

HYPER TOUCH v. VALUECLICK

MOTION FOR SUMMARY JUDGMENT

Date of Hearing: **May 4, 2009**
Department: Y

Trial Date: **June 3, 2009**
Case No.: LC081000

Moving Party: Valueclick, Inc., E-Babylon, Inc., Hi-Speed Media, Inc., VC E-Commerce Solutions, Inc. and Web Clients, LLC (Defendants)

Joinder: PrimaryAds, Inc. (Defendant)

Responding Party: Hypertouch, Inc. (Plaintiff)

E-MAIL – OKAY

[TENTATIVE] RULING

GRANT FOR ALL THE REASONS SET FORTH IN THE MOVING PAPERS, SEPARATE STATEMENT AND EVIDENCE ATTACHED THERETO.

DEFENDANT VALUECLICK, INC. TO FILE AND SERVE A PROPOSED ORDER AND JUDGMENT BY NOON ON MAY 7, 2009. THE PROPOSED ORDER SHALL INCORPORATE THIS RULING IN FULL.

At the oral argument, Plaintiff stipulated that Defendant PrimaryAds, Inc. could join in the motion, as it applied to the issue of preemption, filed by Defendants Valueclick, Inc., E-Babylon, Inc., Hi-Speed Media, Inc., VC E-Commerce Solutions, Inc. and Web Clients, LLC.

At the outset, the Court OVERRULES the objections filed by Plaintiff and Defendants. The Court GRANTS Plaintiff and Defendant's request for Judicial Notice.

"[S]ummary judgment 'motions are to expedite litigation and eliminate needless trials. [Citation.]' " *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1142. In *Aguilar v. Atlantic Richfield Company* (2001) 25 Cal.4th 826, 854-855, Justice Mosk noted the following:

To speak broadly, all of the foregoing discussion of summary judgment law in this state, like that of its federal counterpart, may be reduced to, and justified by, a single proposition: If a party moving for summary judgment in any action, including an antitrust action for unlawful conspiracy, would prevail at trial without submission of any issue of material fact to a trier of fact for determination, then he should prevail on summary judgment. In such a case, as Justice Chin stated in his concurring opinion in *Guz*, the "court should grant" the motion "and avoid a ... trial"

rendered "useless" by nonsuit or directed verdict or similar device. (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th 317, 374, 100 Cal.Rptr.2d 352, 8 P.3d 1089 (conc. opn. of Chin, J.); see *Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at pp. 768-769, 107 Cal.Rptr.2d 617, 23 P.3d 1143.)

Generally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." *Aguilar v. Atlantic Richfield Co.*, *supra* 25 Cal.4th at 850. Furthermore, in moving for summary judgment, "all that the defendant need do is show that the plaintiff cannot establish at least one element of the cause of action -- for example, that the plaintiff cannot prove element X." *Aguilar v. Atlantic Richfield Co.*, *supra* 25 Cal.4th at 850, fn. omitted. Indeed, "the court's sole function on a motion for summary judgment is to determine from the submitted evidence whether there is a 'triable issue as to any material fact' (§ 437c, subd. (c)), and to be 'material' a fact must relate to some claim or defense in issue under the pleadings (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial 3 (The Rutter Group 1997) ¶¶ 10:270 to 10:271)." *Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926.

On April 3, 2008, Plaintiff Hypertouch filed the instant action alleging violations of *Business & Professions Code* §17200 and 17529.5. As paragraphs 55, 56, 57 and 58 of the operative Complaint state:

Between at least April 2, 2004 and the present, inclusive, ValueClick and/or its agents, including but not limited to the other Defendants herein, sent or caused to be sent at least 45,000 false and/or deceptive commercial e-mail advertisements to Plaintiff's servers...

The e-mail advertisements received from Defendant and/or their agents contained or were accompanied by a third-party's domain name without the permission of the third party...

The e-mail advertisements received from Defendants and/or their agents contained and/or were accompanied by falsified, misrepresented, or forged header information...

The e-mail advertisements received from Defendants and/or their agents contained subject lines that a person knows would likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message....

Business & Professions Code §17529.5 states:

(a) It is unlawful for any person or entity to advertise in a commercial e-mail advertisement either sent from California or sent to a California electronic mail address under any of the following circumstances:

(1) The e-mail advertisement contains or is accompanied by a third-party's domain name without the permission of the third party.

(2) The e-mail advertisement contains or is accompanied by falsified, misrepresented, or forged header information. This paragraph does not apply to truthful information used by a third party who has been lawfully authorized by the advertiser to use that information.

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

(b)(1)(A) In addition to any other remedies provided by any other provision of law, the following may bring an action against a person or entity that violates any provision of this section:

(i) The Attorney General.

(ii) An electronic mail service provider.

(iii) A recipient of an unsolicited commercial e-mail advertisement, as defined in Section 17529.1.

(B) A person or entity bringing an action pursuant to subparagraph (A) may recover either or both of the following:

(i) Actual damages.

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

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

(D) However, there shall not be a cause of action under this section against an electronic mail service provider that is only involved in

the routine transmission of the e-mail advertisement over its computer network.

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

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

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

(c) A violation of this section is a misdemeanor, punishable by a fine of not more than one thousand dollars (\$1,000), imprisonment in a county jail for not more than six months, or both that fine and imprisonment

First, at the outset, while the Complaint alleges that Defendants sent 45,000 e-mails, Plaintiff can identify no more than 23 coming from Defendants. As James Joseph Wagner, the owner and operator of Plaintiff Hypertouch, testified at his deposition:

Q: Other than the 23 e-mails listed on Chart 7, are there any of the 45,000 or so e-mails that you contend are at issue in this case that you coned were sent by one of the ValueClick defendants?

A: I personally have not identified any others that I know of. I don't recall. I am still doing investigation, investigation, and I don't know what's been produced recently.

Q: Okay. But sitting here today, you aren't aware of any others than this 23?

A: Correct. [See *Declaration of Ashlie Beringer, Exhibit D, page 208, lines 12-23 and Defendants' Separate Statement of Undisputed Material Facts, No. 21*]

However, moving party indicates that 24 of the e-mails at issue were sent by Hi-Speed Media, a subsidiary of ValueClick. See *Defendants' Separate Statement of Undisputed Material Facts, No. 23 and evidence attached thereto*.

The Court notes that Plaintiff has disputed Defendant's Separate Statement of Undisputed Material Facts, No. 21 wherein Defendants contend that only 23 of the 45,000 e-mails at issue were sent out by Defendants. Plaintiff's evidence in support, though, does not defeat Defendant's fact. Specifically, Plaintiffs point to the deposition of Farshad Fardad, page 30, lines 1-16, page 88, line 23 through page 89, line 16, page 176, line 1 through page 177, line 16 and page 205, lines 1-12; the deposition testimony of Tanya Brown, page 59, line 11 through page 61, line 1 and Exhibit 18, Chart 7. See *Plaintiff's Separate Statement of Undisputed Material Facts, No. 21*. The court finds that Defendants have shifted the burden of proof to Plaintiff and none of the Plaintiff's evidence (indeed, there is no page 59, 60 or 61 attached to the deposition transcript of Tanya Brown) in support of the opposition indicates that any more than 24 e-mails were sent by Defendant. Therefore, Plaintiff has failed to carry its burden of proof as to the referenced 24 e-mails.

Accordingly, for purposes of this motion, only 24 e-mails were sent by Defendants. Thus, instead of exposure to damages of \$45 million, this case, as against the ValueClick defendants, is no more than \$24,000.00 (without actual damages). As *Business & Professions Code §17529.5* notes:

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

Defendants claim that this California statute, with a limited fraud exception, is preempted by the 2004 federal enactment of the CAN-SPAM Act set forth in 15 U.S.C. §7701(A)(11) and (B) which states:

The Congress finds the following:...

Many States have enacted legislation intended to regulate or reduce unsolicited commercial electronic mail, but these statutes impose different standards and requirements. As a result, they do not appear to have been successful in addressing the problems associated with unsolicited commercial electronic mail, in part because, since 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.

(b) Congressional determination of public policy

On the basis of the findings in subsection (a) of this section, the Congress determines that--

(1) there is a substantial government interest in regulation of commercial electronic mail on a nationwide basis;

(2) senders of commercial electronic mail should not mislead recipients as to the source or content of such mail; and

(3) recipients of commercial electronic mail have a right to decline to receive additional commercial electronic mail from the same source.

As further noted in 15 U.S.C. §7707(b)(1):

(b) State law

(1) In general

This chapter supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, **except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.**

As noted in the moving papers:

Section 17529.5 was enacted in 2003. One year later, Congress passed the CAN-SPAM Act, recognizing that there was a substantial federal interest in regulating commercial emails, and that the existing patchwork of state regulations was ineffective. 15 U.S.C. § 7701(A)(11), (B). In particular, Congress recognized that because “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.” *Id.* To ensure American businesses had clear guidance on commercial email advertising, Congress included in CAN-SPAM an explicit provision preempting “all state laws expressly regulating the use of electronic mail to send commercial messages, except to the extent that [the state statute] prohibits falsity or deception in any portion” of a commercial email. 15 U.S.C. § 7707(b)(1) (emphasis added). Courts repeatedly have held that the preemption clause in CAN-SPAM “left states room only to extend their traditional fraud prohibitions and deception prohibitions into cyberspace.” Kleffman

v. Vonage Holdings Corp., 2007 WL 1518650, at *5 (C.D. Cal. May 23, 2007).

By contrast, statutes that reach “beyond common law fraud or deceit,” and are “not limited to inaccuracies in transmission information that were material, [that] led to detrimental reliance by the recipient, and were made by a sender who intended that the misstatements be acted upon and either knew them to be inaccurate or was reckless about their truth,” are preempted by the CAN-SPAM Act. *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F. 3d 348, 353-56 (4th Cir. 2006)....

Because Plaintiff cannot establish any of the traditional fraud elements for even a single Asserted Email, CAN-SPAM's preemption clause mandates dismissal of Plaintiff's § 17529.5 claims. [See *Moving Papers*, page 5, line 17 through page 6, line 5 and page 6, lines 24-25]

In response, Plaintiff asserts:

Implicitly, the ValueClick Defendants argue that fraud must be established in order to avoid any preemptive effect of CAN-SPAM, the federal law regulating commercial e-mail. However, the plain language of CAN-SPAM, its legislative history, and case law interpreting the California anti-spam statute, and other similar statutes, makes clear that CAN-SPAM does not preempt state law that is directed to false and deceptive content in e-mail transmissions, such as California's anti-spam statute. [See *Opposition Papers*, page 4, lines 7-12]

The doctrine of preemption is explained in *Naranjo v. Spectrum Sec. Services, Inc.* (2009) 172 Cal.App.4th 654, wherein the Court noted:

“The supremacy clause of the United States Constitution ... makes federal law paramount, and vests Congress with the power to preempt state law. (U.S. Const., art. VI, cl. 2;....) There are four species of federal preemption: express, conflict, obstacle, and field. [Citations.] First, express preemption arises when Congress ‘define[s] explicitly the extent to which its enactments pre-empt state law....’ [Citations.] Second, conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible. [Citations.] Third, obstacle preemption arises when ‘ “under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” ’ [Citations.] Finally, field preemption, i.e., ‘Congress’ intent to pre-

empt all state law in a particular area,' applies 'where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.' [Citations.]" (*Viva! Internat. Voice For Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935-936, 63 Cal.Rptr.3d 50, 162 P.3d 569.) Generally, " "[c]ourts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state law to prove it." ' ' (*Ibid.*, quoting *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815, 135 Cal.Rptr.2d 1, 69 P.3d 927.)

Here, the express preemption is noted in 15 U.S.C. §7707(b)(1):

This chapter supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, **except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.**

As noted in *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977-978:

When construing a statute, we must "ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [20 Cal.Rptr.2d 523, 853 P.2d 978].) The words of the statute are the starting point. "Words used in a statute ... should be given the meaning they bear in ordinary use. [Citations.] If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature" (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299] (*Lungren*).) If the language permits more than one reasonable interpretation, however, the court looks "to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1008 [239 Cal.Rptr. 656, 741 P.2d 154].) After considering these extrinsic aids, we "must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*People v. Jenkins* (1995) 10 Cal.4th 234, 246 [40 Cal.Rptr.2d 903, 893 P.2d 1224].)

As noted in *Lonicki v. Sutter Health Cent.* (2008) 43 Cal.4th 201, 209-210:

To determine the merits of plaintiff's argument, we need to examine the statutory language. "Our task is to discern the Legislature's intent. The statutory language itself is the most reliable indicator, so we start with the statute's words, assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs. On the other hand, if the language allows more than one reasonable construction, we may look to such aids as the legislative history of the measure and maxims of statutory construction. In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on public policy." (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190, 48 Cal.Rptr.3d 108, 141 P.3d 225; see also *Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1271, 135 Cal.Rptr.2d 654, 70 P.3d 1067.)

In arguing preemption, moving party relies on *Hoang v. Reunion.Com, Inc.*, 2008 WL 4542418 (N.D. Cal., October 6, 2008), wherein the Court notes:

Plaintiffs further allege that one email was "deceptively accompanied by and/or contained a third-party's domain name, 'yahoo.com,' without the permission of that third party." (See *id.* ¶ 33.) Based on such allegations, plaintiffs allege three causes of action, each arising under § **17529.5(a) of the California Business & Professions Code**, a statute that makes unlawful the sending of certain commercial emails....

CAN-SPAM preempts state statutes that "expressly regulate[] the use of electronic mail to send commercial messages," except to the extent such statutes prohibit "falsity or deception in any portion of a commercial electronic mail message or information attached thereto." See 15 U.S.C. § 7707(b)(1). **Section 7701(b)(1) has been interpreted to preempt state law claims, unless such claims are for "common law fraud or deceit."** See *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, 353-56 (4th Cir.2006) (affirming dismissal of claim under Oklahoma statute based on defendant's having sent email containing "immaterial" false statement, because common law fraud claim cannot be based on "immaterial" false statement); *Kleffman v. Vonage Holdings Corp.*, 2007 WL 1518650, (C.D.Cal.2007) (holding claim under § 17529.5(a) preempted, where claim not based on "traditional tort theory" of "fraud and deceit")....

"The necessary elements of fraud are: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage." *Alliance Mortgage Co. v. Rothwell*, 10 Cal.4th 1226, 1239, 44 Cal.Rptr.2d 352, 900 P.2d 601 (1995) (internal quotation and citation omitted). Here, plaintiffs fail to allege facts to support a claim of fraud, which must be alleged with particularity. See Fed.R.Civ.P. 9(b). In that regard, plaintiffs fail to allege with the requisite specificity why the statements at issue were false and why defendant knew they were false when made. Further, plaintiffs fail to allege plaintiffs relied to their detriment on any misrepresentation and that, as a result of such reliance, they incurred damage....

Under such circumstances, the Court finds that affording plaintiffs leave to amend would not necessarily be futile, and, accordingly, plaintiffs will be afforded **leave to allege a common law fraud claim and/or a claim under § 17529.5(a) of the California Business & Professions Code**, to the extent such statutory claim is based on a theory of fraud.

By contrast, the recent decision of *Asis Internet Services v. Consumerbargaingiveaways, LLC*, 2009 WL 1035538 (N.D. Cal, April 17, 2009), upon which Plaintiff relies, held otherwise. In that case, the District Court held indicated that no appellate decision (as opposed to a district court decision) has limited the phrase "falsity or deception" to only common law fraud actions. As the *Asis* decision notes:

This order rejects the preemption challenge. The text and structure of the provision indicate that defendants interpret the savings clause too narrowly: "falsity or deception" is not limited just to common-law fraud and other similar torts....On its own terms, the savings clause exempts from preemption not only "fraud" claims but rather laws that proscribe "falsity or deception" in email advertisements. The Act does not define the words "falsity" and "deception." Congress, however, is certainly familiar with the words "fraud" and choose not to use it; the words "falsity or deception" suggest broader application...

Interestingly, this issue was recently certified to the California Supreme Court by the 9th Circuit Court of Appeal in the case of *Kleffman v. Vonage Holdings Corp.*, 551 F.3d 847 (9th Cir. (Cal.) Dec 19, 2008):

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)?...

The question presented in Section III is worthy of certification because the issue is likely to emerge again in cases governed by § 17529.5, and the court's answer may be dispositive in this case. The relevant provision in § 17529.5 was effective January 1, 2004, and has not been interpreted by the California Courts of Appeal or the California Supreme Court. The position the California Supreme Court will take regarding the certified question is uncertain. We therefore respectfully request that the California Supreme Court accept certification and resolve this question.

Despite this uncertainty, the fact that there is no California case law on this matter, and the fact that the District Courts are in complete disagreement on this issue, this Court will, and must, come to a decision. In making this decision, this Court notes that opinions of the lower federal courts, interpreting federal law, while persuasive, are not binding on California state courts. *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 352.

Whether preemption lies depends on the phrase "falsity or deception." Again, 15 U.S.C. §7707(b)(1) notes:

This chapter supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, **except** to the extent that any such statute, regulation, or rule prohibits **falsity or deception** in any portion of a commercial electronic mail message or information attached thereto.

The phrase "falsity" has been utilized in California courts in conjunction with fraud claims. By way of example, in *Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1446-1447:

By analogy, California does not sanction lawsuits for fraudulent misrepresentations brought by persons who, rather than having been deceived, act for the sole purpose of bringing a lawsuit against "potential targets for litigation." (*Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 807, 66 Cal.Rptr.3d 543 (*Buckland*).) " 'The maker of a fraudulent misrepresentation is not liable to one who does not rely upon its truth but upon the expectation that the maker will be held liable in damages for its **falsity**.' " (*Id.* at p. 808, 66 Cal.Rptr.3d 543.)

Indeed, "falsity" is an element of fraud. As noted in BAJI 12.31:

The essential elements of a claim of fraud by an intentional misrepresentation are:

- 1 The defendant made a representation as to a past or existing material fact;
- 2 The representation was false;
- 3 The defendant must have known that the representation was false when made [or must have made the representation recklessly without knowing whether it was true or false];
- 4 The defendant made the representation with an intent to defraud the plaintiff, that is, [he] [she] must have made the representation for the purpose of inducing the plaintiff to rely upon it and to act or to refrain from acting in reliance thereon;
- 5 The plaintiff was unaware of the **falsity** of the representation; must have acted in reliance upon the truth of the representation and must have been justified in relying upon the representation;
- 6 And, finally, as a result of the reliance upon the truth of the representation, the plaintiff sustained damage.

As noted in BAJI 12.45:

The essential elements of a claim of fraud by a negligent misrepresentation are:

- 1 The defendant made a representation as to a past or existing material fact;
- 2 The representation was untrue;
- 3 Regardless of [his] [her] actual belief the defendant made the representation without any reasonable ground for believing it to be true;
- 4 The representation was made with the intent to induce plaintiff to rely upon it;
- 5 The plaintiff was unaware of the **falsity** of the representation; must have acted in reliance upon the truth of the representation and was justified in relying upon the representation;
- 6 And, finally, as a result of the reliance upon the truth of the representation, the plaintiff sustained damage.

Moreover, deception is defined by dictionary.com as “something that deceives or is intended to deceive; **fraud**; artifice.” As noted in *Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1818:

In order to recover for fraud, as in any other tort, the plaintiff must plead and prove the “detriment proximately caused” by the defendant’s tortious conduct. (Civ.Code, § 3333.) **Deception without resulting loss is not actionable fraud.** (*Hill v. Wrather* (1958) 158 Cal.App.2d 818, 825, 323 P.2d 567.)

Thus, in the opinion of this court, the term “falsity or deception” both sound in fraud, but the Court notes that the phrase is used in the disjunctive. While *Asis Internet Services v. Consumerbargaingiveaways, LLC.*, supra, asserts that this disjunctive usage suggests that the actions were not limited to common law fraud claims:

True, the report referred to “fraudulent or deceptive” conduct rather than “falsity or deception.” Although this arguably suggested that the Senate intended to equate “falsity” with “fraud,” as some district courts have suggested, it does not account for the additional reference (in the disjunctive) to “deception.” Nor do the report’s policy concerns necessitate limiting the phrase to fraud alone: a “legitimate business trying to comply with relevant laws” would not be engaged in “deceptive” practices in contravention of the FTC Act or state law.

For these reasons, this order will not confine the phrase “falsity or deception” to strict common-law fraud such that anti-deception state actions not insisting on every element of common-law fraud are preempted. Plaintiffs’ claims are not preempted merely because the complaint fails to plead, or Section 17529.5 fails to require, reliance and/or damages. Defendants’ motion to dismiss the complaint on preemption grounds is denied.

This Court disagrees to the extent the Court in *Asis Internet Services v. Consumerbargaingiveaways, LLC.*, supra, holds that the usage of the phrase “falsity or deception”, while both meaning fraud, somehow allows causes of action not based on common law fraud. As noted in the reply:

Although one recent decision took a slightly broader view of the types of claims that survive CAN-SPAM, it held that a plaintiff asserting Section 17529.5 claims must establish either the elements of “fraud” or of a claim for “deception as utilized in the FTC Act” – elements Plaintiff admits it cannot establish here. *Asis Internet Services v. Consumerbargaingiveaways, LLC*, 2009 WL 1035538, at *6 [See Reply, page 8, line 28 through page 9, line 3]

Indeed, as explained in *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, 354 (4th Cir.(Va.) Nov 17, 2006):

The exception, as noted, allows states to prohibit “falsity or deception” in commercial e-mail messages. Those terms are not defined in the statute. However, “deception” requires more than bare error, and while “falsity” can be defined as merely “the character or quality of not conforming to the truth or facts,” it also can convey an element of tortiousness or wrongfulness, as in

"deceitfulness, untrustworthiness, faithlessness." Webster's Third New International Dictionary Unabridged 820 (1971); see also Oxford English Dictionary Vol. V 697 (2d ed.1989) (defining false as "erroneous, wrong," but also as "mendacious, deceitful, treacherous," and "[p]urposely untrue"); see also Black's Law Dictionary 635 (8th ed.2004) (defining "false" as "untrue" but also as "deceitful; lying").

Since the word "falsity" considered in isolation does not unambiguously establish the scope of the preemption clause, we read "falsity" in light of the clause as a whole. Reading "falsity" as referring to traditionally tortious or wrongful conduct is the interpretation most compatible with the maxim of *noscitur a sociis*, that a word is generally known by the company that it keeps. See, e.g., *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961); *Neal v. Clark*, 95 U.S. 704, 708-09, 24 L.Ed. 586 (1877). The canon applies in the context of disjunctive lists. See *Neal*, 95 U.S. at 706, 709; *Jarecki*, 367 U.S. at 304 n. 1, 307, 81 S.Ct. 1579. Here, the pre-emption clause links "falsity" with "deception"—one of the several tort actions based upon misrepresentations. Keeton et al., *Prosser and Keeton on the Law of Torts* § 105, at 726-27 (5th ed.1984) (defining deceit as species of false-statement tort); Restatement (Second) of Torts § 525 (describing elements of deceit). **This pairing suggests that Congress was operating in the vein of tort when it drafted the pre-emption clause's exceptions, and intended falsity to refer to other torts involving misrepresentations, rather than to sweep up errors that do not sound in tort.**

The Court finds this reasoning persuasive and rejects the distinction made in *Asis Internet Services v. Consumerbargaingiveaways, LLC.*, supra, wherein the Court held that the reasoning of *Omega World Travel, Inc. v. Mummagraphics, Inc.*, supra, was limited to "immaterial errors" and other public policy concerns. Indeed, the reasoning of *Asis Internet Services v. Consumerbargaingiveaways, LLC.*, supra, allows a loophole the Court rejected in *Omega World Travel, Inc. v. Mummagraphics, Inc.*, supra at p. 356:

Mummagraphics' reading of the preemption clause would upend this balance and turn an exception to a preemption provision into a loophole so broad that it would virtually swallow the preemption clause itself. While Congress evidently believed that it would be undesirable to make all errors in commercial e-mails actionable, Mummagraphics' interpretation would allow states to bring about something very close to that result.

Indeed, allowing such a loophole would undermine the express federal preemption, including allowing claims based on negligence and inadvertence. For instance, under the exception asserted by Plaintiff and the Court in *Asis Internet Services v. Consumerbargaingiveaways, LLC.*, supra, would create an exception that allows lawsuits involving the misspelling of names, improper links, and using old addresses where there was no intent to deceive.

However, in California, statutory interpretation is to prevent an exception from swallowing a rule stating a public policy. As the Supreme Court noted in *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 902 [Exemption from res judicata for declaratory judgments applies only when the first action is purely for declaratory relief, and not when a party also seeks other relief arising from the same cause of action]:

Under MPS's interpretation of the language of section 1062, however, the reference to judgments 'under this chapter' would seem to include all remedies that can be awarded by a court along with declaratory relief, including damages. This reading of the statute would provide parties with an easy way to escape the res judicata bar. By attaching a prayer for declaratory relief in the complaint, a party could evade the effect of res judicata in virtually every lawsuit. Clearly, this is not what the Legislature intended. The res judicata exception afforded by section 1062 is a narrow one, meant to provide parties with a quick way of resolving disputes without the need to assert all claims based on the same cause of action. Any broader reading of this exception would swallow the rule of res judicata at the expense of judicial economy and fairness to the parties.

As noted in *People v. Landis* (2007) 156 Cal.App.4th Supp. 12 [Statute should be interpreted so that the exception does not swallow the rule]:

This case presents an issue on which this court has found little published authority: whether a police officer may stop and cite a motorist for a minor traffic infraction committed in his or her presence but outside his or her territorial jurisdiction, pursuant to the provision in Penal Code section 830.1, subdivision (a)(3) that an officer's authority extends to any place in the state, "[a]s to any public offense committed ... in the peace officer's presence, and with respect to which there is immediate danger ... of the escape of the perpetrator of the offense."

While we conclude that a literal interpretation of the word "escape" could suggest that an officer's authority is sufficiently broad to encompass the citation at issue herein, we find such an interpretation would allow the statutory exception to swallow the

rule that a peace officer's authority is limited to the territorial jurisdiction he or she serves. We therefore reverse the judgment of the trial court.

As noted in *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (April 17, 2009) 2009 WL 1026837 [Plaintiff challenged lawfulness of ordinance on the basis that it was preempted by alleged exception in Civil Code]:

We cannot, conversely, consider Civil Code section 1954.52, subdivision (a)(1) as an exception to section 7060.2, subdivision (d) because the exception would swallow the rule. (Cf. *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 902, 123 Cal.Rptr.2d 432, 51 P.3d 297 [rejecting a proposed statutory interpretation when the "exception would swallow the rule"].) This is because many cities, including Los Angeles (see L.A. Mun.Code, § 12.26, subd. (E)), require a landlord to obtain a certificate of occupancy before a tenant may occupy newly constructed real property. (See 7 *Miller & Starr, Cal. Real Estate* (3d ed. 2001) § 19.224, p. 710.) In such cities, all newly constructed residential properties that fall within the parameters of 7060.2, subdivision (d) would not be subject to rent control under Civil Code section 1954.52, subdivision (a)(1). Such an interpretation does not harmonize the two statutes. Instead, it renders section 7060.2, subdivision (d) nugatory.

As noted in *People v. Blick* (2007) 153 Cal.App.4th 759, 774-775 [Imputing intent is a matter of statutory interpretation consistent with the goals of the legislation]:

The Attorney General argues that the Legislature's failure to include specific intent language in subsection (b)(3) indicates the Legislature did not intend to impose such a requirement. As noted above, however, such an interpretation is unreasonable when subsection (b)(3) is read in the context of section 550 as a whole. (*People v. Hudson*, supra, 38 Cal.4th at p. 1009, 44 Cal.Rptr.3d 632, 136 P.3d 168 [statutory language must be construed in context].) Here, the penalty subsection (c)(3) specifically references fraud, so at best, subsection (b)(3) is ambiguous with respect to its intent requirement, permitting our construction. (*Torres v. Parkhouse Tire Service, Inc.*, supra, 26 Cal.4th at p. 1003, 111 Cal.Rptr.2d 564, 30 P.3d 57 [if statutory language is ambiguous "courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute].) Our interpretation is faithful to the purpose of the statute and the evil which it seeks to remedy—to criminalize and punish the making of false or fraudulent claims to obtain benefits. Also, imputing a

specific intent to defraud avoids absurd results, whereas under the Attorney General's argument, any intentional concealment or knowing failure to disclose amounts to a violation of subsection (b)(3) if it affects benefits, even if disclosure would have increased benefits." (Ibid. [courts must avoid a statutory interpretation "that would lead to absurd consequences."]) Accordingly, we conclude section 550(b)(3) requires a specific intent to defraud. Therefore, the section 550(b)(3) instruction was erroneous, and we now consider whether the error was prejudicial.

As noted in *Vera v. W.C.A.B.* (2007) 154 Cal.App.4th 996, 1010, fn. 16 [New 2005 permanent disability rating schedule applied to applicant's pre-2005 injury]:

The interpretation of the statute advanced by Vera would also make the statutory exception to the application of the old schedule at issue here so broad that it would cease to function as an exception... If the old schedule were to apply in every case where an employer has made a payment of temporary disability benefits, an exception to the application of the new schedule would apply in a large number of cases in which an employee is seeking permanent disability benefits. In short, the exception would swallow the rule. (Cf. *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 902, 123 Cal.Rptr.2d 432, 51 P.3d 297 [rejecting a proffered statutory interpretation when the 'exception would swallow the rule'.]) We reject an interpretation of the statute that would lead to such a result.

See also *People v. Lozano* (1987) 192 Cal.App.3d 618, 627 [Escaping with force or violence applies equally to those who use only slight force or violence as those who use forcible means].

This Court notes that the federal legislation expressly indicates that the federal law was to preempt all state law except where "falsity or deception" is utilized. An exception which allows for claims based on negligence and inadvertence would create an exception so broad that it would defeat the federal preemption statute, and the public policy behind the preemption rule. Indeed, the Senate Committee Report on the federal legislation notes:

[A] State law requiring some or all commercial e-mail to carry specific types of labels, or to follow a certain format or contain specified content, would be preempted. By contrast, a State law prohibiting fraudulent or deceptive headers, subject lines, or content in commercial e-mail would not be preempted.... [I]n contrast to telephone numbers, e-mail addresses do not reveal the State where the holder is located. As a result, a sender of e-mail has no easy way to determine with which State law to comply. Statutes that

prohibit fraud and deception in e-mail do not raise the same concern, because they target behavior that a legitimate business trying to comply with relevant laws would not be engaging in anyway. [S.Rep. No. 108-102, at 21-22]

Congress intended that businesses would not have to guess at the meaning of various state laws when they sent out advertising campaigns by way of e-mail. It left states room only to extend their traditional fraud prohibitions to the realm of commercial e-mails. As noted in the reply (emphasis in original):

The very Congressional Committee language that is quoted and underlined by Plaintiff in its brief states this expressly: "**A State law prohibiting fraudulent or deceptive** headers, subject lines, or content in commercial e-mail **would not be preempted;**" "**Statutes that prohibit fraud and deception in e-mail** do not raise the same concern[s that prompted preemption]" Opp. at 6-7, citing S. Rep. No. 108-02, at 21-22 (emphasis added); see also Req. for Jud. Ntc., Ex. A [Cong. Rec. H12186-H12198 (daily ed. Nov. 21, 2003)] (CAN-SPAM Act was intended to preempt the patchwork of disparate and ineffective state laws regulating spam with a "**uniform national standard** . . . [that] **still allows for State laws that deal with fraud and computer crimes.**") Thus, the legislative history is consistent with unanimous California authority holding that claims under Section 17529.5 must sound in "fraud" or "deception" to avoid preemption by CAN-SPAM. See, *supra*, pp. 8-9. [See Reply, page 9, lines 14-23]

Accordingly, for all the foregoing reasons, the Court finds *Omega World Travel, Inc. v. Mummagraphics, Inc.*, *supra*, and *Hoang v. Reunion.Com, Inc.*, *supra*, to be persuasive, and finds that under federal law, Section 7701(b)(1) preempts state law claims, including California laws, unless such claims are for "common law fraud or deceit." *Hoang v. Reunion.Com, Inc.*, *supra*. Accordingly, any claim must be based on fraud. Again, as noted in *Hoang v. Reunion.Com, Inc.*, *supra*:

...the Court finds that affording plaintiffs leave to amend would not necessarily be futile, and, accordingly, plaintiffs will be afforded **leave to allege a common law fraud claim and/or a claim under § 17529.5(a) of the California Business & Professions Code**, to the extent such statutory claim is **based on a theory of fraud**.

Defendants Valueclick, Inc., E-Babylon, Inc., Hi-Speed Media, Inc., VC E-Commerce Solutions, Inc. and Web Clients, LLC claim that "[b]ecause Plaintiff cannot establish any of the traditional fraud elements for even a single Asserted Email, CAN-SPAM's preemption clause mandates dismissal of Plaintiff's §17529.5 claims." See *Moving Papers*, page 6, lines 24-25. Specifically, Defendants claim that fraud cannot be established because (1) lack of reliance,

(2) lack of injury, and (3) no showing that Valueclick had knowledge of any misleading information in the email headers. *See Moving Papers, page 6, line 26 through page 9, line 10.* As the Moving Papers assert:

Critically, Plaintiff admits that neither it nor its end users relied on the alleged false or deceptive information contained in a single Asserted Email. (UF ¶¶14-15.) Wagner testified on behalf of Plaintiff that he could not identify any action that he or any recipient of the Asserted Emails took, or refrained from taking, as a result of the purportedly “false” information contained in the emails. (UF ¶14.) Likewise, Wagner could not identify a single email that he or any other recipient relied on or was deceived by (or even read). (Id.) In fact, Plaintiff admits that over 43,600 of the emails at issue were sent to non-existent email addresses associated with “dummy” or “test” accounts, and not to any end user. (UF ¶ 18)....

Plaintiff argues that these emails contributed to the overall volume of emails processed by its servers, creating general administrative costs having nothing to do with any alleged falsity or the specific emails at issue. (UF ¶¶ 19-20.) Because Plaintiff cannot demonstrate any injury resulting from reliance on the purportedly false information contained in the Asserted Emails, its claims cannot survive summary judgment for this independent reason...

Plaintiff also concedes that it has no evidence that ValueClick had knowledge of any of the allegedly “deceptive” information contained in the headers of the Asserted Emails. The undisputed facts establish that over 99.9% of the Asserted Emails were sent by third-party, and not by ValueClick.

Significantly, all of the information alleged to be “deceptive” in the Asserted Emails (e.g. the “From” lines, the “To” lines and the “Subject” lines) is contained in the “header” of the email, and not in the advertisement contained in the body of the email. As Plaintiff has acknowledged, the “header” of each email is created by the actual sender when the email is sent, and there is no reason that anyone other than the sender (and recipient) would know the header’s contents....[*See Moving Papers, page 6, line 27 through page 8, line 18*]

As Wagner testified at his deposition:

Q: Okay. And can you identify any specific email contained Exhibit 28, Chart 3, for which you or any third person attempted to participate in the terms of the incentive reward offered?

A: Not that I can think of. [*See Declaration of Ashlie Beringer, Exhibit C, page 740, lines 9-13 and Defendants' Separate Statement of Undisputed Material Facts, No. 14*]...

Q: I'm asking whether you actually were deceived by any information contained in this email in the domain name?

A: I do not know when I first received this email what my reaction was, so I can't answer that.

Q: Any you don't even know whether you opened this email; correct?

A: I guess I - - I know it's been opened because - - but at the time when it came in, I do not know if it was opened then.

Q: You know it's been opened in the course of searching for emails for litigation; correct?

A: I know it's been opened in the course of litigation; correct.

Q: But you don't know whether or not in the ordinary course when you received this email you actually opened it and reviewed it; correct?...

A: I don't know. [*See Declaration of Ashlie Beringer, Exhibit B, page 395, line 23 through page 396, line 17 and Defendants' Separate Statement of Undisputed Material Facts, No. 15*]...

Q: And can you identify any specific email for which you or any end-user of Hypertouch relied on the mistaken belief that the HELO information was accurate when, in fact, it was not?...

A: No. [*See Declaration of Ashlie Beringer, Exhibit C, page 643, lines 9-14, and Defendants' Separate Statement of Undisputed Material Facts, No. 15*]...

Q: With respect to any of the emails listed on Chart 3, Exhibit 28, can you identify a single email that you or any other person received who was deceived in any way by the contents of the subject line?

A: I do not have the full exhibit, but I cannot. [*See Declaration of Ashlie Beringer, Exhibit C, page 738, line 5 through page 739, line 6, and Defendants' Separate Statement of Undisputed Material Facts, No. 15*]...

Indeed, it appears that over 95% of the e-mails were sent to e-mail addresses not being utilized by a "bona fide recipient." See *Defendants' Separate Statement of Undisputed Material Facts, No. 9*. As noted in the declaration of Scott Mellon, paragraphs 13 and 14:

I have reviewed the deposition testimony of Joe Wagner. From this testimony, I understand that Plaintiff uses so-called "wild card" email addresses to collect commercial electronic mail sent to non-existent email addresses (i.e., email addresses that were not created by Hypertouch for its end users). I have further reviewed Exhibit 1 to Plaintiff's Confidential Response to Defendant E-Commerce Solution's Special Interrogatory Nos. 32-35, which purports to identify the account names and user names Plaintiff assigned to Joe Wagner, Lisa Wagner, Paul Wagner, and Beyond Systems (the purported recipients of the Asserted Emails).

Using the Concordance database and Microsoft Excel, I have analyzed the "To" lines of the Asserted Emails and have determined that over 43,500 (97%) were sent to non-existent "wild card" email addresses that bear no relationship to any of the account names or user names created by Plaintiff for its end users.

As for damage, Wagner testified as follows:

Q: But I'm asking whether any specific e-mail in this case caused Hypertouch to suffer an injury that's unique to that email.

A: No. Each e-mail uniquely takes up space and bandwidth and so on, and each email has different sizes and so object. But nothing - - I guess the actual damages are similar in nature for all the emails .

Q: Well, let me repeat my question. Is there any specific e-mail that you can point to and state, for example, Hypertouch incurred, you know, \$4.36 of damages because it took some action or didn't take some action when it received that e-mail?

A: I can point to these e-mails and say in order to hand - - handle the spam load which includes these e-mails, I had to purchase more robust software, I had to purchase additional servers and I had to purchase additional bandwidth and so on...[See *Declaration of Ashlie Beringer, Exhibit D, page 265, lines 3-21, and Defendants' Separate Statement of Undisputed Material Facts, Nos. 19 and 20*]

Plaintiff, by arguing against preemption, has failed to show fraud. As noted in the opposition papers:

The plain language of section 17529.5 – unlike common law fraud – does not require Hypertouch to prove reliance or show that Hypertouch or its end-user's reliance was a substantial factor in causing harm...Nor does Section 17529.5 require that Hypertouch show that defendants had actual knowledge of the false representations. [See *Opposition*, page 4, lines 23-27]

As explained above, Plaintiff has neither adduced evidence nor even attempted to show, that any elements of fraud exist in this case. Specifically, the Court finds the wording of 15 U.S.C. §7707(b)(1) with respect to “falsity or deception” at least means intent to deceive as in a common law fraud action. Therefore, the Court's construction of this statute is limited to the element of intent, and even if the Court ignores all the other elements of fraud, Plaintiff's complaint is preempted by federal law since Plaintiff's complaint omits intent to deceive or intent to cause deception. Accordingly, the Court grants the motion for summary judgment.

For all the foregoing reasons, the Court also grants the joinder motion by Defendant PrimaryAds, Inc.

The remaining issues raised by the parties are moot.