



## William Silverstein v. Keynetics Inc. et al

2016 | Cited 0 times | N.D. California | June 27, 2016

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Northern District of California

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

WILLIAM SILVERSTEIN,

Plaintiff, v. KEYNETICS INC., et al.,

Defendants.

Case No. 16-cv-00684-DMR

ORDER ON MOTIONS TO DISMISS Re: Dkt. Nos. 6, 13

Defendants 418 Media LLC and Lewis Howes, and specially appearing Defendants Keynetics, Inc. and Click Sales, Inc. separately move pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(2) to dismiss Plaintiff William s. 6, 13.] The court ordered the parties to file supplemental briefing on the motions, which the parties timely filed. [Docket Nos. 34-36.] The court held a hearing on April 28 s to dismiss are granted s for relief are preempted by federal law. I. BACKGROUND

amended complaint, and are assumed to be true for purposes of this motion. 1

Plaintiff brings this putative cl FAC ¶ 4. Through his membership in

that group, he received unlawful commercial emails that came from fictitiously

1 Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam) (citation omitted).

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named senders through the LinkedIn group email system. The emails were sent from the domain



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linkedin.com even though non-party LinkedIn did not authorize the use of its domain, and was not the actual sender of the emails. Id. at ¶¶ 30, 42.

The bodies of the emails contain links to web pages at linkedinfluence.com, paidsurveyauthority.com, takesurveysforcash.com, click4surveys.com, and getcashforsurveys.com. Id. at ¶ 4. Plaintiff alleges upon information and belief that these links

wholly owned subsidiary of Keynetics. Id. at ¶¶ 6, 14. He also alleges upon information and belief that 418 Media owns the domain name linkedinfluence.com, and that Doe 2 is Lewis Howes, an individual who owns and operates 418 Media. Id. at ¶ 12.

Plaintiff alleges that the information in the field in the email headers falsely states who is actually sending or advertising in the spam emails. Id. at ¶¶ 32, 34. For example, the include and Paine, none of whom are the true senders of the emails. Moreover, the ames do not

identify the web page links contained in the bodies of the emails, nor do they appear to be associated with any of the Defendants. Id. at ¶¶ 36, 37.

Plaintiff attached an exemplar email to his amended complaint. It contains the following email header information:

From: -noreply@linkedin.com> Subject: [New discussion] How a newbie banked \$5K THIS Date: Sat, July 11, 2015 1:22 am To: linkedin.com@[redacted]> Id. at ¶ 26, Ex. A. The body of the email contains a web link. Id. Plaintiff received at least 86 spam emails from July 6, 2015 to November 17, 2015 advertising linkedinfluence.com, paidsurveyauthority.com, takesurveysforcash.com, click4surveys.com, and getcashforsurveys.com, all of which had from ames in their headers. Id. at ¶¶ 35, 36.

Plaintiff asserts one claim for violation of California Business and Professions Code section 17529.5, which prohibits certain unlawful activities related to commercial email

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advertisements. He seeks liquidated damages of \$1,000 per unlawful email message, as well as Id. at ¶¶ 65-71. Defendants 418 Media and Howes move pursuant to Rule 12(b)(6) 17529.5 claims are preempted by the federal Controlling the Assault of Non-Solicited - U.S.C. §§ 7701-7713; 2) the amended complaint is not pled with the requisite specificity; and 3) Plaintiff does not plead Defendants Keynetics and Click Sales join in 418 the ground of federal preemption. [Docket No. 13 at 8.] Keynetics and Click Sales also move pursuant to Rule 12(b)(6) for failure to state a claim against



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Keynetics, and pursuant to personal jurisdiction. 2 II. LEGAL STANDARDS

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims alleged in the complaint. See *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). When reviewing a motion to dismiss *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)

le legal

*Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.

content that allows the court to draw the reasonable inference that the defendant is liable for the *Iqbal*, 556 U.S. at 678 (citation omitted). In other words, the facts alleged

*Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007) (citing

2 Click Sal

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*Papasan v. Allain*, 478 U.S. 265, 286 (1986)); see *Lee v. City of L.A.*, 250 F.3d 668, 679 (9th Cir. 2001), overruled on other grounds by *Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). III. DISCUSSION

A. Preemption California Business and Professions Code section 17529.5 governs unsolicited commercial -mail advertisement either sent from California or sent to a California electronic mail address under any

(1) The e-mail advertisement contains or is accompanied by a third- 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. 3

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. Cal. Bus. & Prof. Code § 17529.5(a). Plaintiff alleges that the emails at issue violate section 17529.5(a)(1) because they were sent from the linkedin.com domain, even though LinkedIn did not authorize the use of its domain and was not the actual sender of the emails. FAC at ¶¶ 30, 42. He alleges t from



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names misrepresent who is advertising in the emails and who sent the emails. Id. at ¶¶ 32-34, 37, 41, 42.

All section 17529.5 claims are preempted by the federal CAN-SPAM Act. The CAN-SPAM Act contains an express preemption

3 Kleffman v. Vonage Holdings Corp., 49 Cal. 4th 334, 340 n.5 (2010), the California Supreme Court applied the CAN- information attached to an electronic mail message, including the originating domain name and originating electronic mail address, and any other information that appears in the line identifying,

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provision which provides as follows:

(1) In general. This chapter supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto. (2) State law not specific to electronic mail. This chapter shall not be construed to preempt the applicability of

(A) State laws that are not specific to electronic mail, including State trespass, contract, or tort law; or (B) other State laws to the extent that those laws relate to acts of fraud or computer crime. 15 U.S.C. § 7707(b) (emphasis added).

The Ninth Circuit has interpreted the CAN-SPAM Acts preemption clause as preempt[ing] state regulation of commercial e-mail with limited, narrow exception. Congress

-mail Gordon v. Virtumundo, Inc., 575 F.3d 1040, 1061 (9th Cir. 2009).

Defendants make two preemption arguments. First, they assert that preempted to the extent they challenge the fact that the names in the field misrepresent the

actual email advertisers. Such claims do not address false or deceptive information, and instead amount to . See Gordon, 575 F.3d at 1064. Defendants also argue that any challenge to the fact that the e is preempted, because breach of a user agreement is not -8.

In Gordon, the Ninth Circuit held that the CAN- exception from preemption for laws prohibiting conduct. 575 F.3d at 1062 (citing Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F.3d 348,



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354 (4th Cir. 2006)). Thus, in order to satisfy the preemption exception, the false or deceptive information in a commercial email must be material. Id. In reaching this conclusion, t in Omega have intended, by way of the carve- Case 4:16-cv-00684-DMR Document 52 Filed 06/27/16 Page 5 of 12 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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insignificant inaccuracies immaterial error in commercial e-

Id. at 1061 (quoting Omega, 469 F.3d at 354-55). Therefore, in order to prevail on a state law claim alleging false or deceptive header information in a commercial email and avoid CAN-SPAM Act preemption, a plaintiff must be able to demonstrate that the header information violates the state statute and contains material misrepresentations. See Wagner v. Spire Vision LLC, No. C 13-04952 WHA, 2015 WL 876514, at \*3 (N.D. Cal. Feb. 27, 2015); Asis Internet Services v. Member Source Media, LLC, No. C-08-1321 EMC, 2010 WL 1610066, at \*4 (N.D. Cal. April 20, 2010) Gordon, the Ninth Circuit clearly held that falsity and deception as used in the CAN-SPAM preemption provision

After interpreting the CAN-SPAM Act preemption clause, the Ninth Circuit in Gordon The plaintiff in Gordon argued that the defendant with header information that misrepresented identity. 4

Defendant, a company called Virtumundo, sent emails from addresses such as inalJustice@vm- - Gordon, 575 F.3d at 1063. Although the Gordon plaintiff conceded that he was not misled or deceived by the information in the , he nevertheless argued tha . . . violate[d] CEMA because they fail[ed] to clearly identify Virtumundo as the e- and therefore misrepresent[ed] or obscure[d] Id.

The Ninth Circuit affirmed, finding that the claim was for than comprehensive information regarding the [identify of the email] sender. Id. at 1064. Such actions do - . Id. at 1063.

4 The plaintiff in Gordon alleged the defendant violated a provision of CEMA that prohibited the transmission of a c name without permission of the third party, or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic Gordon, 575 F.3d at 1057 (citing Wash. Rev. Code § 19.190.020(1)(a)).

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The court noted (and the plaintiff conceded) that the domain registrant could readily be identified -look- Id. at 1064. The court concluded that technical allegations regarding the header information [found] no basis in traditional tort theories, therefore were preempted. Id. at 1064.



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The Gordon plaintiff broadly argued that a to obscure the identity of the sender amounts to actionable, non-preempted deception. Thus, according to the plaintiff,

-mail, or perhaps . . . the person or entity Id. at 1064 (second alteration in original). The court rejected this theory. It held that -SPAM Act does not impose such found Id. (citing S. Rep. No. 108-102, at 21-22

-mail to carry specific types of labels . . . or contain see also Kleffman v. Vonage Holdings Corp., No. CV 07-2406GAFJWJX, 2007 WL 1518650, at \*3 (C.D. Cal. May 23, 2007) (dismissing section

-102, at 21-22)). 5

Here, Plaintiff alleges that the information in the email headers is deceptive because it misrepresents who is advertising in the email ; see also FAC ¶¶ 34, 37, 40. Plaintiff asserts that the header information is deceptive in two ways. First, he contends that the sender fictitious and false. Second, Plaintiff asserts that the actual

5 The Ninth Circuit in Gordon did not analyze whether the state statute was itself preempted by the CAN-SPAM Act; instead, it determined preemption by examining the particular claims brought under the statute. Other courts have followed this approach. For example, in Asis Internet Services v. Member Source Media, LLC, No. C-08-1321 EMC, 2010 WL 1610066, at \*4 (N.D. Cal. April 20, 2010), the court dismissed as p same allegations that the plaintiff in Gordon made: that the header information was deceptive See also Kleffman, 2007 WL 1518650, at \*3 n.1 language of the statutes at issue to the savings clause, as opposed to examining the nature of the

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senders further hid their identities by using the linkedin.com domain to send the emails, thereby s goodwill.

preempted allegations made in Gordon; i.e., that the header information is deceptive because it does not clearly identify either the email sender or the entity advertising in the body of the email. See Gordon, 575 F.3d at 1063. To be sure, allegations differ from those made in Gordon. In Gordon use of domain names that did not clearly identify defendant Id. at 1064. Here, Plaintiff alleges that the email headers include names, (e.g., , Plaintiff claims that this practice is particularly deceptive because the emails misappropriate LinkedIn's goodwill, as they are sent through the linkedin.com domain without permission.

This is a difference without a distinction. The gravamen of Plaintiffs claim is identical to the theory



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that the Ninth Circuit has already rejected. Plaintiff alleges that the emails are deceptive because the headers do not reveal who ¶ 33, 34. Plaintiff does not claim that the email headers contain fraudulent information. For example, he , and that the email sender masqueraded as her, thereby misappropriating her identity. 6

Plaintiff also does not allege that the headers were deceptive because the emails appeared to come from the linkedin.com domain, for, as Plaintiff concedes, all of the emails did come from the linkedin.com domain. The alleged violation of amount to a breach of contract, but the headers do not falsely or deceptively misrepresent the domain from which the emails actually traveled.

Plaintiff also does not allege that the header information deceived him into believing that the email was not commercial in nature, 7

or that he could not identify the true sender. In fact, like

6 email spoofing-mail appears to have Release, (July 21, 2003) 2003 WL 21692056 (D.O.J.). 7 It is unlikely Plaintiff could plausibly allege that he was deceived, given the clearly commercial

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the plaintiff in Gordon, Plaintiff admits that he was able to ascertain the true sender, and acknowledges that all of the emails at issue advertised the same five websites. 8

Accordingly, the court concludes that the headers at issue in this case are not meaningfully different from the headers at issue in Gordon of the CAN- See Gordon, 575 F.3d at 1064.

Gordon is the governing Ninth Circuit precedent on the issue of CAN-SPAM Act preemption. Unfortunately, Plaintiff did not address or distinguish Gordon in his opposition brief, 9

and Defendants did not discuss Gordon at length in their submissions. Accordingly, before the hearing, the court ordered the parties to submit supplemental briefing addressing, among other things, the applicability of Gordon to this case. [Docket No. 33.] In his supplemental brief, Plaintiff distinguishes Gordon on the basis that it examined preemption of Washington state law, not section 17529.5. This is not a persuasive distinction. Plaintiff also argues that Gordon did not

8 must include the names of the entities advertising in the emails, that is precisely the type of content or labeling requirement that the Gordon, 575 F.3d at 1064. 9 In his opposition, Plaintiff cites a number of cases in which district courts addressed whether a plaintiff seeking relief under section 17529.5 must allege and prove all of the elements of common law fraud, including reliance and



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damages, in order to satisfy the CAN- exception. See, e.g., *Wagner v. Spire Vision*, No. C 13-04952 WHA, 2014 WL 889483, at \*2-3 (N.D. Cal. March 3, 2014); *Asis Internet Servs. v. Vistaprint USA, Inc.*, 617 F. Supp. 2d 989, 992- 94 (N.D. Cal. 2009); *Hoang v. Reunion.com*, No. C-08-3518 MMC, 2010 WL 1340535, at \*4-6 (N.D. Cal. March 31, 2010); *Asis Internet Servs. v. Subscriberbase Inc.*, No. 09-3503 SC, 2009 WL 4723338, at \*3 (N.D. Cal. Dec. 4, 2009). These cases are inapposite because they did not address the issue before this court; specifically, whether the allegations of falsity or deception rise to the level required to escape preemption under Gordon. It is not clear why Plaintiff cited these cases, as claims are preempted because he failed to allege reliance and damages. However, the court notes that 418 Media and Howes improperly made this argument for the first time in their supplemental brief. [See Docket No. 34.] The court will not consider arguments raised for the first time on reply. See *United States ex rel. Giles v. Sardie* is improper for a moving party to introduce new facts or different legal arguments in the reply

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address the precise issue here, which is through LinkedIn without permission. However, as analyzed above, the factual differences between Gordon and this case do not support a different outcome.

Rather than attempt to grapple meaningfully with Gordon, Plaintiff relies primarily on *Balsam v. Trancos, Inc.*, 203 Cal. App. 4th 1083 (2012). That case is distinguishable. In *Balsam*, the court held that header information in a commercial e-mail is falsified or misrepresented for purposes of section 17529.5(a)(2) when it uses a sender domain name that neither identifies the actual sender on its face nor is readily traceable to the sender using a publicly available online database such as WHOIS. *Id.* at 1101 (emphasis in original). The *Balsam* defendant explicitly -up [domain]

preempted by the CAN- rate use of randomly chosen, as well as an element of

*Id.* at 1102-03. 10

Unlike the plaintiff in *Balsam*, Plaintiff does not allege that the headers of the emails at issue contained false and untraceable domain names. He admits that all were sent from linkedin.com, a readily identifiable domain. Plaintiff also does not allege that he could not determine the actual email senders; to the contrary, he alleges that the emails contained links to five web pages operated by Defendants. FAC ¶¶ 4, 27, 36.

Finally, at oral argument Plaintiff appeared to contend that the emails were deceptive because he was required to open them in order to determine the identity of the actual senders. The California Court of Appeal has rejected this argument. In *Balsam*, the court based its ruling on the fact that the sender deliberately used untraceable domain names. But the court explicitly . . . the presence of other





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10 As Plaintiff relies so heavily on Balsam, it is important to note that Balsam did not address the fact that the Ninth Circuit had held that the CAN-SPAM Act preempts any state law requirement that the actual sender be identified in a commercial email header. See Gordon, 575 F.3d at 1064.

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information identifying the sender in the body of the e-mail could affect liability under the 203 Cal. App. 4th at 1101 n.17. Two years after Balsam was decided, the California Court of Appeal in Rosolowski v. Guthy-Renker LLC, 230 Cal. App. 4th 1403, 1407 (2014), held

identify the official name of the entity which sent the e-mail, or merely because it does not identify an entity whose domain name is traceable from an online database, is readily ascertainable from the body of the e-mail (emphasis added). See also Wagner, 2015

WL 876514, at \*4-5 (granting summary judgment on 17529.5(a)(2) claim because emails in Here, Plaintiff admits that the bodies of the emails readily reveal the identity of the

senders. determine their senders is not actionable.

In sum, the court concludes that as in Gordonleged header deficiencies relate to, at most, non-deceptive statements or omissions and a heightened content or labeling See Gordon, 575 F.3d at 1064. They are accordingly preempted by the CAN- SPAM Act. The court therefore need not reach D

B. Leave to Amend

delay, bad faith, prejudice, and futility. Foman v. Davis, 371 U.S. 178, 182 (1962). Here,

y, Plaintiff is granted leave to amend the complaint. IV. CONCLUSION

For the foregoing reasons, file an amended complaint in conformance with this order within 14 days of the date of this order.

The June 29, 2016 case management conference is CONTINUED to August 31, 2016, with the

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IT IS SO ORDERED. Dated: June 27, 2016



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Donna M. Ryu United States Magistrate Judge

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

IT IS SO ORDERED

Judge Donna M. Ryu

