted by the Microsoft Office Word 2003 program used to generate the brief.

DATED: April 17, 2009



Elaine T. Byszewski

Index to Attachments

Attachment	Permitted by Rule	Page(s)
Black's Law Dictionary (6th ed. 1990), definition of misrepresentation.	CRC 8.520(h)	1
Infinite Monkeys & Co., LLC v. Global Res. Sys. Corp. (Cal. Super. Ct., Sept. 14, 2005, No. 1-05-CV039918)	CRC 8.1115(c)	2-5

Attachment

Misprision of treason. The bare knowledge and concealment of an act of treason or treasonable plot by failing to disclose it to the appropriate officials; that is, without any assent or participation therein, for if the latter elements be present the party becomes a principal. 18 U.S.C.A. § 2382.

Misreading. Reading a deed or other instrument to an illiterate or blind man (who is a party to it) in a false or deceitful manner, so that he conceives a wrong idea of its tenor or contents.

Misrecital /mìsrəsáytəl/. The erroneous or incorrect recital of a matter of fact, either in an agreement, deed, or pleading.

Misrepresentation. Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An untrue statement of fact. An incorrect or false representation. That which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists. Colloquially it is understood to mean a statement made to deceive or mislead.

As amounting to actual legal fraud consists of material representation of presently existing or past fact, made with knowledge of its falsity and with intention that other party rely thereon, resulting in reliance by that party to his detriment. Jewish Center of Sussex County v. Whale, 86 N.J. 619, 432 A.2d 521, 524.

In a limited sense, an intentional false statement respecting a matter of fact, made by one of the parties to a contract, which is material to the contract and influential in producing it. A "misrepresentation," which justifies the rescission of a contract, is a false statement of a substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

See also Deceit; Deception; False; Fraud; Material fact; Reliance.

Insurance law. A statement of something as a fact which is untrue and material to the risk, and which assured states knowing it to be untrue and with intent to deceive, or which insured states positively as true, not knowing it to be true, and which has a tendency to mislead. One that would influence a prudent insurer in determining whether or not to accept the risk, or in fixing the amount of the premium in the event of such acceptance. *See also* Material fact.

Missilia /məsáyl(i)yə/. In Roman law, gifts or liberalities, which the prætors and consuls were in the habit of throwing among the people.

Missing ship. In maritime law, a vessel is so called when, computed from her known day of sailing, the time that has elapsed exceeds the average duration of similar voyages at the same season of the year.

Missions. In church parlance, the establishment of churches and schools and relief depots through which are taught the principles of Christianity, the afflicted cared for, and the needy supplied.

Missura /mìs(y)úrə/. The ceremonies used in a Roman Catholic church to recommend and dismiss a dying person.

Mistake. Some unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence. A state of mind not in accord with reality. A mistake exists when a person, under some erroneous conviction of law or fact, does, or omits to do, some act which, but for the erroneous conviction, he would not have done or omitted. It may arise either from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence. Salazar v. Steelman, 22 Cal.App.2d 402, 71 P.2d 79, 82. *See also* Error; Ignorance.

Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in (1) an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or (2) belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed.

A *mistake of law* happens when a party, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference, arising from an imperfect or incorrect exercise of the judgment, upon facts, Page v. Provines, 179 Okl. 391, 66 P.2d 7, 10; and necessarily presupposes that the person forming it is in full possession of the facts. The facts precede the law, and the true and false opinion alike imply an acquaintance with them. The one is the result of a correct application of legal principles, which every man is presumed to know, and is called "law;" the other, the result of a faulty application, and is called a "mistake of law."

In criminal law, ignorance or mistake as to a matter of fact or law is a defense if: (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense. Model Penal Code, § 2.04(1).

Mutual mistake is where the parties have a common intention, but it is induced by a common or mutual mistake. "Mutual" as used in the expression mutual mistake of fact expresses a thought of reciprocity and distinguishes it from a mistake which is a common mistake of both parties. There is something of the thought of a common mistake because it must affect both parties. Mistake of fact as ground for relief may be neither "mutual" nor common in the strict sense because it may be wholly the mistake of one of the parties, the other being wholly ignorant both of the fact upon the faith of which the other has mistakenly acted and that the other has acted upon such an understanding of the fact situation.

(ENDORSED)

FILED

SEP 14 2005

KIRI TORRE
Chief Executive Officer
Superior Court of CA County of Santa Clara
BY _____ DEPUTY
Ann Vizconde

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

INFINITE MONKEYS & CO., LLC, Plaintiff, v. GLOBAL RESOURCE SYTEMS CORP. et al. , Defendants.	Case No. 1 – 05 – CV039918 Order re: Demurrer, Motion to Strike, and Motion for Preliminary Injunction

The Demurrers by Defendants Global Resource Systems Corp., Quinstreet, Inc. DeVry University, Inc., and Impulse Marketing Group, Inc.; the Motion to Strike by Defendant DeVry University Inc., and the Motion for Preliminary Injunction by Plaintiff Infinite Monkeys & Co. LLC came on for hearing before the Honorable William F. Martin on September 13, 2005 at 9:00 a.m. in Department 15. The matters having been submitted, the Court orders as follows:

The Demurrers to the first cause of action for violation of B&P Code § 17529.5 by Defendants Global Resource Systems Corporation, Impulse Marketing Group, Inc., and Quinstreet Inc. are OVERULED. The Request for Judicial Notice by Defendant DeVry University, Inc. is GRANTED. The Demurrer to the first cause of action for violation of B&P Code § 17529.5 by Defendant DeVry University, Inc. is GRANTED WITH LEAVE TO AMEND BY September 30, 2005.

The Court finds that the Legislature intended the phrase "advertise in a commercial e-mail advertisement" contained in Business & Professions Code § 17529.5(a) to be construed broadly and to include all entities involved in the creation and dissemination of an e-mail

advertisement. Thus the entity that sponsored a commercial e-mail advertisement, the parties that prepared and organized the dissemination of the advertisement, and the parties that effected delivery of the e-mail to the recipients are all proper defendants in a Business & Professions Code § 17529.5(a) cause of action. Any other construction of the statute would render the Business & Professions Code § 17529.5(b) (1) (D) exemption for electronic mail service providers superfluous and would fail to achieve the Legislative purpose stated in Business & Professions Code § 17529. The Court finds that actions under Business & Professions Code § 17529.5(a) fall within the express exception to preemption provided in 15 U.S.C. § 7707(b) (the CAN-SPAM Act) and that the private right of action provided by Business & Professions Code § 17529.5 is a permissible exercise of a state's right to regulate falsity or deception in any portion of an electronic mail message expressly recognized by 15 U.S.C. § 7707(b).

The Court finds that a plaintiff need not plead with specificity when asserting a cause of action under Business & Professions Code § 17529.5 (see *Chen v. Bank of America* (1976) 15 Cal.3d 866, 876; *Comm. On Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211 [interpreting pleading standard under analogous provisions of Business & Professions Code § 17500].) Consequently, the allegations of the Complaint are sufficient to state a cause of action against all demurring defendants and to plead that Defendant Global Resource Systems acted outside the scope of the Business & Professions Code § 17529.5(b)(1)(D) exemption for electronic mail service providers. However, the allegations of the Complaint are contradicted by the discovery responses served by Plaintiff on Defendant DeVry, of which this Court can take judicial notice. (*Del. E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604; *Dawn v. Dixon* (1963) 216 Cal.App.2d 260].) The Demurrer of Defendant DeVry is therefore Sustained With Leave to Amend, as specified above, to state a violation of Business & Professions Code § 17529.5(a) that is consistent with the discovery responses.

The Demurrers to the second cause of action for trespass to chattel by Defendants Global Resource Systems Corporation, Impulse Marketing Group, Inc., Quinstreet Inc., and DeVry University are OVERULED. The allegations of the complaint, if assumed to be true, establish that there was interference with Plaintiff's hardware that distinguishes this case from the facts of

Intel *Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1346. Further discovery may lead to evidence which supports further defense motions on this issue.

The Demurrers to the third cause of action for Unfair Business Practices and the fourth case of action for Unfair Advertising Practices by Defendants Global Resource Systems Corporation are OVERRULED.

Defendant DeVry University Inc.'s Motion to Strike is DENIED.

Plaintiff Infinite Monkeys & Co. LLC's Motion for Preliminary Injunction is CONTINUED to December 5, 2005 at 9:00 A.M. at which time an evidentiary hearing will be held. Plaintiff's case will be limited to one hour, including reasonable cross-examination. Defendants' case likewise will be limited to one hour with reasonable cross-examination. The Court will entertain brief oral testimony to supplement or clarify written evidence filed earlier as described below. Plaintiff shall file a renewed motion providing admissible evidence establishing specific examples of the alleged violations, the harm suffered by Plaintiff, the connection between the violations and the injunctive relief sought, why damages are not an adequate remedy, whether injunctive relief should address misleading header or subject lines, and addressing Defendants' contentions (1) that Plaintiff is a entity whose sole purpose is the litigation of claims, (2) that the requested relief will require Defendant Global Resource Systems to cease business, and (3) that Plaintiff should provide an undertaking of approximately $2 Million. Defendants shall file an opening brief with supporting admissible evidence in opposition to Plaintiff's requested injunctive relief. Of particular interest is evidence regarding the use of multiple internet addresses and/or domain names when distributing these advertisements over the Internet. Both Plaintiff and Defendants shall file their respective opening briefs per CCP section 1005 (i.e. Sixteen (16) Court days before the Hearing) thus allowing the Court additional time to review both the Plaintiff's and the Defendants' arguments and evidence as to the requested injunctive relief. Briefing on other motions, if any, (i.e. Demurrers, motions to strike, etc.) shall be according to code. The Case Management Conference is CONTINUED to December 5, 2005 at 9:00 A.M. All motions presently scheduled for September 29, 2005 at 9:00 A.M. are taken OFF CALENDAR.

Defendant Global Resource Systems is responsible for meeting and conferring with all parties and then preparing a stipulated agreement for service of the motions papers described above. Defendant University of Phoenix, Inc. is responsible for meeting and conferring with all parties and then preparing a protective order limited to Plaintiff's confidentiality claims regarding Plaintiff's e-mail address and other similar information sought by Defendants. The intent of the Court is to allow accelerated discovery of this information so that Defendants may bring further motions, if supported by this discovery, early in the litigation.

Date: SEP 14 2005

WILLIAM F. MARTIN

William F. Martin
Judge of the Superior Court

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 April 17, 2009, 2009, I served the foregoing document(s) described as:

Reply 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 17th day of April 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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