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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ASIS INTERNET SERVICES, a	)	Case No. 09-3503 SC
California corporation, and JOEL	)	
HOUSEHOLTER, dba KNEELAND	)	ORDER GRANTING DEFENDANTS'
ENGINEERING, dba FOGGY.NET,	)	<u>MOTION TO DISMISS</u>
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
SUBSCRIBERBASE INC., et al.,	)	
	)	
Defendants.	)	
	)	

**I. INTRODUCTION**

Plaintiffs Asis Internet Services ("Asis") and Joel Householter, dba Foggy.Net ("Foggy") (collectively, "Plaintiffs"), brought this suit against Defendants Subscriberbase, Inc., et al. ("Defendants"), for alleged violations of section 17529.5 of the California Business & Professions Code. Docket No. 1 ("Compl."). This matter comes before the Court on Defendants' Motion to Dismiss ("Motion"). Docket No. 6. Plaintiffs have submitted an Opposition, Docket No. 7, and Defendants have submitted a Reply, Docket No. 12. Having considered the papers submitted by all parties, the Court GRANTS Defendants' Motion to Dismiss.

**II. BACKGROUND**

Asis and Foggy allege that they are providers of internet and

1 email services. Compl. ¶ 11-12. Asis provides services to about  
2 950 customers, and provides about 1500 email accounts (as of 2008);  
3 Foggy has roughly 75 customers and 180 email accounts (as of 2007).  
4 Id. Both claim that they employ filtering software to process and  
5 store unsolicited commercial email advertisements ("spam emails")  
6 that are sent to their customers' email addresses. Id.

7 According to Plaintiffs, Defendants have sent large volumes of  
8 spam emails to Plaintiffs' customers. Id. ¶ 2. Asis claims that  
9 between August 2, 2008 through July 7, 2009, Defendants sent a  
10 total of 1534 spam emails to "Asis' protected computers . . . with  
11 a subject line that a person would know would be likely to mislead  
12 a recipient, acting reasonably under the circumstances, about a  
13 material fact regarding the contents and subject matter of the  
14 message." Id. ¶ 13. Foggy claims that from July 31, 2008, through  
15 July 7, 2009, it received 922 similar spam emails. Id. ¶ 14.  
16 Plaintiffs explain that the emails "contained subject lines that  
17 were false and misleading in that they made an offer for a free  
18 product and did not provide anywhere in the email the terms and  
19 conditions for that offer." Id. ¶ 17. Plaintiffs have provided a  
20 list of the offending email subject lines, as well as a number of  
21 sample emails. See Compl. Exs. H ("First Email Samples"), I  
22 ("Second Email Samples"), J ("First Subject List"); Opp'n Ex. A  
23 ("Second Subject List"). Plaintiffs identify a total of 117  
24 subject lines in emails collected by Asis and 116 subject lines in  
25 emails collected by Foggy. See Second Subject List at 1-6.

26 Examples of the offending subject lines include: "Go shop at  
27 Old Navy Stores loaded with \$1000 Cash for Free!"; "Let us buy you  
28 a 1080p HDTV;" "Test & Keep the 2 New Blackberry Storms;" "Free

1 Blackberry Storm," and similar subject lines suggesting that the  
2 recipient could "test and keep" particular products or otherwise  
3 get them for "free," "on us," or "on our tab." Id. The body of  
4 the sample emails provided by Plaintiffs typically includes a  
5 disclaimer stating that the email is an advertisement, and  
6 indicating that the "[p]romotion . . . is subject to terms and  
7 conditions. See website for complete details." See, e.g., Second  
8 Email Samples at 6. Should the recipient click on the hyperlink  
9 included in the email, the recipient's web browser will load a  
10 "landing page[]" where they must submit information to continue.  
11 Only at this point are they given any information of the actual  
12 terms of the offer . . . ." Compl. ¶ 20. The terms "contain the  
13 following or a similar statement:"

14 1) Must be a legal US resident; 2) must be at  
15 least 18 years old or older; 3) must have a valid  
16 email and shipping address; 4) Eligible members  
17 can receive the incentive gift package by  
18 completing two reward offers from each of the  
19 Top, Prime and Premium reward offer page options.  
20 Various types of reward offers are available.  
21 Completion of reward offers most often requires a  
22 purchase or filing a credit application and being  
23 accepted for a financial product such as a credit  
24 card or consumer loan. The following link  
25 illustrates a Representative Sample of reward  
26 offers by group along with monetary and non-  
27 monetary obligations. Failure to submit accurate  
28 registration information will result in loss of  
eligibility.

23 Id.

24 Plaintiffs allege that, in sending the above-described emails,  
25 Defendants have violated section 17529.5 of the California Business  
26 & Professions Code ("section 17529.5"), part of the California  
27 False Advertising Law ("FAL"). Id. ¶¶ 16-30. Plaintiffs seek  
28 statutory damages totaling \$2,456,000. Id. at 13-14. Defendants

1 have moved to dismiss Plaintiffs' Complaint.

2  
3 **III. LEGAL STANDARD**

4 A motion to dismiss under Federal Rule of Civil Procedure  
5 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.  
6 Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based  
7 on the lack of a cognizable legal theory or the absence of  
8 sufficient facts alleged under a cognizable legal theory.  
9 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
10 1990). Allegations of material fact are taken as true and  
11 construed in the light most favorable to the nonmoving party.  
12 Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir.  
13 1996). Although well-pleaded factual allegations are taken as  
14 true, a motion to dismiss should be granted if the plaintiff fails  
15 to proffer "enough facts to state a claim for relief that is  
16 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544,  
17 547 (2007). The court need not accept as true legal conclusions  
18 couched as factual allegations. Ashcroft v. Iqbal, 129 S.Ct. 1937,  
19 1949-50 (2009). "Threadbare recitals of the elements of a cause of  
20 action, supported by mere conclusory statements, do not suffice."  
21 Id. at 1949.

22 Where plaintiffs allege fraud, or conduct that is sufficiently  
23 "grounded in fraud," they must plead their claim with particularity  
24 as required by Rule 9(b) of the Federal Rules of Civil Procedure.  
25 See Edwards v. Marin Park, Inc., 356 F.3d 1058, 1065-66 (9th Cir.  
26 2004); Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir.  
27 2003). Plaintiffs must include "the who, what, when, where, and  
28 how" of the fraud. Vess, 317 F.3d at 1106 (citations omitted). A

1 plaintiff satisfies the particularity requirement only if his or  
2 her allegations are "specific enough to give defendants notice of  
3 the particular misconduct which is alleged to constitute the fraud  
4 charged so that they can defend against the charge and not just  
5 deny that they have done anything wrong." Bly-Magee v. California,  
6 236 F.3d 1014, 1019 (9th Cir. 2001) (citation and internal  
7 quotation marks omitted).

8  
9 **IV. DISCUSSION**

10 **A. Preemption Under the CAN-SPAM<sup>1</sup> Act**

11 Defendants argue that Plaintiffs' cause of action is expressly  
12 preempted by the CAN-SPAM Act, 15 U.S.C. § 7707(b)(1). Mot. at 5-  
13 8. The savings provision of the CAN-SPAM Act states that it  
14 "supersedes any statute . . . except to the extent that any such  
15 statute . . . prohibits falsity or deception in any portion of a  
16 commercial electronic mail message . . . ." Id. Defendants argue  
17 that this provision only saves common law fraud claims, and that  
18 Plaintiffs must therefore plead every element of common-law fraud,  
19 or their cause of action will be preempted by the CAN-SPAM Act.  
20 Mot. at 6. This would require Plaintiffs to establish both  
21 reliance and damages -- something that they are apparently not in a  
22 strong position to plead.

23 District courts in California are split on the question of  
24 whether this savings clause only exempts state laws that are based  
25 on common law fraud. In particular, the courts have disagreed over  
26 whether section 17529.5 can avoid preemption without requiring

27  
28 <sup>1</sup> "CAN-SPAM" stands for "Controlling the Assault of Non-Solicited  
Pornography and Marketing."

1 plaintiffs to show each element of common law fraud, including  
2 reliance and damages. Compare Asis Internet Servs. v. Vistaprint  
3 USA, Inc., 617 F. Supp. 2d 989 (N.D. Cal. 2009) (section 17529.5 is  
4 not preempted, even though it does not require showing of reliance  
5 or damages) and Asis Internet Servs. v. Consumerbargaingiveaways,  
6 LLC, 622 F. Supp. 2d 935, 940-44 (N.D. Cal. 2009) (same) with Hoang  
7 v. Reunion.Com, Inc., No. 08-3518, 2008 U.S. Dist. LEXIS 85187, \*4-  
8 6 (N.D. Cal. Oct. 6, 2008) (finding that CAN-SPAM only allows state  
9 causes of action based on common law fraud and dismissing section  
10 17529.5 complaint that does not allege reliance and damages). This  
11 Court agrees with those courts that have read the terms "falsity or  
12 deception" broadly, thereby saving more than just common law fraud  
13 claims and narrowing the preemptive effects of the CAN-SPAM Act.  
14 In particular, this Court agrees that Congress's use of the word  
15 "fraud" elsewhere in the section, and the CAN-SPAM Act's references  
16 to the word "deception" as used in the FTC Act, invite this broader  
17 reading. See Consumerbargaingiveaways, 622 F. Supp. 2d at 942.  
18 Plaintiffs therefore do not need to plead reliance and damages in  
19 order to avoid preemption of their claims.

20 **B. Pleading with Particularity**

21 As a threshold matter, the Court finds that Plaintiffs must  
22 plead their claim for violations of section 17529.5 with  
23 particularity, in accordance with Rule 9(b) of the Federal Rules of  
24 Civil Procedure. Plaintiffs argue that they need only meet the  
25 requirements of Rule 8(a), instead of the heightened pleading  
26 requirements of Rule 9(b). Opp'n at 12. However, Rule 9(b)  
27 applies to all claims that are "grounded in fraud," i.e., where  
28 plaintiffs allege a unified course of fraudulent conduct and rely

1 entirely on that conduct to form their claim. Vess, 317 F.3d at  
2 1104. Plaintiffs have alleged that Defendants intended to mislead  
3 the recipients of their emails, and induce reliance upon the  
4 subject lines. Compl. ¶ 20. Although section 17529.5 only  
5 requires Plaintiffs to plead knowledge of a likelihood of  
6 misleading a reasonable person, thereby eliminating the elements of  
7 reliance and damages that would be present in a common law fraud  
8 claim, the Court finds that the absence of these elements is not  
9 enough to eliminate the need for specificity. In most cases,  
10 pleading reliance and damages with specificity is not likely to be  
11 of much use in helping a defendant to prepare an adequate response;  
12 rather, it is the specific description of the other aspects of the  
13 fraud, "the who, what, when, where, and how," that will be most  
14 important in allowing a defendant to prepare its answer. C.f.  
15 Vess, 317 F.3d at 1106.

16 Defendants first argue that, because Plaintiffs name multiple  
17 defendants, Plaintiffs must identify the role that each defendant  
18 played in the alleged fraudulent schemes. Mot. at 10-11.  
19 Defendants go on to claim that they did not send the emails, or  
20 draft the emails, or register the domain names to send the emails.  
21 Id. at 10. However, the Court finds that the Complaint adequately  
22 alleges that Defendants "advertised in a commercial e-mail  
23 advertisement," and it describes, with particularity, sufficient  
24 ties between Defendants and the emails in question. In particular,  
25 Plaintiffs identify the various domain names for the landing sites  
26 that the emails provide links to, and state that the registrant for  
27 these landing sites is Subscriberbase Holdings, Inc., or a related  
28 entity with an identical address. See Compl. ¶ 7, Ex. D. Not only

1 does Subscriberbase Holdings, Inc., allegedly have an identical  
2 address with Defendants Consumer Research Corporation Inc. and  
3 Subscriberbase, Inc., but its services are touted on the website of  
4 Defendant Subscriberbase, Inc. Id. Ex. E. This is sufficient to  
5 support Plaintiffs' contention that "SUBSCRIBERBASE HOLDINGS and  
6 [Consumer Research Corporation] are in fact agents, partners,  
7 subsidiaries or employees of Defendant Subscriberbase." Compl.  
8 ¶ 8.

9 Plaintiffs have gone to great lengths to establish that the  
10 Defendants mentioned in the Complaint are related, and are  
11 connected with the email advertisements by the creation and  
12 maintenance of landing sites. Although it is possible that  
13 Defendants' involvement is greater than this, Plaintiffs have  
14 alleged with particularity at least one concrete role that  
15 Defendants have played. Additionally, Plaintiffs have alleged that  
16 Defendants are sufficiently interrelated (for the purpose of a  
17 motion to dismiss) to eschew the need to plead the specific role of  
18 each closely-related entity. Further details can be uncovered in  
19 discovery.

20 Defendants also fault Plaintiffs for alleging 2456 separate  
21 violations of section 17529.5, but only including a handful of  
22 (i.e., twenty-one) sample emails that specifically show the subject  
23 line, date, sender, and contents of the emails.<sup>2</sup> Mot. at 9; First  
24 Email Samples; Second Email Samples. This argument has merit.

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25 <sup>2</sup> The samples redact the recipients' email addresses for privacy  
26 reasons. The Court finds this to be appropriate at this stage of  
27 the litigation. If these email addresses turn out to be relevant,  
28 Defendants may discover them at a later date, subject to a  
protective order. See Consumerbargaingiveaways, 622 F. Supp. 2d at  
945.



1 Although Plaintiffs attach an appendix that apparently lists every  
2 email subject line, see First Subject List, this lacks important  
3 information about the sender, date, and content of the emails, and  
4 does not indicate how many copies of each email were received.  
5 Plaintiffs claim that the 2,456 emails are redundant, but they  
6 still contain roughly 230 different subject lines. Id. The Court  
7 recognizes that it would be impractical to require the submission  
8 of 2,456 emails, or even 230 sample emails. However, Plaintiffs  
9 can, at the very least, submit an appendix that contains each  
10 subject line, the total number of emails that bore it, and specific  
11 information about each email that bore it, including the sender,  
12 the date it was sent, and the landing site to which the email  
13 directs the recipient. As it is still useful to have a small  
14 number of sample emails, Plaintiffs should include with the amended  
15 complaint the sample emails that they included with their original  
16 Complaint; they need not include full samples of all 230 types of  
17 Defendants' emails.

18 In its current form, the Complaint states with particularity  
19 only twenty-one violations of section 17529.5, i.e., those  
20 violations that are based upon the twenty-one emails for which  
21 samples were attached. Plaintiffs do not state with particularity  
22 that they received multiple copies of these. Rather than attempt  
23 to sever and save these claims, the Court will DISMISS the  
24 Complaint in its entirety and allow Plaintiffs LEAVE TO AMEND so  
25 that they can plead each alleged violation with particularity, as  
26 outlined above.

27 ///

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1           **C. Whether the Subject Lines were Likely to Mislead**

2           Defendants argue that Plaintiffs fail to allege that the  
3 subject lines were misleading because they do not "allege that the  
4 recipients of the Emails were not entitled to these gifts." Mot.  
5 at 10. Plaintiffs' arguments do not rest upon charges that  
6 Defendants failed to send or offer the gifts in question; rather,  
7 Plaintiffs argue that the subject lines are misleading because they  
8 purport to provide "free" gifts (or gifts subject to additional  
9 language such as "on us," "review and keep," or "let us get you a .  
10 . ."), when the emails and associated web pages in fact offer gifts  
11 only to those who perform additional affirmative acts, such as  
12 signing up for a credit card or submitting a loan application.  
13 Compl. ¶ 20.<sup>3</sup> The Complaint alleges that the subject lines are  
14 deceitful because they falsely characterize the "gifts" as "free."  
15 As Plaintiffs characterize these "gifts," they are not "free," and  
16 the terms and conditions are too far removed from the subject lines  
17 to render the description accurate. See Compl. ¶¶ 18-21.

18 Defendants have not seriously attempted to challenge Plaintiffs'

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19           <sup>3</sup> Defendants also argue that some of the subject lines do not  
20 include "free" or an equivalent term. Mot. at 10. They cite a  
21 number of subject lines which, according to Plaintiffs, were  
22 accidentally cropped from the appendices attached to the Complaint,  
23 such that the use of the word "free" or equivalent statements did  
24 not appear. Plaintiffs have attempted to correct this by  
25 submitting an appendix to their Opposition, which does not crop the  
26 subject lines. Second Subject List. For example, Defendants fault  
27 Plaintiffs for claiming that the following subject line is  
28 deceptive: "Be the first to get Blackberry's newest phone-The  
Blackberry Storm." Mot. at 10. Plaintiffs' appended list shows  
that the subject line was actually "Be the first to get  
Blackberry's newest phone-The Blackberry Storm get two now- No cost  
to you." Second Subject List at 1. The Court notes that  
Plaintiffs cannot amend their Complaint by their opposition;  
however, because the Court is already dismissing all claims based  
on the subject lines listed solely in Plaintiffs' appendices,  
Plaintiffs may easily remedy this by submitting a list of complete  
subject lines with their amended complaint.

1 characterization. Read in a light most favorable to Plaintiffs,  
2 the Complaint sufficiently describes subject lines that are likely  
3 to mislead a recipient, acting reasonably under the circumstances.

4 **D. Standing**

5 Defendants do not argue in their Motion that Plaintiffs lack  
6 standing, except to argue that Plaintiffs must plead damages and  
7 reliance in their Complaint. As this Court previously noted,  
8 section 17529.5. does not require that Defendants plead damages and  
9 reliance in order to state a claim. See Part IV.A, supra.  
10 Further, the section specifically states that claims may be brought  
11 by "electronic mail service provider[s]." Cal. Bus. & Prof. Code  
12 § 17529.5(b)(1)(A)(ii). There is no suggestion that Plaintiffs may  
13 lack Article III standing. See Consumerbargaingiveaways, 622 F.  
14 Supp. 2d at 939-40 (finding that internet service providers have  
15 Article III standing to bring section 17529.5 claim). Although  
16 Defendants have raised a separate standing argument based on  
17 Proposition 64, Reply at 9-10, they did not make this argument in  
18 their opening memorandum, and this Court therefore declines to  
19 consider it.<sup>4</sup>

20  
21 **V. CONCLUSION**

22 The Court hereby GRANTS Defendants' Motion to Dismiss.  
23 Although the Complaint alleges with particularity twenty-one  
24 violations of section 17529.5, Plaintiffs attempted to allege 2456  
25 violations. The Court therefore DISMISSES the Complaint in its  
26

27 <sup>4</sup> Consideration of this issue would not likely change the outcome  
28 of this Order, as Proposition 64 expressly applies only to standing  
for plaintiffs who seek injunctive relief, and Plaintiffs here seek  
statutory damages. Cal. Bus. & Prof. Code § 17535.

1 entirety, but allows Plaintiffs leave to amend so that it can plead  
2 each of these violations with particularity. Plaintiffs may submit  
3 an amended complaint within thirty (30) days of the date of this  
4 Order.

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IT IS SO ORDERED.

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Dated: December 4, 2009

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UNITED STATES DISTRICT JUDGE

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