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

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF RE NEW AUTHORITY PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.520(d)

HAGENS BERMAN SOBOL SHAPIRO LLP
STEVE W. BERMAN
1301 FIFTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98101
(206) 623-7292 • FAX (206) 623-0594
steve@hbsslaw.com

HAGENS BERMAN SOBOL SHAPIRO LLP
REED R. KATHREIN (SBN 139304)
ELAINE T. BYSZEWSKI (SBN 222304)
700 SOUTH FLOWER ST., SUITE 2940
LOS ANGELES, CALIFORNIA 90017
(213) 330-7150 • FAX (213) 330-7152
reed@hbsslaw.com
elaine@hbsslaw.com

Attorneys for Plaintiff-Appellant and Petitioner Craig E. Kleffman

INTRODUCTION

Pursuant to rule 8.520(d) of the California Rules of Court, Plaintiff-Appellant Craig E. Kleffman ("Petitioner") submits this supplemental brief to address a new Ninth Circuit decision that was published on August 6, 2009, after Petitioner filed his Answer to Brief of Amicus Curiae Email Sender and Provider Coalition and Valueclick, Inc. ("Amici") in Support of Defendants-Appellants on July 21, 2009 ("Answer"). *Gordon v. Virtumundo* (9th Cir. Aug. 6, 2009) 575 F.3d 1040, supports Petitioner's argument that CAN-SPAM's savings clause reaches California Business and Professions Code section 17529.5, subdivision (a)(2) ("Section 17529.5(a)(2)") as properly construed to prohibit conduct that is likely to deceive.

ARGUMENT

To put this new authority regarding preemption in context, in their brief, Amici improperly invited the Court to give Section 17529.5(a)(2) an unreasonable construction—construing "misrepresented" to incorporate the whole gamut of common law fraud requirements—to avoid the possibility of preemption in favor of Petitioner's reasonable construction—based on the "likely to deceive" standard found in similar false advertising statutes of the Business and Professions Code, such as sections 17200 and 17500. (Answer at pp. 11-16.)

Moreover, the construction of Section 17529.5(a)(2) urged by Petitioner avoids preemption because CAN-SPAM permits state laws prohibiting "falsity or deception." (Answer at pp. 16-20.) Indeed, the new Ninth Circuit decision supports the argument that CAN-SPAM's savings clause reaches Section 17529.5(a)(2) as construed to prohibit conduct that is likely to deceive. In *Gordon v. Virtumundo*, the Ninth Circuit held that Washington state's anti-spam act was preempted by CAN-SPAM. But Washington state's anti-spam statute had been interpreted by its state courts to reach "a vast array of non-deceptive acts and practices." (575 F.3d 1040, p. 1059; see also *id.* at p. 1063, fn. 21 ["Whether the exception language of § 7707(b) permits states to prohibit e-mail activity that is *not* unfair or deceptive is precisely the issue before us."] [emphasis in original].) So the Ninth Circuit held that it was preempted by CAN-SPAM, which saves only "traditionally tortious or wrongful conduct," *id.* at p. 1062, because "Congress did not intend that states retain unfettered freedom to create liability for immaterial inaccuracies or omissions." (*Id.* at p. 1062.[1]) Instead, Congress "left the individual states free to extend traditional tort theories such as claims arising from fraud or deception to commercial e-mail communication." (*Id.* at p. 1063.)

---

[1] All internal quotations and citations omitted, unless otherwise indicated.

Because Petitioner urges the California Supreme Court to interpret "misrepresented header information" as header information that is "likely to deceive," Petitioner's interpretation of the California act would not reach "a vast array of non-deceptive acts and practices" like the preempted Washington act. Instead, Petitioner asserts that the purpose of Vonage's multiple garbled and nonsensical domain names is to deceive recipients, Internet service providers ("ISPs"), and their filters as to the identity of Vonage as the single author of the email advertisements. This rises above the "bare immaterial error" that concerned the Ninth Circuit. (*Id.* at p. 1061.) Unlike here, the plaintiff ISP in *Gordon v. Virtumundo* did not "present evidence that Virtumundo's practice is aimed at misleading recipients as to the identity of the sender....Gordon's claim is for, at best, incomplete or less than comprehensive information regarding the sender." (*Id.* at p. 1064.) The very question certified by the Ninth Circuit to the California Supreme Court, conversely, presumes an intent to deceive, i.e. whether multiple domain names intended to bypass spam filters violates Section 17529.5(a)(2)'s prohibition of misrepresented header information.

The Ninth Circuit also opined that there was "nothing inherently deceptive in Virtumundo's use of fanciful domain names," such as the "vmmail.com," "vmadmin.com", "vtarget.com," and "vmlocal.com"

domain names used to send its over 13,000 spam emails to the ISP plaintiff. (*Id.* at pp. 1063-1064, 1046.) These four domain names can be contrasted with the manipulation of random words into garbled phrases to create the 11 different nonsensical domain names used to send the 11 Vonage e-mail advertisements to Petitioner. The domain names used to send Vonage's unsolicited e-mail advertisements are much more numerous and garbled: (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 domain names used by Virtumundo, on the other hand, are like the examples of non-deceptive multiple domain names, such as "verizonwireless.com," "verizon.com," and "vzw.com," discussed in Petitioner's Reply Brief on the Merits at pp. 10-11.[2] In any event, the trier of fact should determine whether the domain names used to send Vonage's e-mail advertisements are "inherently deceptive."

[2] As stated therein, Petitioner's claim does not require that the name of a company, or its product or service, be included in the domain. *Gordon v. Virtumundo* cites to the district court's ruling in *Kleffman v. Vonage* that "the claim that the failure to include Vonage's name in the email is clearly preempted." (575 F.3d 1040, 1064.) But Petitioner sought to clarify in his First Amended Complaint that his claim under Section 17529.5(a)(2) does *not* require Vonage to place certain content in the domain names used to send its e-mail advertisements. The district court's denial of leave to amend remains on appeal before the Ninth Circuit, pending the outcome of this Court's resolution of the certified question.

Moreover, the plaintiff in *Gordon v. Virtumundo* did not assert that the "fanciful" domain names were being used intentionally to deceive or bypass spam filters. Instead he argued that the "from lines" failed to clearly identify Virtumundo as the e-mails' sender. (575 F.3d at p. 1063.) Accordingly, the Ninth Circuit focused on whether the "from lines" prevented the recipient from determining who sent the e-mail. (*Id.* at p. 1064.) Petitioner does not contest that the content of the e-mail advertisements at issue here, once opened, identify Vonage as the advertiser of broadband telephone services. But the deception alleged by Petitioner occurs before Vonage's e-mail advertisements are opened by intentionally using multiple random and nonsensical domain names to bypass spam filters and thereby deceive recipients and their ISPs into receiving and/or opening them.

CONCLUSION

For all the reasons stated above, this Court should answer the certified question in the affirmative: Yes, sending unsolicited commercial e-mail advertisements from multiple domain names for the purpose of bypassing spam filters constitutes falsified, misrepresented, or forged header information under Section 17529.5(a)(2). (*Kleffman v. Vonage Holdings Corp.* (9th Cir. 2008) 551 F.3d 847, 849.)

DATED: September 24, 2009

HAGENS BERMAN SOBOL SHAPIRO LLP

By: _____

STEVE W. BERMAN
REED R. KATHREIN
ELAINE T. BYSZEWSKI

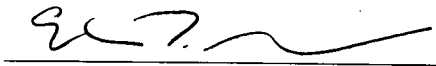
Attorneys for Petitioner **CRAIG E. KLEFFMAN**

CERTIFICATE OF WORD COUNT

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

The text of this brief contains 1,055 words as counted by the Microsoft Office Word 2003 program used to generate the brief.

DATED: September 24, 2009



ELAINE T. BYSZEWSKI

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 September 24, 2009, 2009, I served the foregoing document(s) described as:

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF RE NEW AUTHORITY PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.520(d)

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 24th day of September 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.

ATTORNEYS FOR PLAINTIFF / PETITIONER

Elaine T. Byszewski
HAGENS BERMAN SOBOL SHAPIRO LLP
700 S. Flower Street, Suite 2940
Los Angeles, CA 90017
Telephone: (213) 330-7150
Facsimile: (213) 330-7152
Elaine@hbsslaw.com

Via Email

Steve W. Berman
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Fifth Avenue, Suite 2900
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
Steve@hbsslaw.com

Via Email

Reed Kathrein
HAGENS BERMAN SOBOL SHAPIRO LLP
425 2nd Street, Suite 500
San Francisco, CA 94107
Telephone: (415) 896-6300
Facsimile: (415) 896-6301
Reed@hbsslaw.com

Via Email

ATTORNEYS FOR DEFENDANTS / RESPONDENT

Elizabeth L. McDougall
Rebecca S. Engrav
PERKINS COIE
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Facsimile: (206) 359-9000
EMcDougall@perkinscoie.com
REngrav@perkinscoie.com

Via Email and U.S. Mail

Judy Gitterman
PERKINS COIE
1888 Century Park East
Suite 1700
Los Angeles 90067
Telephone: (310) 788-9900
Facsimile: (310) 788-3399
JGitterman@perkinscoie.com

Via Email & Messenger

ATTORNEYS FOR AMICI CURIAE

Daniel M. Kolkey
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
Suite 3100
San Francisco, CA 94105-2933
Telephone: (415) 393-8200
Facsimile: (415) 393-8206

Via U.S. Mail

S. Ashlie Beringer
Michael B. Smith
Benjamin Glickman
GIBSON, DUNN & CRUTCHER LLP
1881 Page Mill Road
Palo Alto, CA 94304
Telephone: (650) 849-5300
Facsimile: (650) 849-5333

Via U.S. Mail