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San Francisco County Superior Court

JUL 22 2019

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN FRANCISCO**

MARTA GREENBERG, an individual; JOHN  
JUDGE, an individual; KAREN MANDEL, an  
individual; ANDREW MONROE, an individual;  
and KATIE VAN CLEAVE, an individual,

Plaintiffs,

v.

DIGITAL MEDIA SOLUTIONS LLC, a  
Delaware limited liability company; BILCO  
MEDIA INC., a business entity of unknown  
organization; ALLAN HUGHES, an individual;  
and DOES 1-100,

Defendants.

Case No. CGC-18-572010

**ORDER SUSTAINING DEFENDANT'S  
DEMURRER TO COMPLAINT**

On July 16, 2019, this Court heard and considered Defendant Digital Media Solutions LLC's demurrer to the Complaint for Damages filed by Plaintiffs Marta Greenberg, *et al.* Jacob Harker and Daniel L. Balsam appeared on behalf of Plaintiffs. Jay T. Ramsey appeared telephonically on behalf of Defendant. After considering the papers and evidence submitted in connection with the motions, as well as the oral argument of counsel presented at the hearing, this Court hereby rules as follows:



1 with its principal place of business in Clearwater, Florida, was the true sender of the emails through  
2 its marketing partners, and that it maintains a website at www.platinumautowarranty.com. (*Id.* ¶¶  
3 1, 13-15.)

4 The e-mail opens with a salutation to the recipient ("martagreenberg@yahoo.com" in the  
5 exemplar), followed by the words, "please confirm your extended warranty plan." (*Id.*, Fig. 1.)

6 The body of the e-mail reads as follows:

7 Your Vehicle's Warranty May Be Expiring Within 28 Days ::

8 View your warranty options below and see how you can prevent car trouble from breaking  
9 your bank.

10 Protect yourself from costly vehicle repairs. Without protection, auto issues could lead to  
11 severe financial hardship.

12 Below a "button" reading "View Your Warranty Options Here," which apparently contains a  
13 hyperlink to Defendant's website,<sup>2</sup> the body of the e-mail closes with an unsubscribe notice and a  
14 business name and address: "Transparent Auto Warranty, 7000 W. Palmetto Park Rd. Suite 210,  
15 Boca Raton, FL 33433." (*Id.* ¶ 14 & Ex. A.) At the hearing in this matter, Plaintiffs asserted that  
16 Transparent Auto Warranty is an affiliated company or fictitious name utilized by Defendant  
17 Digital Media Solutions and, as discussed below, they have offered to amend the complaint to  
18 allege as much.

19 Although the complaint as pled contains but a single cause of action, Plaintiffs seek to state  
20 three different claims for violation of a single subdivision of Section 17529.5, subdivision (a)(2).  
21 First, they allege that the "From Name" in the e-mails constituted "falsified, misrepresented, or  
22 forged header information" in violation of that provision. (Compl. ¶¶ 32-42.) Second, they allege  
23 that the e-mails also violated Section 17529.5(a)(2) because they were sent from sender domain  
24 names that neither identified the actual sender nor were readily traceable to the sender using a  
25 publicly available online database. (*Id.* ¶¶ 43-47.) Third, they claim that the "Subject Line" in the

26 <sup>2</sup> The "landing page" for each of the e-mails in question is identified in Exhibit A to the Complaint  
27 as "platinumautowarranty.com."

1 e-mails contained falsified or misrepresented information, and allege that also violated Section  
2 17529.5(a)(2). (*Id.* ¶¶ 48-51.) The Court addresses each in turn.

3 **From Names and Domain Names**

4 Article 1.8 of Division 7, Part 3 of the Business & Professions Code, §§ 17529-17606,  
5 “imposed broad restrictions on advertising in unsolicited commercial e-mail advertisements sent  
6 from or to a computer in California.” (*Hypertouch, Inc. v. ValueClick, Inc.* (2011) 192 Cal.App.4th  
7 805, 818.) In enacting the bill, the Legislature found, among other things, that unsolicited  
8 commercial e-mail advertisements (“spam”) comprise a substantial percentage of all e-mail traffic  
9 in the United States; that the increase in spam is an annoyance to recipients and creates an  
10 increasing drain on corporate budgets; and imposes costs on users and on businesses, including lost  
11 productivity and the additional equipment, software and manpower needed to combat the problem.  
12 (Bus. & Prof. Code § 17529(a),(b),(d),(e).) The Legislature found that “[t]he true beneficiaries of  
13 spam are the advertisers who benefit from the marketing derived from the advertisements.” (*Id.* §  
14 17529(k).) And, it found, “There is a need to regulate the advertisers who use spam, as well as the  
15 actual spammers, because the actual spammers can be difficult to track down due to some return  
16 addresses that show up on the display as ‘unknown’ and many others being obvious fakes and they  
17 are often located offshore.” (*Id.* § 17529(j).) Thus, “the Legislature did not intend the statute to  
18 apply solely to those entities that actually send or initiate a deceptive e-mail.” (*Hypertouch, Inc.*,  
19 192 Cal.App.4th at 820; see also *id.* at 821 [“both the text and legislative history of S.B. 186 make  
20 clear that section 17529.5 was intended to apply to entities that advertise in deceptive commercial  
21 e-mails, not only the spammers who send them”].)

22 Based on these findings, the Legislature enacted a number of restrictions, including a  
23 general ban on spam sent from California or to a California e-mail address, as well as prohibitions  
24 on collecting e-mail addresses for use in spam. (*Id.* §§ 17529.2, 17529.4.) At issue here are the  
25 provisions of Section 17529.5. Subdivision (a) of that statute makes it “unlawful for any person or  
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1 entity to advertise in a commercial e-mail advertisement either sent from California or sent to a  
2 California electronic mail address” under any of three circumstances:

- 3 (1) The e-mail advertisement contains or is accompanied by a third-party’s domain name  
4 without the permission of the third party.
- 5 (2) The e-mail advertisement contains or is accompanied by falsified, misrepresented, or  
6 forged header information. This paragraph does not apply to truthful information used  
7 by a third party who has been lawfully authorized by the advertiser to use that  
8 information.
- 9 (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.

10 (*Id.* § 17529.5(a)(1),(2),(3).) Subdivision (b) authorizes the Attorney General, an electronic mail  
11 service provider, and a recipient of an unsolicited commercial e-mail advertisement to bring an  
12 action against a person or entity that violates any provision of Section 17529.5 to recover either  
13 actual damages, liquidated damages of \$1,000 for each unsolicited commercial e-mail  
14 advertisement transmitted in violation of the statute, plus reasonable attorney’s fees and costs. (*Id.*  
15 § 17529.5(b)(1)(A),(B),(C).) A complaint that states a cause of action for violation of Section  
16 17529.5 is not preempted by the Controlling the Assault of Non-Solicited Pornography and  
17 Marketing Act of 2003 (CAN-SPAM Act), 15 U.S.C. § 7701 *et seq.* (*Hypertouch, Inc.*, 192  
18 Cal.App.4th at 825; accord, *Balsam v. Trancos, Inc.* (2012) 203 Cal.App.4th 1083, 1101-1103.)

19 As noted above, Plaintiffs’ claim in the complaint is brought under a single provision of this  
20 statute, Section 17529.5, subdivision (a)(2). The definitional provisions of the legislation do not  
21 specifically define “header information,” the key term in this provision. (See Bus. & Prof. Code §  
22 17529.1.) However, the courts have made clear that “header information” includes the domain  
23 names from which e-mails are sent (*Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334,  
24 340) and the purported sender names and e-mail addresses that appear in the e-mails’ “From” lines.  
25 (*Balsam*, 203 Cal.App.4th at 1092; see also *Kleffman*, 49 Cal.4th at 340 n.5 [quoting the federal  
26 CAN-SPAM Act, which defines “header information” in 15 U.S.C. § 7720(8) as “the source,  
27 destination, and routing information attached to an electronic mail message, including the

1 originating domain name and originating electronic mail address, and any other information that  
2 appears in the line identifying, or purporting to identify, a person initiating the message”].)

3 In *Kleffman*, our Supreme Court found that “a single e-mail with an accurate and traceable  
4 domain name neither contains nor is accompanied by ‘misrepresented . . . header information’  
5 within the meaning of section 17529.5,” explaining that “[a]n e-mail with an accurate and traceable  
6 domain name makes no *affirmative* representation or statement of fact that is false.” (49 Cal.4th at  
7 346-347.) In *Balsam*, conversely, the Court of Appeal held that “header information in a  
8 commercial e-mail is falsified or misrepresented for purposes of section 17529.5(a)(2) when it uses  
9 a sender domain name that *neither* identifies the actual sender on its face *nor* is readily traceable to  
10 the sender using a publicly available online database such as WHOIS.” (*Balsam v. Trancos, Inc.*,  
11 203 Cal.App.4th at 1101 (footnote omitted); cf. *Kleffman*, 49 Cal.4th at 340, 346-347 [domain  
12 names that “actually exist and are technically accurate, literally correct, and fully traceable to  
13 [defendant’s] marketing agents” did not constitute “misrepresented . . . header information”].) In  
14 *Balsam*, the court affirmed a judgment after a court trial against defendant, an Internet advertiser  
15 that had sent unsolicited commercial e-mail advertisements on behalf of eight different advertisers,  
16 where only one was a real company, and the other “senders” identified in the headers either did not  
17 exist or were otherwise misrepresented. (203 Cal.App.4th at 1093.) The court explained that  
18 unlike *Kleffman*, “an e-mail with a made-up and *untraceable* domain name affirmatively and  
19 *falsely* represents the sender has no connection to Trancos.” (*Id.* at 1098.)

20 Here, just as in *Balsam*, Plaintiffs allege that the senders’ domain names in Defendants’ e-  
21 mails (“badealz.com” is one example) did not represent real companies and could not be readily  
22 traced back to Defendant, the owner of the domain names and true sender of the emails. Nothing  
23 about the generic phrase “Vehicle Service Plan” identified Defendant as the sender of the e-mails,  
24 or referred to a real company or a product from which recipients could have identified it as the  
25 sender. “[W]here, as in this case, the commercial e-mailer intentionally uses privately registered  
26 domain names in its headers that neither disclose the true sender’s identity on their face nor permit



1 Complaint lists as the apparent sender a company called “Transparent Auto Warranty” with an  
2 address in Boca Raton, Florida, which Plaintiffs have admitted is either an affiliate or fictitious  
3 name utilized by Defendant. Indeed, in their opposition brief, Plaintiffs assert they could amend  
4 the complaint to state that Defendant Digital Media Solutions is the registrant of the domain name  
5 transparentautowarranty.com and operates the website with that name. Further, Plaintiffs allege  
6 that if recipients click in the body of the e-mails, a link takes them to Defendant’s “Platinum Auto  
7 Warranty” website where they are encouraged to make a purchase.

8       Thus, Plaintiffs cannot plausibly allege that Defendant attempted to conceal its identity, as  
9 the clear purpose of its e-mails, apparent from their face, was to drive traffic to its website. Just as  
10 in *Rosolowski*, that is, “the body of the e-mails was sufficient to enable the recipient to identify  
11 [Defendant] as the sender.” (230 Cal.App.4th at 1416.) Thus, Plaintiffs’ challenges to the From  
12 Names and domain names fail under *Rosolowski*. (See also *Wagner v. Spire Vision LLC* (N.D. Cal.  
13 Feb. 27, 2015) 2015 WL 876514, at \*4 [granting defendant’s motion for summary judgment where  
14 emails provided a hyperlink to the advertiser’s website, an unsubscribe link, and a mailing address  
15 for the sender; “[t]he sender’s identity could thus be readily ascertained from the bodies of the  
16 emails,” and the emails “were not materially falsified, misrepresented, or forged and met the  
17 criteria that the *Rosolowski* standard requires”].)

18       Plaintiffs attempt to distinguish *Rosolowski* on the ground that its holding was limited to the  
19 situation where the identity of the “sender,” as opposed to the “advertiser,” is ascertainable from  
20 the body of the e-mail. However, because Guthy-Renker, the advertiser, was the only named  
21 defendant in *Rosolowski*, there would have been no reason in that case for the court to draw that  
22 distinction. Nor would such a distinction find any support in the Legislature’s findings and overall  
23 objectives in enacting the legislation. To the contrary, the express findings quoted above make  
24 clear that “the Legislature did not intend the statute to apply solely to those entities that actually  
25 send or initiate a deceptive e-mail.” (*Hypertouch, Inc.*, 192 Cal.App.4th at 820.) Rather, “both the  
26 text and legislative history of S.B. 186 make clear that section 17529.5 was intended to apply to  
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1 entities that advertise in deceptive commercial e-mails, not only the spammers who send them.”  
2 (*Id.* at 821.) Plaintiffs offer no plausible explanation for why one category of defendant should be  
3 treated differently, nor why an e-mail from the body of which a recipient can identify the ultimate  
4 advertiser should be treated as “falsified” or “misrepresented” but one from which the advertiser’s  
5 marketing partner can be identified should not.

6 In short, because the recipients of the e-mails of which Plaintiffs complain could readily  
7 identify Defendant, the advertiser and ultimate “sender,” from the body of those e-mails, *Rosolowski*  
8 is controlling. While Plaintiffs attack *Rosolowski* as “illogical” and “wrong” (Compl. ¶ 42), it is  
9 controlling authority that is binding on this Court. (*Auto Equity Sales, Inc. v. Superior Court*  
10 (1962) 57 Cal.2d 450, 455; see also *Wagner*, 2015 WL 876514 at \*6 [“If we were writing on a  
11 clean slate, the undersigned judge would favor more honesty in email advertising than required by  
12 *Rosolowski*. Nevertheless it must be followed as the best statement of the law in California”].)

### 13 Subject Lines

14 Plaintiffs’ third claim—that the Subject Line of the e-mails constitutes falsified or  
15 misrepresented header information in violation of Section 17529.5(a)(2)—is readily rejected. That  
16 is because the Subject Line of an e-mail does not constitute part of the e-mail’s “header  
17 information” within the meaning of the statute. Rather, e-mail subject lines are covered by a  
18 different paragraph of Section 17529.5(a). Subdivision (a)(3) provides it is unlawful for any person  
19 or entity to advertise in a commercial e-mail advertisement either sent from California or sent to a  
20 California electronic mail address if “[t]he e-mail advertisement has a subject line that a person  
21 knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a  
22 material fact regarding the contents or subject matter of the message.” (§ 17529.5(a)(3).) Thus, the  
23 statute expressly distinguishes between an e-mail’s “header information,” which is governed by  
24 subdivision (a)(2), and its “subject line,” which is governed by subdivision (a)(3).


25 Plaintiffs’ assertion that “[t]he Subject Line is part of email headers” (Compl. ¶ 49) thus  
26 conflicts with the plain language and structure of the statutory scheme. It is also inconsistent with  
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1 standard canons of statutory interpretation, including one that the California Supreme Court  
2 invoked in interpreting the very same statutory provisions as those involved here: “when different  
3 words are used in contemporaneously enacted, adjoining subdivisions of a statute, the inference is  
4 compelling that a difference in meaning was intended.” (*Kleffman*, 49 Cal.4th at 343; see also *id.*  
5 at 345 [observing that legislative history of 2004 amendment to Section 17529.5(a)(2) “expressly  
6 recognized the linguistic differences between subdivision (a)(2) and (3) of section 17529.5”].)  
7 Indeed, the Supreme Court recognized in *Kleffman* that “the language in section 17529.5,  
8 subdivision (a)(3), fully articulat[es] the standard applicable to e-mail subject lines.” (*Id.* at 343;  
9 see also *Hypertouch, Inc.*, 192 Cal.App.4th at 836-840 [addressing under subdivision (a)(3) claim  
10 that subject lines were likely to mislead].) “Thus, [Plaintiffs] may only make claims regarding the  
11 emails’ subject lines under Section 17529.5(a)(3).” (*Wagner*, 2015 WL 876514 at \*6.)

12 For the foregoing reasons, the Complaint fails to state a viable cause of action for a  
13 violation of Section 17529.5(a)(2). However, it is possible that the portion of the complaint that  
14 seeks to challenge the Subject Lines may be amended to state a cause of action for a violation of  
15 Section 17529.5(a)(3), should Plaintiffs elect to pursue such a claim. Accordingly, Defendant’s  
16 demurrer is sustained with 20 days leave to amend.

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18 **IT IS SO ORDERED.**

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20 Dated: July 22, 2019

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22 ETHAN P. SCHULMAN  
23 JUDGE OF THE SUPERIOR COURT  
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SOLUTIONS LLC ET AL

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on July 22, 2019 I served the foregoing ORDER SUSTAINING DEFENDANT'S DEMURRER TO THE COMPLAINT on each counsel of record or party appearing in propria persona by causing a copy thereof to be enclosed in a postage paid sealed envelope and deposited in the United States Postal Service mail box located at 400 McAllister Street, San Francisco CA 94102-4514 pursuant to standard court practice.

Date: July 22, 2019

By: M. GOODMAN

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