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SAN MATEO COUNTY

MAR 10 2010

Clerk of the Superior Court
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

DANIEL L. BALSAM,

Civil No. 471797

Plaintiff,

**JUDGMENT AND FINAL
STATEMENT OF DECISION**

vs.

Dept. 2, Hon. Marie S. Weiner

TRANCOS, INC., et al.,

Defendants.

_____ /

This matter was assigned for trial in Department 2 of this Court before the Honorable Marie S. Weiner. Timothy Walton, Esq. appeared on behalf of Plaintiff Daniel Balsam, and Robert Nelson of Nelson & Weinkauff appeared on behalf of the remaining Defendants Trancos Inc. Brian Nelson, and Laure Majcherczyk. Plaintiff voluntarily dismissed Defendant Laure Majcherczyk during the course of the trial.

A Court Trial commenced in this action on October 14, 2009 and concluded the presentation of evidence and oral argument on October 19, 2009. As set forth on the record, this Court held that Plaintiff has no standing to sue under the second cause of action for violation of the Consumers Legal Remedies Act, Civil Code Section 1750 *et seq.*, as Plaintiff was not a "consumer" of any goods or services as defined in Civil Code

Section 1761(d), and as Plaintiff did not sustain “any damages” caused by Defendants’ alleged conduct as required by Section 1780.¹ See Buckland v. Threshold Enterprises Ltd. (2007) 155 Cal.App.4th 798, 809.

The Court also held that Plaintiff’s first cause of action for violation of Business & Professions Code Section 17529 *et seq.* is not pre-empted under federal law, for the reasons set forth on the record, which are incorporated herein by reference without repeating. Further, it was undisputed that Plaintiff had no claim for actual injury or actual monetary damages from any violation of the Business & Professions Code.

It was agreed by counsel for the parties that the third cause of action for declaratory relief was duplicate of the first cause of action.

According, the Court held that Plaintiff was not entitled to a trial by jury, and proceeded with a court trial.

¹ Plaintiff now argues, as an “objection” to the tentative decision, that he need not show “actual damages” in order to sue under the Consumer Legal Remedies Act. Plaintiff ignores the fact that there was no evidence that Plaintiff sustain *any* monetary loss. Plaintiff relies upon Meyer v. Sprint Spectrum L.P. (2009) 45 Cal.4th 634, but that case held, consistent with this Court’s ruling, that a violation of CLRA is not enough – the Plaintiff must have sustained some monetary implication *caused by* the defendant’s violation of the law. Meyer, at p. 641 (“If the Legislature had intended to equate ‘any damage’ with being subject to an unlawful practice by itself, it presumably would have omitted the causal link between ‘any damage’ and the unlawful practice, and instead would have provided something like ‘any consumer who is subject to a method, act, or practice declared to be unlawful by Section 1770 may bring an action’ under CLRA.”) The Supreme Court stated in Meyer that tort damages are not required, but “any damage” may include transaction costs and opportunity costs. Id., at p. 640. Plaintiff had no evidence of any economic loss or costs incurred.

Based upon a preponderance of the evidence presented at trial, and having considered the objections and responses to the tentative statement of decision, THE COURT FINDS as follows:

Material Facts Presented

This case presents issues of first impression as to interpretation and application of Business & Professions Code sections which prohibit spam emails.

Plaintiff Daniel Balsam is a licensed California attorney with experience in consumer protection litigation. Plaintiff Balsam is also a named plaintiff and/or attorney representing plaintiffs in dozens of lawsuits since 2002 against companies for unsolicited commercial email advertising, commonly known as “spam” emails. Plaintiff has a website named “DanhatesSpam.com”, undertakes efforts to track spammers, and has a weblog (“blog”) with articles regarding spam litigation. Plaintiff personally has over 100 email addresses.

Plaintiff is a San Francisco resident who owns four computers, all of which are located in California. The subject of this lawsuit are eight emails sent to his email address @yahoo.com. This constitutes a “California address” under B&P Code Section 17529(b). Plaintiff received these eight emails in July and August 2007. It is undisputed that the emails were sent by Defendant Trancos Inc.

Brian Nelson is the CEO and founder of Defendant Trancos Inc. Defendant Trancos has 44 employees and three offices (the headquarters in Redwood City, in Malibu, and in New York). Defendant Trancos owns/registered 477 different domain names. These are privately registered through DomainsByProxy. Defendant privately registers its domain names and uses DomainsByProxy so that reference to that site by

members of the public would not reveal the true owner of the domain name. The purpose of private registration of these domain names by Defendant was to avoid complaints by the public, and avoid getting direct complaints by members of the public. Indeed, Defendant previously had threatening phone calls from people who wanted to opt-out of their email lists. Use of private registration avoided receiving threatening phone calls over unsolicited emails. Rather, Defendant would require, by this method, that unhappy people would have to (1) leave message with Domains By Proxy to supposedly forward to Trancos and/or (2) affirmatively unsubscribe by opting out from the domain name communication.

During the relevant time period, namely the Summer of 2007, Trancos had a division called Meridian. It managed nine email lists including Hi-Speed Media email lists. Defendant would find internet advertisers, and send advertisements using email lists provided by Hi-Speed Media/ValueClick (which is a huge network advertiser).

It was Nelson's understanding that Hi-Speed Media/ValueClick obtained emails subject to the proviso that the emails could be used for itself or its "partners", and by this broad authorization Hi-Speed could use emails of its customers for any commercial use whatsoever as long as it shared in the revenue. Hi-Speed Media provided (and kept ownership) of the email address lists and Trancos "managed" the lists and used them to send out email advertisements. Revenue from the advertising was then split between Trancos and Hi-Speed Media. This arrangement commenced in June 2007 and was terminated in September 2007 – because Trancos was losing money or not making money. Meridian is no longer a division of Trancos since its efforts were discontinued in 2007. Thus Defendant has stopped doing the allegedly wrongful conduct of which Plaintiff complains.

Defendant Trancos Inc. sent eight emails to Plaintiff. As best as Defendant can determine, Trancos obtained Plaintiff's email address from GiveAwayCafe.com, which is owned by Hi-Speed Media, which is owned by Value Click. Defendant used eight different domain names to send the eight emails to Plaintiff.

According to each of the eight emails, Plaintiff allegedly gave consent for use of his email address on "2007 July 11" for IP address 64.184.86.246. Plaintiff presented uncontradicted evidence that Plaintiff *never* consented to receive any of these eight emails from any of the sources, including Defendant Trancos, Hi-Speed Media, ValueClick, Give Away Cafe.com, and the eight advertisers.

Defendant Nelson testified that it is possible for someone – who is not Plaintiff – to type Plaintiff's email address into the website of Give Away Cafe.com, and thereby "authorizing" use of Plaintiff's email. Thus it is possible that email is used by an advertiser or list collector which is not authorized by the true person.

The eight emails received by Plaintiff from Defendant Trancos are as follows, in order as set forth in Trial Exhibit #2:

Email #1: The email from IP address 75.140.65.221, dated July 22, 2007, states it is from "Paid Survey" with an email address of survey@misstepoutcome.com. The Subject stated is "Get paid 5 Dollars for 1 survey". The content in the body of the email is a commercial advertisement purportedly by Survey Adventure. In regard to opting out of future emails, it states at the end of the email:

To block further mailings, write to: Strategic Financial Publishing, Inc., 10535 E. Washington Street, Ste. 310, Indianapolis, IN 46229-2609 or <http://misstepoutcome.com/soi?m+79444&! =2>

We hope you enjoyed receiving this email, but if you no longer wish to receive our emails please click here.

USAProductsOnline.com
11870 Santa Monica Blvd. Suite #106-529
Los Angeles, C.A. 90025

Paid Survey is not the name of any existing company, but rather treats the “from” line as though an additional “subject” line. Evidence was presented that there is no company actually named misstepoutcom and no website named www.misstepoutcome.com, but rather this is nonsensical name for one of Defendant Trancos’ hundreds of privately registered domain names. Brian Nelson never had any communications with anyone at Strategic Financial Publishing nor Survey Adventure.

If one clicks on the advertisement for Survey Adventure, you do *not* “get paid 5 dollars for 1 survey”. Indeed, you are obligated to sign up for three offers, then take multiple surveys and have no guarantee of getting paid anything by anyone for taking the survey. Of the people who testified at trial, no one who actually tried the website got paid for taking a survey.

There is no actual company named USAProductsOnline.com nor USA Products Online. No such entity is registered as a corporation, LLC or limited partnership to do business in the State of California, and is not a registered fictitious business name in Los Angeles County or San Mateo County. There is no website at www.USAProductsOnline.com. This is a domain name created by Defendant Trancos which has no real existence.

Email #2: The email from IP address 75.140.65.217, dated July 21, 2007, states it is from “Your Business” with an email address of franchisegator@modalworship.com. The Subject stated is “Be Your Own Boss! You could own a franchise!” The content in the body of the email is a commercial

advertisement purportedly by Franchise Gator. In regard to opting out of future emails, it states at the end of the email:

To unsubscribe, [click here](#). Or mail a copy of this email to:
Franchise Gator
315 5th Ave S, Suite 100
Seattle, WA 98104

We hope you enjoyed receiving this email, but if you no longer wish to receive our emails please [click here](#).

USAProductsOnline.com
11870 Santa Monica Blvd. Suite #106-529
Los Angeles, C.A. 90025

Again, there is no actual business named Your Business, no actual entity named modalworship, no website at www.modalworship.com, and no actual entity named USA Products Online or USAProductsOnline.com. The name of the true sender, Trancos, appears nowhere.

Email #3: The email from IP address 75.140.65.210, dated July 27, 2007, states it is from "Christian Dating" with an email address of ChristianDating@mousetogether.com. The Subject stated is "Date single Christians". The content in the body of the email is a commercial advertisement purportedly by ChristianCafe.com. In regard to opting out of future emails, it states at the end of the email:

Unsubscribe: To stop receiving email messages from or on behalf of ChristianCafe.com write to: 600 Alden Road, Suite 210, Markham, ON L3R 0E7

We hope you enjoyed receiving this email, but if you no longer wish to receive our emails please [click here](#).

USAProductsOnline.com
11870 Santa Monica Blvd. Suite #106-529
Los Angeles, C.A. 90025

No evidence was presented as to whether ChristianCafe.com actually exists or references a real business. The business is not named Christian Dating. There is no actual entity “mousetogether”, no website at www.mousetogether.com, and no actual entity named USA Products Online.com. The name of the true sender, Trancos, appears nowhere.

Email #4: The email from IP address 75.40.65.209, dated July 27, 2007, states it is from “Your Promotion” with an email address of YourPromotion@mucousmarquise.com. The Subject stated is “Workers Needed Online”. The content in the body of the email is a commercial advertisement giving no indication of the name of the advertiser or business. In regard to opting out of future emails, it states at the end of the email:

Ad Sponsors LLC 4301 N.W. 63rd St., Suite 105 Oklahoma City, OK 73116
Follow this link for removal: <http://mucousmarquise.com/soi?m=151444&! =1>

We hope you enjoyed receiving this email, but if you no longer wish to receive our emails please click here.

USAProductsOnline.com
11870 Santa Monica Blvd. Suite #106-529
Los Angeles, C.A. 90025

There is no business named “Your Promotion”, no entity called mucousmarquise nor any website at www.muousemarquise.com. The nature of Ad Sponsors LLC is unknown. There is no USA Products Online.com. The name of the true sender, Trancos, appears nowhere.

Email #5: The email from IP address 75.140.65.226, dated July 31, 2007, states it is from “Bank Wire Transfer Available” with an email address of BankWireTransferAvailable@minuteprovenance.com. The Subject stated is “Sign up for a 24-hour Renters Cash Advance”. The content in the body of the email is a commercial

advertisement giving no indication of the name of the advertiser or business. On the contrary, the small print at the end of the ad states that the advertiser is a conduit for financial institutions and is not a lender itself, but rather only a “sponsor”. These are for usurious loans of 300% to 800%. In regard to opting out of future emails, it states at the end of the email:

To stop further mailings, visit this link: [https:// secure. renterscashadvance.com/unsubscribe.php](https://secure.renterscashadvance.com/unsubscribe.php) or write: RentersCashAdvance, 260 West 36th Street FL 10, New York NY 10018.

We hope you enjoyed receiving this email, but if you no longer wish to receive our emails please click here.

USAProductsOnline.com
11870 Santa Monica Blvd. Suite #106-529
Los Angeles, C.A. 90025

Once again, there is no company “BankWireTransferAvailable”, there is no entity “minuteprovenance”, no website at minuteprovenance.com, no entity Renters Cash Advance, and no entity USA Products Online.

Email #6: The email from IP address 75.140.65.228, dated August 11, 2007, states it is from “eHarmony” with an email address of eHarmony@minecyclic.com. The Subject states is “You Could Be in Everlasting Dating Harmony”. The content in the body of the email is a commercial advertisement by eHarmony for their singles-matching services. There is an opt-out opportunity at the end of the email, by mail or by clicking a link *with eHarmony*. It is undisputed that eHarmony is a real company, generally known to the public. There is also an opt-out opportunity allegedly with USAProductsOnline.com. Apparently, Plaintiff’s claim is based upon the non-existence of minecyclic and USA Products Online, and the lack of identification of Trancos.

Email #7: The email from IP address 75.140.65.206, dated August 14, 2007, states it is from "Dating Generic" with an email address of dating@mythicaldumbwaiter.com. The Subject is "It's a Great Time to Say Hello to Someone New!" The content in the body of the email is a commercial advertisement with no identification of the advertiser or business. Instead it contains a suggestive photo of a young woman, scanty clad in lingerie. There is not even a name of the entity whom you could contact to unsubscribe in the first instance. In regard to opting out of future emails, it states at the end of the email:

We respect your privacy. If you wish to no longer receive emails like this one, please click here to unsubscribe and your email address will be removed from future email promotions. You can also unsubscribe by writing to us at 800 El Camino Real Suite #180, Mountain View, CA 94040. Please allow up to 10 days upon receipt to process physical mail.

We hope you enjoyed receiving this email, but if you no longer wish to receive our emails please click here.

USAProductsOnline.com
11870 Santa Monica Blvd. Suite #106-529
Los Angeles, C.A. 90025

Plaintiff Daniel Balsam investigated the address listed in Mountain View, California. At that address, Plaintiff found that it was a shared suite with no company named listed at all. Thus, even if mail was sent, there would be no one to direct the mail to, because multiple businesses are sharing the suite. Thus the physical address given for mailing an opt-out is useless.

Needless to say, there is no company named Dating Generic, no entity Mythical Dumbwaiter, no website mythicaldumbwaiter.com, and no entity USA Products Online.

Email #8: The email from IP address 75.140.65.204, dated August 13, 2007, states it is from "Join Elite" with an email address of JoinElite@nationalukulele.com. The

Subject stated is "Get your criminal Justice Degree". The content in the body of the email is a commercial advertisement about getting a criminal justice degree, but there is no identification of any person, company or business as the advertiser. No true sender is identified. Plaintiff clicked on the ad, and was transferred to "Find the Right School", which lists several online universities, but no identification of the business sponsor.

In regard to opting out of future emails, it states at the end of the email:

We respect your privacy. If you wish to no longer receive emails like this one, please click here to unsubscribe and your email address will be removed from future email promotions. You can also unsubscribe by writing to us at 800 El Camino Real Suite #180, Mountain View, CA 94040. Please allow up to 10 days upon receipt to process physical mail.

We hope you enjoyed receiving this email, but if you no longer wish to receive our emails please click here.

USAProductsOnline.com
11870 Santa Monica Blvd. Suite #106-529
Los Angeles, C.A. 90025

As set forth above, Plaintiff Daniel Balsam investigated the address listed in Mountain View only to find that it is a shared suite with no company name identified and no way for mail to be delivered to a particular person or company. As set forth above, there is no USA Products Online. There is no entity named Join Elite nor named national ukulele.

Plaintiff Daniel Balsam investigated the address of USAProductsOnline.com, which is listed at the end of each of these eight emails from Trancos. The address on Santa Monica Boulevard is a UPS Store, not the address of the business. Defendant Nelson admitted that this is not a physical location for Defendant Trancos, but merely a postal box. Plaintiff subpoenaed documents for this address from the UPS Store (Trial Exhibit #9), and the application for the postal box is in the name of

USAProductsOnline.com – an entity which does not exist. The physical address given on the application is the Trancos office that was in Pacific Palisades, California.

Plaintiff never “clicked” to opt-out of any of these email communications. Plaintiff never sent a letter asking to opt-out of future communications from these companies. Plaintiff did not attempt to “reply” to these emails with a request to stop sending future communications.

Opting out by the recipient is not required under the law. Indeed, the Attorney General and Internet Service Providers, such as Plaintiff’s ISP Yahoo, tell the public *not* to respond or click on the opt-out button, because it is more likely to *cause* more spam to be sent – because it confirms the viability of the email address.

Plaintiff did send a certified letter addressed to USAProductsOnline.com at the UPS address, which was received on August 9, 2007, complaining about receiving five spam emails, and demanding a remedy under the law of a \$1000 penalty. Plaintiff never received a reply.

Plaintiff was not tricked into believing that these emails were anything other than commercial advertisements. Plaintiff was not tricked into seeking to purchase any goods or services. Plaintiff has a policy of never purchasing anything from a spam advertiser. The problem for Plaintiff is that the use of hundreds of nonsensical names for the sender tricks the spam filters from catching and identifying spam (and sending it into the spam file of a person’s email).

During the relevant time period, Trancos had a procedure for deleting or otherwise segregating recipients who electronically request to “opt-out” of future communications from the same entity who provided the service lists. Trancos also commonly utilized a

form of contract (with those entering into an agreement to provide e-mail lists for sending of advertisements and the sharing of revenue) explicitly requiring its “partner” to represent that the e-mails were authorized or otherwise acquired through direct consent. Notably, the agreement with Hi-Speed Media did *not* use this standard contract, but rather had no promises or representations by Hi-Speed that they had direct consent or other authorization for the use of the e-mails provided.

Plaintiff has not received any further spam from Defendant since August 2007. Defendant Nelson testified to efforts to erase or exclude Plaintiff’s e-mail address from all subsequent use of e-mail lists, now and in the future.

Applicable Law

The parties’ requests for judicial notice are GRANTED as to federal and non-California reported decisions and statutes and California legislative history, and is DENIED as to unreported California trial court decisions.

Pertinent provisions of the California Business & Professions Code prohibiting spam are as follows:

Section 17529.1

- (a) “Advertiser” means a person or entity that advertises through the use of commercial e-mail advertisements.
- (b) “California electronic mail address” or “California e-mail address” means any of the following:

(1) An e-mail address furnished by an electronic mail service provider that sends bills for furnishing and maintaining that e-mail address to a mailing address in this state;

(2) An e-mail address ordinarily accessed from a computer located in this state.

(3) An e-mail address furnished to a resident of this state.

(c) “Commercial e-mail advertisement” means any electronic mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift, offer, or other disposition of any property, goods, services, or extension of credit.

(d) “Direct consent” means that the recipient has expressly consented to receive e-mail advertisements from the advertiser, either in response to a clear and conspicuous request for the consent or at the recipient’s own initiative.

* * *

(i) “Initiate” means to transmit or cause to be transmitted a commercial e-mail advertisement or assist in the transmission of a commercial e-mail advertisement by providing electronic mail addresses where the advertisement may be sent

* * *

(l) “Preexisting or current business relationship,” as used in connection with the sending of a commercial e-mail advertisement, means

that the recipient has made an inquiry and has provided his or her e-mail address, or has made an application, purchase, or transaction, with or without consideration, regarding products or services offered by the advertiser.

Commercial e-mail advertisements sent pursuant to the exemption provided for a preexisting or current business relationship shall provide the recipient of the commercial e-mail advertisement with the ability to “opt-out” from receiving further commercial e-mail advertisements by calling a toll-free telephone number or by sending an “unsubscribe” e-mail to the advertiser offering the products or services in the commercial e-mail advertisement. This opt-out provision does not apply to recipients who are receiving free-email service with regard to commercial e-mail advertisements sent by the provider of the e-mail service.

* * *

(o) “Unsolicited commercial e-mail advertisement” means a commercial e-mail advertisement sent to a recipient who meets both of the following criteria:

- (1) The recipient has not provides direct consent to receive advertisements from the advertiser.
- (2) The recipient does not have a preexisting or current business relationship, as defined in subdivision (l), with the advertiser promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

Section 17529.2

Notwithstanding any other provision of law, a person or entity may not do any of the following:

(a) Initiate or advertise in an unsolicited commercial e-mail advertisement from California or advertise in an unsolicited commercial e-mail advertisement sent from California.

(b) Initiate or advertise in an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.

* * *

Section 17529.5

(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:

... (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.

* * *

(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.

* * *

Section 17529.8

(a)(1) In addition to any other remedies provided by this article or by any other provisions of law, a recipient of an unsolicited commercial e-mail advertisement transmitted in violation of this article, an electronic mail service provider, or the Attorney General may bring an action against an entity that violates any provision of this article to recover either or both of the following:

(A) Actual damages.

(B) Liquidated damages of one thousand dollars (\$1,000) for each unsolicited commercial e-mail advertisement transmitted in violation of Section 17529.2, up to one million dollars (\$1,000,000) per incident.

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

* * *

(b) If the court finds that the defendant established and implemented, with due care, practice and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements that are in violation of this article, the court shall reduce the liquidated damages recoverable under subdivision (a) to a maximum of one hundred dollars (\$100) for each unsolicited commercial e-mail advertisement, or a maximum of one hundred thousand dollars (\$100,00) per incident.

Section 17538.5

(a) It is unlawful in the sale or offering for sale of consumer goods or services for any person conducting, any business in this state which utilizes a post office box address, a private mailbox receiving service, or a street address representing a site used for the receipt or delivery of mail or as a telephone answering service, to fail to disclose the legal name under which business is done and, except as provided in paragraph (2) of subdivision (b), the complete street address from which business is actually conducted in all advertising and promotional materials, including order blanks and forms. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not

exceeding six months, or by a fine not exceeding two thousand five hundred dollars (\$2,500), or both.

There Is No Federal Preemption

The Court also held that Plaintiff's first cause of action for violation of Business & Professions Code Section 17529 *et seq.* is not pre-empted under federal law, for the reasons set forth on the record which are incorporated herein by reference without repeating. As its "objection" to the tentative statement of decision, Defendant argues further with additional authorities cited for the proposition that the California anti-spam statute is preempted by federal law, known as CAN-SPAM, 15 U.S.C. §7701 *et seq.* This further argument does not lead the Court to a difference conclusion, and the Court finds that Plaintiff's claim is not preempted by federal law.

That the California statute is *not* preempted by federal law is supported by Asis Internet Services v. Consumerbargaingiveaways LLC (N.D. Cal. 2009) 622 F.Supp.2d 935; Asis Internet Services v. Subscriberbase Inc. (N.D. Cal. 2009) 2009 U.S. Dist. LEXIS 112852; Asis Internet Services v. Vistaprint USA Inc. (N.D. Cal. 2009) 617 F.Supp.2d 989; see also Ferguson v. Friendfinders Inc. (2002) 94 cAL.aPP.34TH 1255, 1267-1268 ("We find that California has a substantial legitimate interest in protecting its citizens from the harmful effects of deceptive UCE [unsolicited commercial e-mail]"). Congressional legislative history reflects that "a State law prohibiting fraudulent or deceptive headers, subject lines, or content in commercial e-mail would not be preempted." S. Rep. No. 108-102.

Defendants assert that the Ninth Circuit decision in Gordon v. Virtumundo Inc. (9th cir. 2008) 575 F.3d 1040, supports its assertion of preemption. It does not demonstrate preemption as to Plaintiff's claims herein. First, the Ninth Circuit in Gordon was applying Washington State law, which is *not* the same as our California statute. For example, the Washington State statute, Wash. Rev. Code §19.190.010 *et seq.*, does not require that the "initiator" of the spam email *know* that it is false or misleading, and does not require that any false information or misrepresentation be *material*. Second, the Ninth Circuit in Gordon held that Gordon's claim was not for a deceptive or fraudulent practice, because he was able to easily trace and identify the actual owner of the domain names used and the sending of the emails. Gordon, at p. 1064. The Ninth Circuit explicitly distinguished the sort of claim – as alleged by Plaintiff Balsam – which *would* be exempt and *not* subject to federal preemption:

Nothing contained in this claim [by Gordon] rises to the level of "falsity or deception" within the meaning of the CAN-SPAM Act's preemption clause. Gordon offers no proof that any headers have been altered to impair a recipient's ability to identify, locate, or respond to the person who initiated the e-mail. Nor does he present evidence that Virtumundo's practice is aimed at misleading recipients as to the identity of the sender.

Gordon, at p. 1064. Plaintiff Balsam *has* proven that Defendant Trancos intentionally undertook efforts to impair a recipient's ability to identify, locate, or respond to it as the initiator of the email, and that it intended to hide itself from identification by recipients as the sender.

Legal Analysis

The evidence reflects that Defendant Brian Nelson was acting at all relevant times as an officer and employee of Defendant Trancos Inc. in regard to the subject transactions, and thus liability and responsibility reposes in the corporation and not in Defendant Nelson individually.

Plaintiff has demonstrated by a preponderance of the evidence that his email is a California email as defined in Section 17529.1(b), that the eight emails he received from Defendant Trancos are commercial email advertisements as defined in Section 17529.1(c), that Plaintiff did *not* give direct consent to receive commercial email advertisements from any of these eight advertisers nor from Trancos nor from Hi-Speed Media nor from Give Away Cafe.com as defined in Section 17529.1(d), that Defendant Trancos initiated the eight emails sent to Plaintiff as defined in Section 17529.1(i), and that Plaintiff had no preexisting or current business relationship with any of the eight advertisers whose products or services were the subject of the eight emails as defined in Section 17529.1(l).

Even if there had been a preexisting or current business relationship, Defendant Trancos did not comply with the opt-out requirements of Section 17529.1(l), nor did the eight advertisers. The statute requires that there be an opportunity to opt-out by calling a toll-free number or “by sending an unsubscribe e-mail to the advertiser offering the products or services in the commercial e-mail advertisement”. *None* of the eight emails provided a toll-free number to call to opt-out. *Seven* of the eight emails did not provide the ability to send an “unsubscribe” email *to the advertiser* of the product or service advertised in the email. Only the email for eHarmony nominally provided a link to eHarmony. Defendants presented no evidence that clicking the opt-out on the email

would have sent an unsubscribe message *to the advertiser*. Trancos was not the advertiser because it was not selling any product or service advertised in the email – the same is true for Hi-Speed Media.

Plaintiff has asserted that Email #1 violates Section 17529.5(a)(3) for having a false subject line, in that the representation, “Get paid 5 dollars for 1 survey”, is false. Yet, Section 17529.5(a)(3) requires “that a person knows” it “would be likely to mislead a recipient”. Plaintiff did not prove by a preponderance of the evidence that Trancos or its officers (such as Nelson) actually *knew* this was a false statement or was misleading.

Plaintiff has asserted that all eight emails violate Section 17529.5(a)(2) because of “falsified, misrepresented, or forged header information”. There is no evidence that header information was forged. Rather the issue is whether it is falsified or misrepresented. Other than the email for eHarmony, which does state that it is from eHarmony, the seven other emails do not truly reveal who sent the email. Thus the sender information (“from”) is misrepresented. All of these emails came from Defendant Trancos, but none of the emails disclose this in the header (or the body or the opt-out). The emails were sent on behalf of eight different advertisers, i.e., purveyors of good and service, but only eHarmony was a real company. The rest of the “senders” identified in the headers of the other seven emails do not exist or are otherwise misrepresented, namely Paid Survey, Your Business, Christian Dating, Your Promotion, Bank Wire Transfer Available, Dating Generic, and Join Elite. In those same headers reflecting the “from” line of the email, the referenced sender email is a non-existence entity using a nonsensical domain name reflecting no actual company, namely *misstepoutcome.com*,

modalworship.com, moussetogether.com, mucousmarquise.com, minuteprovenance.com, mythicaldumbwaiter.com, and nationalukulele.com.²

Accordingly, Plaintiff would be entitled to “liquidated damages”³ against Defendant Trancos Inc. pursuant to Section 17529.5(b)(1)(B) of \$7000.00 (seven spam multiplied by \$1000).

Alternatively, Plaintiff has proven by a preponderance of the evidence that each of these eight emails constituted an unsolicited commercial e-mail advertisement as defined in Section 17529.1(o). Plaintiff has demonstrated that Defendant Trancos violated Section 17529.2 by initiating spam to a California email (and also sent from California).

Accordingly, based upon the identical evidence and allegations, Plaintiff would be entitled

² This Court acknowledges that the California Supreme Court presently has pending a decision, upon certification by the Ninth Circuit, to answer the following question of law: “Does sending unsolicited commercial email 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)?” (S169195.) In our case, the issue is not just sending of spam through multiple domain names, but that the “sender” names (or domain names used) do not represent any real company, and cannot be readily traced back to the true owner/sender. Contrary to the assertion by Defendant, the same cannot be said of use of email from “aol.com” or “comcast.net” or “google.com” because those all reflect a real existing company that actually does business.

³ In its “objection” to the tentative decision, Plaintiff argues extensively that the award should be called liquidated damages and not a penalty. In this case, there is no material distinction, i.e., the liquidated damages are the same as a statutory penalty. “Liquidated damages” consisting of a fixed sum with no demonstrate that the fixed amount is a fair approximation of probable damages for a violation or breach is the same as a “penalty” under the law. See Ridgley v. Topa Thrift & Loan Assn. (1998) 17 Cal.4th 970, 977. Here, there is no evidence and no legislative history reflecting that the \$1000 amount in the “liquidated damages” provision is calculated based upon anticipated damages that one would actually incur for a violation of the statute; rather it is simply a fixed penalty. Further, despite its extensive argument, Plaintiff points to no substantive or material difference as to the effect in this case if the Court calls it a penalty or calls it liquidated damages.

to a (non-duplicative) remedy of a monetary penalty of \$8000.00 (8 spam emails multiplied by \$1000).

As Plaintiff is required by law to only receive damages or penalties under one of these two anti-spam statutes, as its primary claim was under Section 17529.5, the Court will only award the lesser amount of \$7000.00.


The statutes provide a mitigation clause if the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent spam. See §17529.5(b)(2) and §1759.8(b). Defendant has failed to demonstrate the elements of the mitigation clause by a preponderance of the evidence. Indeed, the evidence reflects that Trancos intentionally and affirmatively established practices and procedures to avoid all human contact, avoid the ability of members of the public to contact Trancos directly to stop the sending of emails, and avoid members of the public even *knowing* who actually sent the emails.

Although not the basis of a claim, Plaintiff presented evidence that Trancos violated Section 17538.5 by giving a phony name for a nonexistence company as the business name for its UPS Store private mailbox address listed on each of the eight emails sent to Plaintiff, in that the mailbox was registered under the name of USAProductsOnline.com. This further denigrates any assertion that Defendant was acting with due care and design to avoid sending spam.

IT IS HEREBY ADJUDGED AND ORDERED that Defendant Trancos Inc. is liable to Plaintiff Daniel L. Balsam on the first cause of action for violation of the Business & Professions Code, and Plaintiff is awarded statutory "liquidated damages" of \$7000.00

against Defendant Trancos Inc. The third cause of action for declaratory relief is DENIED AND DISMISSED AS MOOT. Defendant Trancos Inc. is not liable to Plaintiff Daniel L. Balsam on the second cause of action for violation of the Consumers Legal Remedies Act, and Plaintiff shall take nothing thereon. Defendant Brian Nelson is not liable to Plaintiff Daniel L. Balsam on any cause of action, and Plaintiff shall take nothing from Defendant Brian Nelson. No punitive damages are awarded to Plaintiff as Plaintiff has not presented actual damages by a preponderance of the evidence, and there is no statutory right to punitive damages for violation of the Business & Professions Code sections at issue here. Plaintiff is deemed the prevailing party as to Defendant Trancos Inc. and entitled to recovery of reasonable attorneys' fees and costs, pursuant to timely filing and service of a Memorandum of Costs and a Motion for Award of Attorneys' Fees.

DATED: March 10, 2010



HON. MARIE S. WEINER
JUDGE OF THE SUPERIOR COURT

AFFIDAVIT OF MAILING

ENDORSED FILED
SAN MATEO COUNTY

CASE NUMBER: CIV 471797

MAR 10 2010

DANIEL L. BALSAM vs TRANCOS, INC. et al

Clerk of the Superior Court
By TERRI MARAGOULAS
DEPUTY CLERK

JUDGMENT AND FINAL STATEMENT AND DECISION

I declare, under penalty of perjury, that on the following date I deposited in the United State Post Office Mail Box at San Mateo, California a true copy of the foregoing document, enclosed in an envelope, with the proper and necessary postage prepaid thereon, and addressed to the following:

TIMOTHY WALTON, ESQ.
801 Woodside Road, Suite 11
Redwood City, CA 94061-3751

ROBERT NELSON
NELSON & WEINKAUF
35 Mitchell Blvd., Suite 15
San Rafael, CA 94903

Executed on: March 10, 2010
at San Mateo, California

JOHN FITTON
CLERK OF THE SUPERIOR COURT

By: TERRI MARAGOULAS
Terri Maragoulas, Deputy Clerk