

Copy

ORIGINAL FILED
Los Angeles Superior Court

JUN 16 2009

FILED
John A. Clarke, Clerk
BY A. Kidder, Deputy
LOS ANGELES SUPERIOR COURT

JUN 16 2009

JOHN A. CLARKE, CLERK
BY A. KIDDER, DEPUTY

1 GIBSON, DUNN & CRUTCHER LLP
2 KEVIN S. ROSEN, SBN 133304
3 MATTHEW C. WICKERSHAM, SBN 241733
4 SCOTT H. MELLON (*admitted pro hac vice*)
5 333 South Grand Avenue
6 Los Angeles, California 90071-3197
7 Phone: (213) 229-7000
8 Fax: (213) 229-7520
9 krosen@gibsondunn.com

6 GIBSON, DUNN & CRUTCHER LLP
7 S. ASHLIE BERINGER (*admitted pro hac vice*)
8 MICHAEL B. SMITH, SBN 235764
9 1881 Page Mill Road
10 Palo Alto, CA 94304
11 Phone: (650) 849-5338
12 Fax: (650) 849-5038
13 msmith@gibsondunn.com

14 Attorneys For Defendants
15 ValueClick, Inc., E-Babylon, Inc., Hi-Speed Media,
16 Inc., VC E-Commerce Solutions, Inc., Web Clients,
17 LLC, and Commission Junction, Inc.

18 SUPERIOR COURT OF THE STATE OF CALIFORNIA
19 FOR THE COUNTY OF LOS ANGELES, NORTHWEST DIVISION

20 HYPERTOUCHE, INC., a California corporation,
21 Plaintiff,

CASE NO. L C-08-1000

22 v.

23 VALUECLICK, INC., a Delaware corporation;
24 E-BABYLON, INC., a Delaware corporation;
25 HI-SPEED MEDIA, INC., a Delaware
26 corporation; VC E-COMMERCE SOLUTIONS,
27 INC., a Delaware corporation; WEBCLIENTS,
28 INC., a Pennsylvania corporation;
PRIMARYADS.COM, INC., a Nevada
corporation; and COMMISSION JUNCTION,
INC.

**[PROPOSED] ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT**

Defendants.

The motion by Defendants ValueClick, Inc., E-Babylon, Inc., Hi-Speed Media, Inc., VC E-Commerce Solutions, Inc., Web Clients, LLC, and Commission Junction, Inc. (collectively, the

1 “ValueClick Defendants”) for summary judgment, or in the alternative for summary adjudication, came
2 on for hearing in Department NW-Y of this Court on May 4, 2008. Ashlie Beringer, Esq. of Gibson,
3 Dunn & Crutcher, LLP, appeared on behalf of the ValueClick Defendants. Leonard S. Machtinger,
4 Esq., of Kenoff & Machtinger, LLP, appeared on behalf of Defendant PrimaryAds, Inc. Lawrence P.
5 Riff, Esq. and Carla A. Veltman, Esq., of Steptoe & Johnson LLP, appeared on behalf of Plaintiff
6 Hypertouch, Inc.

7 After full consideration of the evidence, and the written and oral submissions by the parties, the
8 Court GRANTS the ValueClick Defendants' motion for summary judgment for all the reasons set forth
9 in the moving papers, separate statement and evidence attached thereto.

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

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

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

18 To speak broadly, all of the foregoing discussion of summary judgment law in this
19 state, like that of its federal counterpart, may be reduced to, and justified by, a single
20 proposition: If a party moving for summary judgment in any action, including an
21 antitrust action for unlawful conspiracy, would prevail at trial without submission of
22 any issue of material fact to a trier of fact for determination, then he should prevail on
23 summary judgment. In such a case, as Justice Chin stated in his concurring opinion in
24 *Guz*, the "court should grant" the motion "and avoid a ... trial" rendered "useless" by
25 nonsuit or directed verdict or similar device. (*Guz v. Bechtel National, Inc.*, *supra*, 24
26 Cal.4th 317, 374, 100 Cal.Rptr.2d 352, 8 P.3d 1089 (conc. opn. of Chin, J.); see
27 *Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at pp. 768-769, 107 Cal.Rptr.2d
28 617, 23 P.3d 1143.)

25 Generally, “the party moving for summary judgment bears an initial burden of production to
26 make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his
27 burden of production, he causes a shift, and the opposing party is then subjected to a burden of
28 production of his own to make a prima facie showing of the existence of a triable issue of material

1 fact.” *Aguilar v. Atlantic Richfield Co.*, supra 25 Cal.4th at 850. Furthermore, in moving for summary
2 judgment, “all that the defendant need do is show that the plaintiff cannot establish at least one element
3 of the cause of action -- for example, that the plaintiff cannot prove element X.” *Aguilar v. Atlantic*
4 *Richfield Co.*, supra 25 Cal.4th at 850, fn. omitted. Indeed, “the court's sole function on a motion for
5 summary judgment is to determine from the submitted evidence whether there is a ‘triable issue as to
6 any material fact’ (§ 437c, subd. (c)), and to be ‘material’ a fact must relate to some claim or defense in
7 issue under the pleadings (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial 3 (The
8 Rutter Group 1997) ¶¶ 10:270 to 10:271).” *Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926.

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

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

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

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

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

22 *Business & Professions Code* §17529.5 states:

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

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

27 (2) The e-mail advertisement contains or is accompanied by falsified, misrepresented,
28 or forged header information. This paragraph does not apply to truthful information

1 used by a third party who has been lawfully authorized by the advertiser to use that
2 information.

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

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

7 (i) The Attorney General.

8 (ii) An electronic mail service provider.

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

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

13 (i) Actual damages.

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

17 (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.

18 (D) However, there shall not be a cause of action under this section against an
19 electronic mail service provider that is only involved in the routine transmission of the
20 e-mail advertisement over its computer network.

21 (2) If the court finds that the defendant established and implemented, with due care,
22 practices and procedures reasonably designed to effectively prevent unsolicited
23 commercial e-mail advertisements that are in violation of this section, the court shall
24 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.

25 (3)(A) A person who has brought an action against a party under this section shall not
26 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.

27 (B) A person who has brought an action against a party under Section 17529.8 or
28 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.

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

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

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

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

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

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

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

18 The Court notes that Plaintiff has disputed Defendant's Separate Statement of Undisputed
19 Material Facts, No. 21 wherein Defendants contend that only 23 of the 45,000 e-mails at issue were
20 sent out by Defendants. Plaintiff's evidence in support, though, does not defeat Defendant's fact.
21 Specifically, Plaintiffs point to the deposition of Farshad Fardad, page 30, lines 1-16, page 88, line 23
22 through page 89, line 16, page 176, line 1 through page 177, line 16 and page 205, lines 1-12; the
23 deposition testimony of Tanya Brown, page 59, line 11 through page 61, line 1 and Exhibit 18, Chart 7.
24 See *Plaintiff's Separate Statement of Undisputed Material Facts, No. 21*. The court finds that
25 Defendants have shifted the burden of proof to Plaintiff and none of the Plaintiff's evidence (indeed,
26 there is no page 59, 60 or 61 attached to the deposition transcript of Tanya Brown) in support of the
27 opposition indicates that any more than 24 e-mails were sent by Defendant. Therefore, Plaintiff has
28 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,

1 instead of exposure to damages of \$45 million, this case, as against the ValueClick defendants, is no
2 more than \$24,000.00 (without actual damages). As *Business & Professions Code* §17529.5 notes:

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

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

7 The Congress finds the following:...

8 Many States have enacted legislation intended to regulate or reduce unsolicited
9 commercial electronic mail, but these statutes impose different standards and
10 requirements. As a result, they do not appear to have been successful in addressing the
11 problems associated with unsolicited commercial electronic mail, in part because,
12 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.

13 (b) Congressional determination of public policy

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

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

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

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

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

22 (b) State law

23 (1) In general

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

28 As noted in the moving papers:

1 Section 17529.5 was enacted in 2003. One year later, Congress passed the CAN-
2 SPAM Act, recognizing that there was a substantial federal interest in regulating
3 commercial emails, and that the existing patchwork of state regulations was
4 ineffective. 15 U.S.C. § 7701(A)(11), (B). In particular, Congress recognized that
5 because “an electronic mail address does not specify a geographic location, it can be
6 extremely difficult for law-abiding businesses to know with which of these disparate
7 statutes they are required to comply.” Id. To ensure American businesses had clear
8 guidance on commercial email advertising, Congress included in CAN-SPAM an
9 explicit provision preempting “all state laws expressly regulating the use of electronic
10 mail to send commercial messages, except to the extent that [the state statute]
11 prohibits falsity or deception in any portion” of a commercial email. 15 U.S.C. §
12 7707(b)(1) (emphasis added). Courts repeatedly have held that the preemption clause
13 in CAN-SPAM “left states room only to extend their traditional fraud prohibitions and
14 deception prohibitions into cyberspace.” *Kleffman v. Vonage Holdings Corp.*, 2007
15 WL 1518650, at *5 (C.D. Cal. May 23, 2007).

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

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

26 In response, Plaintiff asserts:

27 Implicitly, the ValueClick Defendants argue that fraud must be established in order to
28 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

1 federal directives is impossible. [Citations.] Third, obstacle preemption arises when ‘
2 “under the circumstances of [a] particular case, [the challenged state law] stands as an
3 obstacle to the accomplishment and execution of the full purposes and objectives of
4 Congress.”’ [Citations.] Finally, field preemption, i.e., ‘Congress’ intent to pre-empt
5 all state law in a particular area,’ applies ‘where the scheme of federal regulation is
6 sufficiently comprehensive to make reasonable the inference that Congress “left no
7 room” for supplementary state regulation.’ [Citations.]” (*Viva! Internat. Voice For
8 Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935-
9 936, 63 Cal.Rptr.3d 50, 162 P.3d 569.) Generally, “ “[c]ourts are reluctant to infer
10 preemption, and it is the burden of the party claiming that Congress intended to
11 preempt state law to prove it.” ’ ” (*Ibid.*, quoting *Olszewski v. Scripps Health* (2003)
12 30 Cal.4th 798, 815, 135 Cal.Rptr.2d 1, 69 P.3d 927.)

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

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

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

20 When construing a statute, we must "ascertain the intent of the Legislature so as to
21 effectuate the purpose of the law." (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5
22 Cal.4th 382, 387 [20 Cal.Rptr.2d 523, 853 P.2d 978].) The words of the statute are the
23 starting point. "Words used in a statute ... should be given the meaning they bear in
24 ordinary use. [Citations.] If the language is clear and unambiguous there is no need for
25 construction, nor is it necessary to resort to indicia of the intent of the Legislature"
26 (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299]
27 (*Lungren*)). If the language permits more than one reasonable interpretation, however,
28 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].)

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

2 To determine the merits of plaintiff's argument, we need to examine the statutory
3 language. "Our task is to discern the Legislature's intent. The statutory language itself
4 is the most reliable indicator, so we start with the statute's words, assigning them their
5 usual and ordinary meanings, and construing them in context. If the words themselves
6 are not ambiguous, we presume the Legislature meant what it said, and the statute's
7 plain meaning governs. On the other hand, if the language allows more than one
8 reasonable construction, we may look to such aids as the legislative history of the
9 measure and maxims of statutory construction. In cases of uncertain meaning, we may
10 also consider the consequences of a particular interpretation, including its impact on
11 public policy." (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164,
12 1190, 48 Cal.Rptr.3d 108, 141 P.3d 225; see also *Palmer v. GTE California, Inc.*
13 (2003) 30 Cal.4th 1265, 1271, 135 Cal.Rptr.2d 654, 70 P.3d 1067.)

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

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

21 CAN-SPAM preempts state statutes that "expressly regulate[] the use of electronic
22 mail to send commercial messages," except to the extent such statutes prohibit "falsity
23 or deception in any portion of a commercial electronic mail message or information
24 attached thereto." See 15 U.S.C. § 7707(b)(1). **Section 7701(b)(1) has been**
25 **interpreted to preempt state law claims, unless such claims are for "common law**
26 **fraud or deceit.**" See *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d
27 348, 353-56 (4th Cir.2006) (affirming dismissal of claim under Oklahoma statute
28 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....

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

6 By contrast, the recent decision of *Asis Internet Services v. Consumerbargaingiveaways, LLC*,
7 2009 WL 1035538 (N.D. Cal, April 17, 2009); upon which Plaintiff relies, held otherwise. In that case,
8 the District Court held indicated that no appellate decision (as opposed to a district court decision) has
9 limited the phrase “falsity or deception” to only common law fraud actions. As the *Asis* decision notes:

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

18 Interestingly, this issue was recently certified to the California Supreme Court by the 9th Circuit Court
19 of Appeal in the case of *Kleffman v. Vonage Holdings Corp.*, 551 F.3d 847 (9th Cir. (Cal.) Dec 19,
20 2008):

21 Does sending unsolicited commercial e-mail advertisements from multiple domain
22 names for the purpose of bypassing spam filters constitute falsified, misrepresented, or
23 forged header information under Cal. Bus. & Prof. Code § 17529.5(a)(2)?...

24 The question presented in Section III is worthy of certification because the issue is
25 likely to emerge again in cases governed by § 17529.5, and the court's answer may be
26 dispositive in this case. The relevant provision in § 17529.5 was effective January 1,
27 2004, and has not been interpreted by the California Courts of Appeal or the California
28 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.

1 §7707(b)(1) notes:

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

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

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

16 Indeed, “falsity” is an element of fraud. As noted in BAJI 12.31:

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

- 18 1 The defendant made a representation as to a past or existing material fact;
- 19 2 The representation was false;
- 20 3 The defendant must have known that the representation was false when made [or
21 must have made the representation recklessly without knowing whether it was true or
22 false];
- 23 4 The defendant made the representation with an intent to defraud the plaintiff, that is,
24 [he] [she] must have made the representation for the purpose of inducing the plaintiff
25 to rely upon it and to act or to refrain from acting in reliance thereon;
- 26 5 The plaintiff was unaware of the **falsity** of the representation; must have acted in
27 reliance upon the truth of the representation and must have been justified in relying
28 upon the representation;
- 29 6 And, finally, as a result of the reliance upon the truth of the representation, the
30 plaintiff sustained damage.

31 As noted in BAJI 12.45:

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

- 33 1 The defendant made a representation as to a past or existing material fact;
- 34 2 The representation was untrue;
- 35 3 Regardless of [his] [her] actual belief the defendant made the representation without
36 any reasonable ground for believing it to be true;
- 37 4 The representation was made with the intent to induce plaintiff to rely upon it;
- 38 5 The plaintiff was unaware of the **falsity** of the representation; must have acted in
39 reliance upon the truth of the representation and was justified in relying upon the
40 representation;

1 6 And, finally, as a result of the reliance upon the truth of the representation, the
2 plaintiff sustained damage.

3 Moreover, deception is defined by dictionary.com as “something that deceives or is intended to
4 deceive; **fraud**; artifice.” As noted in *Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th
5 1807, 1818:

6 In order to recover for fraud, as in any other tort, the plaintiff must plead and prove the
7 “detriment proximately caused” by the defendant's tortious conduct. (Civ.Code, §
8 3333.) **Deception without resulting loss is not actionable fraud.** (*Hill v. Wrather*
9 (1958) 158 Cal.App.2d 818, 825, 323 P.2d 567.)

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

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

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

27 This Court disagrees to the extent the Court in *Asis Internet Services v.*
28 *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]

1
2 Indeed, as explained in *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, 354 (4th
3 Cir.(Va.) Nov 17, 2006):

4 The exception, as noted, allows states to prohibit “falsity or deception” in commercial
5 e-mail messages. Those terms are not defined in the statute. However, “deception”
6 requires more than bare error, and while “falsity” can be defined as merely “the
7 character or quality of not conforming to the truth or facts,” it also can convey an
8 element of tortiousness or wrongfulness, as in “deceitfulness, untrustworthiness,
9 faithlessness.” Webster’s Third New International Dictionary Unabridged 820 (1971);
10 see also Oxford English Dictionary Vol. V 697 (2d ed.1989) (defining false as
11 “erroneous, wrong,” but also as “mendacious, deceitful, treacherous,” and
12 “[p]urposely untrue”); see also Black’s Law Dictionary 635 (8th ed.2004) (defining
13 “false” as “untrue” but also as “deceitful; lying”).

14 Since the word “falsity” considered in isolation does not unambiguously establish the
15 scope of the preemption clause, we read “falsity” in light of the clause as a whole.
16 Reading “falsity” as referring to traditionally tortious or wrongful conduct is the
17 interpretation most compatible with the maxim of noscitur a sociis, that a word is
18 generally known by the company that it keeps. See, e.g., *Jarecki v. G.D. Searle & Co.*,
19 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961); *Neal v. Clark*, 95 U.S. 704,
20 708-09, 24 L.Ed. 586 (1877). The canon applies in the context of disjunctive lists. See
21 *Neal*, 95 U.S. at 706, 709; *Jarecki*, 367 U.S. at 304 n. 1, 307, 81 S.Ct. 1579. Here, the
22 pre-emption clause links “falsity” with “deception”-one of the several tort actions
23 based upon misrepresentations. Keeton et al., *Prosser and Keeton on the Law of Torts*
24 § 105, at 726-27 (5th ed.1984) (defining deceit as species of false-statement tort);
25 *Restatement (Second) of Torts* § 525 (describing elements of deceit). **This pairing**
26 **suggests that Congress was operating in the vein of tort when it drafted the pre-**
27 **emption clause's exceptions, and intended falsity to refer to other torts involving**
28 **misrepresentations, rather than to sweep up errors that do not sound in tort.**

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

25
26 *Mummagraphics'* reading of the preemption clause would upend this balance and turn
27 an exception to a preemption provision into a loophole so broad that it would virtually
28 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.

1
2 Indeed, allowing such a loophole would undermine the express federal preemption, including
3 allowing claims based on negligence and inadvertence. For instance, under the exception asserted by
4 Plaintiff and the Court in *Asis Internet Services v. Consumerbargaingiveaways, LLC.*, supra, would
5 create an exception that allows lawsuits involving the misspelling of names, improper links, and using
6 old addresses where there was no intent to deceive.

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

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

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

25 This case presents an issue on which this court has found little published authority:
26 whether a police officer may stop and cite a motorist for a minor traffic infraction
27 committed in his or her presence but outside his or her territorial jurisdiction, pursuant
28 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.

1
2 As noted in *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (April 17, 2009) 2009
3 WL 1026837 [Plaintiff challenged lawfulness of ordinance on the basis that it was preempted by
4 alleged exception in Civil Code]:

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

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

19 The Attorney General argues that the Legislature's failure to include specific intent
20 language in subsection (b)(3) indicates the Legislature did not intend to impose such a
21 requirement. As noted above, however, such an interpretation is unreasonable when
22 subsection (b)(3) is read in the context of section 550 as a whole. (*People v. Hudson*,
23 supra, 38 Cal.4th at p. 1009, 44 Cal.Rptr.3d 632, 136 P.3d 168 [statutory language
24 must be construed in context].) Here, the penalty subsection (c)(3) specifically
25 references fraud, so at best, subsection (b)(3) is ambiguous with respect to its intent
26 requirement, permitting our construction. (*Torres v. Parkhouse Tire Service, Inc.*,
27 supra, 26 Cal.4th at p. 1003, 111 Cal.Rptr.2d 564, 30 P.3d 57 [if statutory language is
28 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.

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

1 The interpretation of the statute advanced by Vera would also make the statutory
2 exception to the application of the old schedule at issue here so broad that it would
3 cease to function as an exception... If the old schedule were to apply in every case
4 where an employer has made a payment of temporary disability benefits, an exception
5 to the application of the new schedule would apply in a large number of cases in
6 which an employee is seeking permanent disability benefits. In short, the exception
7 would swallow the rule. (*Cf. Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888,
8 902, 123 Cal.Rptr.2d 432, 51 P.3d 297 [rejecting a proffered statutory interpretation
9 when the 'exception would swallow the rule'.]) We reject an interpretation of the
10 statute that would lead to such a result.

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

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

18 [A] State law requiring some or all commercial e-mail to carry specific types
19 of labels, or to follow a certain format or contain specified content, would be
20 preempted. By contrast, a State law prohibiting fraudulent or deceptive
21 headers, subject lines, or content in commercial e-mail would not be
22 preempted.... [I]n contrast to telephone numbers, e-mail addresses do not
23 reveal the State where the holder is located. As a result, a sender of e-mail has
24 no easy way to determine with which State law to comply. Statutes that
25 prohibit fraud and deception in e-mail do not raise the same concern, because
26 they target behavior that a legitimate business trying to comply with relevant
27 laws would not be engaging in anyway. [S.Rep. No. 108-102, at 21-22]

28 Congress intended that businesses would not have to guess at the meaning of various state laws when
the 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*

1 *standard...[that] still allows for State laws that deal with fraud and computer*
2 *crimes.”*) Thus, the legislative history is consistent with unanimous California
3 authority holding that claims under Section 17529.5 must sound in "fraud" or
4 "deception" to avoid preemption by CAN-SPAM. *See, supra*, pp. 8-9. [*See Reply,*
5 *page 9, lines 14-23*]

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

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

15 Defendants ValueClick, Inc., E-Babylon, Inc., Hi-Speed Media, Inc., VC E-Commerce
16 Solutions, Inc. and Web Clients, LLC claim that “[b]ecause Plaintiff cannot establish any of the
17 traditional fraud elements for even a single Asserted Email, CAN-SPAM’s preemption clause mandates
18 dismissal of Plaintiff’s §17529.5 claims.” *See Moving Papers, page 6, lines 24-25*. Specifically,
19 Defendants claim that fraud cannot be established because (1) lack of reliance, (2) lack of injury, and
20 (3) no showing that ValueClick had knowledge of any misleading information in the email headers.
21 *See Moving Papers, page 6, line 26 through page 9, line 10*. As the Moving Papers assert:

22 Critically, Plaintiff admits that neither it nor its end users relied on the alleged false or
23 deceptive information contained in a single Asserted Email. (UF ¶¶14-15.) Wagner
24 testified on behalf of Plaintiff that he could not identify any action that he or any
25 recipient of the Asserted Emails took, or refrained from taking, as a result of the
26 purportedly “false” information contained in the emails. (UF ¶14.) Likewise, Wagner
27 could not identify a single email that he or any other recipient relied on or was
28 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...

1
2 Plaintiff also concedes that it has no evidence that ValueClick had knowledge of any
3 of the allegedly “deceptive” information contained in the headers of the Asserted
4 Emails. The undisputed facts establish that over 99.9% of the Asserted Emails were
5 sent by third-party, and not by ValueClick.

6 Significantly, all of the information alleged to be “deceptive” in the Asserted Emails
7 (e.g. the “From” lines, the “To” lines and the “Subject” lines) is contained in the
8 “header” of the email, and not in the advertisement contained in the body of the email.
9 As Plaintiff has acknowledged, the “header” of each email is created by the actual
10 sender when the email is sent, and there is no reason that anyone other than the sender
11 (and recipient) would know the header’s contents....[See *Moving Papers*, page 6, line
12 27 through page 8, line 18]

13 As Wagner testified at his deposition:

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

17 A: Not that I can think of. [See *Declaration of Ashlie Beringer*, Exhibit C, page 740,
18 lines 9-13 and *Defendants’ Separate Statement of Undisputed Material Facts*, No.
19 14]...

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

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

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

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

27 Q: You know it’s been opened in the course of searching for emails for litigation;
28 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]...

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

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

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

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

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

13 I have reviewed the deposition testimony of Joe Wagner. From this testimony, I
14 understand that Plaintiff uses so-called "wild card" email addresses to collect
15 commercial electronic mail sent to non-existent email addresses (i.e., email addresses
16 that were not created by Hypertouch for its end users). I have further reviewed
17 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).

18 Using the Concordance database and Microsoft Excel, I have analyzed the "To" lines
19 of the Asserted Emails and have determined that over 43,500 (97%) were sent to non-
20 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.

21 As for damage, Wagner testified as follows:

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

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

26 Q: Well, let me repeat my question. Is there any specific e-mail that you can point to
27 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?

28 A: I can point to these e-mails and say in order to hand - - handle the spam load which

1 includes these e-mails, I had to purchase more robust software, I had to purchase
2 additional servers and I had to purchase additional bandwidth and so on...[See
3 *Declaration of Ashlie Beringer, Exhibit D, page 265, lines 3-21, and Defendants'*
4 *Separate Statement of Undisputed Material Facts, Nos. 19 and 20*]

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

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

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

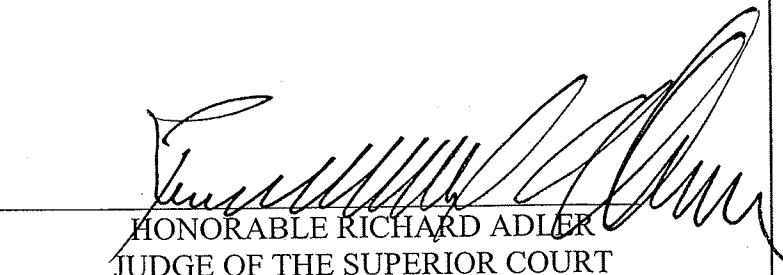
18 For all the foregoing reasons, the Court also grants the joinder motion by Defendant
19 PrimaryAds, Inc.

20 The remaining issues raised by the parties are moot.

21 THEREFORE IT IS ORDERED that the motion for summary judgment is granted, and that
22 judgment in favor of ValueClick, Inc., E-Babylon, Inc., Hi-Speed Media, Inc., VC E-Commerce
23 Solutions, Inc., Web Clients, LLC, and Commission Junction, Inc. and against Hypertouch, Inc. shall be
24 entered accordingly.

25 DATED: _____

JUN 16 2009

26
27
28

HONORABLE RICHARD ADLER
JUDGE OF THE SUPERIOR COURT