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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

TIMOTHY A. DEWITT,

Plaintiff and Appellant,

A141847

v.

**(San Francisco County
Super. Ct. No. CGC13532370)**

FOOT LOCKER RETAIL, INC. et al.,

Defendants and Respondents.

_____ /

California attorney Timothy A. DeWitt sued Foot Locker Retail, Inc. (Foot Locker) and 1Ink.com (1Ink) (collectively, defendants) in propria persona for, among other things, violating the California Anti-Spam Act (Bus. & Prof. Code, § 17529.5).¹ The trial court sustained defendants' demurrers to the operative complaint without leave to amend, concluding it failed to state a cause of action for violating section 17529.5 and failed to allege facts sufficient to support the joinder of defendants in one action (Code Civ. Proc., §§ 430.10, subs. (d), (e), 379, subd. (a)(1)). The court entered judgment of dismissal.

¹ For an overview of the California Anti-Spam Act, see *Rosolowski v. Guthy-Renker LLC* (2014) 230 Cal.App.4th 1403, 1410-1412 (*Rosolowski*.) Unless noted, all further statutory references are to the Business and Professions Code.

DeWitt appeals in propria persona. He contends: (1) the operative complaint stated a cause of action for violating section 17529.5; (2) defendants were properly joined in the lawsuit; and (3) the court erred by denying leave to amend. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

DeWitt filed a complaint against defendants alleging claims for violating section 17529.5 and declaratory relief.² After a federal district court denied Foot Locker's removal motion, defendants separately demurred to the complaint. In response, DeWitt filed the operative first amended complaint (complaint). The first cause of action alleged defendants sent "[u]nsolicited false or misleading commercial e-mails" in violation of section 17529.5. The complaint also alleged derivative claims for negligence and declaratory relief. DeWitt sought \$375,000 in statutory damages, punitive damages, and declaratory and injunctive relief.

The gravamen of the complaint asserts defendants sent DeWitt unsolicited commercial e-mail advertisements containing "false or misleading header and/or subject line information." The complaint alleged DeWitt received 345 to 355 e-mails from Foot Locker advertising the "'Foot Locker' or 'Champs' commercial brand" and 30 to 35 e-mails from 1Ink advertising 1Ink's "commercial brand, products, or services." According to the complaint, defendants' e-mails contained "misleading sender information . . . calculated to hide or disguise the true and correct identities of the persons or entities who actually sent . . . the e-mails" *or* contained "header or subject line information presented on the pretense that [d]efendants had an established or pre-existing commercial e-mail relationship with [DeWitt] or that [DeWitt] had somehow previously specifically consented or subscribed to receiving commercial e-mails" from defendants.

The complaint alleged "a large number of the emails" DeWitt received contained "generic header information, such as 'Foot Locker VIP,' which would mislead the

² DeWitt's appendix does not comply with the California Rules of Court. It is not arranged chronologically, is not paginated, and omits required documents. (Cal. Rules of Court, rules 8.122(b)(1), 8.124(b) & (d)(1), 8.144(a)(1).) DeWitt's opening brief refers to documents not included in his appendix. (Cal. Rules of Court, rule 8.204(a)(2)(C).) The court expects DeWitt to comply with the applicable rules of court in future filings.

ordinary consumer recipient as to the true identity of the person or entity actually transmitting the email” and “would lead the ordinary consumer recipient” to believe he or she had a “special pre-existing consensual commercial email relationship with Foot Locker” and was “somehow and specifically an existing preferred or ‘VIP’ consumer of Foot Locker.” The complaint further alleged the email’s domain name — “e.footlocker.com” — “further confuses and misleads the ordinary consumer recipient as to the true origin of the . . . deceptive email, and which is itself not readily traceable through an online ‘whois’ lookup.”³

The complaint attached an e-mail DeWitt claims he received from Foot Locker. The e-mail is from “Foot Locker VIP <Footlocker@e.footlocker.com>” and the subject line is “Keep it Clean, Keep it Classy With Fresh White Sneakers!” The body of the e-mail contains a large picture of white sneakers and the directive “Fresh & Clean! Shop white kicks now[.]” The body of the e-mail identifies Foot Locker four times and refers to “footlocker.com” three times and “footlocker@e.footlocker.com” once. (A copy of the e-mail is attached as an appendix to this opinion, with DeWitt’s e-mail address redacted.)

Defendants demurred separately but raised similar issues. They argued the complaint did not state a claim for a violation of section 17529.5 based on the e-mail attached to the complaint. They also argued the complaint failed to state a cause of action for the remainder of the e-mails DeWitt allegedly received because the complaint did not: (1) state when DeWitt received the e-mails; (2) identify the e-mail addresses where the e-mails were sent; (3) describe the content of the e-mails; or (4) explain how the header information or subject line information in the e-mails violated section 17529.5, subdivision (a). Additionally, defendants argued the complaint’s derivative negligence

³ “WHOIS ‘is a publically available online database through which users can access information regarding domains, including the registrant’s name, address, phone number, and e-mail address. [Citation.] WHOIS data is compiled by registrars from information submitted by registrants.’ [Citation.]” (*Rosolowski, supra*, 230 Cal.App.4th at p. 1407 & fn. 3.) We deny Foot Locker’s request for judicial notice of the results of a WHOIS search for “e.footlocker.com” and amicus curiae Jay Fink’s request for judicial notice of trial court documents from a different case because these documents are immaterial to the disposition of this case.

and declaratory relief claims failed, and there was no basis to join both defendants in one action. Ink argued the federal CAN-SPAM Act (15 U.S.C. § 7701 et seq.) preempted the California Anti-Spam Act. DeWitt opposed the demurrers but did not seek leave to amend.

The court issued a tentative ruling sustaining the demurrers without leave to amend. At the hearing, DeWitt remarked the “most surprising aspect of the [tentative ruling] was no leave to amend.” In response, the court noted DeWitt had not asked for leave to amend in his opposition, nor explained how the defects in the complaint “could be cured if . . . given leave to amend.” This prompted DeWitt to ask for leave to amend. The court asked DeWitt, “How are you going to amend?” and urged him to “[t]ell me what you’re going to do. What would you plead? . . . Tell me how you would amend.” In response, DeWitt claimed he had “plenty of other details” and e-mails “to include” but did not provide any “details” or identify any e-mails. Instead, DeWitt referred to the email attached to the complaint and restated the complaint’s allegations. The court told DeWitt, “you had every chance . . . every clue to plead this correctly, and you didn’t do it.”

The court sustained defendants’ demurrers without leave to amend. The court determined: (1) the complaint did not plead facts establishing defendants could be properly joined in one action; (2) the complaint did not plead facts establishing DeWitt “received emails with header information that [was] ‘falsified, misrepresented, or forged’” in violation of section 17529.5, subdivision (a)(2); (3) the complaint did not plead facts establishing DeWitt “received emails with 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’” in violation of section 17529.5, subdivision (a)(3); (4) the complaint failed to state a claim for negligence or declaratory relief; and (5) DeWitt was not entitled to leave to amend because he “already had one opportunity to amend the complaint” and “did not request leave to amend in his opposition, nor has [he] demonstrated how he could amend the

complaint to cure these defects.” The court did not reach 1Ink’s preemption argument. The court entered judgment of dismissal.

DISCUSSION

“In our de novo review of an order sustaining a demurrer, we assume the truth of all facts properly pleaded in the complaint or reasonably inferred from the pleading, but not mere contentions, deductions, or conclusions of law. [Citation.] We then determine if those facts are sufficient, as a matter of law, to state a cause of action under any legal theory. [Citation.]” (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751 (*Scott*)). We conclude the court properly sustained defendants’ demurrers without leave to amend.

I.

The Complaint Fails to State a Cause of Action for Violating Section 17529.5

The court sustained defendants’ demurrers, concluding the complaint did not plead facts establishing a violation of section 17529.5. Section 17529.5, subdivision (a) provides in relevant part: “It is unlawful for any . . . entity to advertise in a commercial e-mail advertisement . . . sent to a California electronic mail address under any of the following circumstances: . . . [¶] (2) The e-mail advertisement contains or is accompanied by falsified, misrepresented, or forged header 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.”

A. The Complaint Fails to Allege Facts Sufficient to State a Claim for Violating Section 17529.5, Subdivision (a)(2)

Section 17529.5, subdivision (a)(2) “‘makes it “unlawful . . . to advertise in a commercial e-mail advertisement” that “contains or is accompanied by *falsified, misrepresented, or forged header information.*”’” (*Rosolowski, supra*, 230 Cal.App.4th at p. 1412, quoting *Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 339-340

(*Kleffman*).⁴ The complaint alleges defendants sent commercial e-mails containing “misleading” and “confusing” header information. These allegations are insufficient to state a claim for violating section 17529.5, subdivision (a)(2) because there is no cognizable claim for a violation of section 17529.5 based on a “confusing” or “misleading” header. (See *Kleffman, supra*, 49 Cal.4th at p. 343.) Our high court has held the word “misrepresented” in section 17529.5 does not mean “misleading” or ‘likely to mislead.’” (*Kleffman, supra*, at pp. 342-345; see also *Balsam v. Trancos, Inc.* (2012) 203 Cal.App.4th 1083, 1095 (*Balsam*).) As a result, the complaint fails to state a claim for violating section 17529.5, subdivision (a)(2).

The complaint’s bare allegation that defendants sent e-mails with “false . . . header information” does not state a claim for violating section 17529.5 because that allegation is contradicted by the e-mail attached to the complaint. If the provisions of an exhibit are inconsistent with or contradict the allegations of a complaint, the facts in the exhibit control. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604; see also *Scott, supra*, 214 Cal.App.4th at p. 751.) Here, the e-mail’s header lists the originating e-mail address as “Footlocker@e.footlocker.com.” (See Appendix.) This information is not “falsified, misrepresented, or forged” in violation of section 17529.5, subdivision (a)(2) because the single domain name — e.footlocker.com — makes clear the identity of the sender or merchant-advertiser on whose behalf the e-mail was sent. (See *Kleffman, supra*, 49 Cal.4th at p. 345.)

This is not — as DeWitt suggests — a situation like the one in *Balsam, supra*, 203 Cal.App.4th 1083, where a division of this court held header information was falsified or misrepresented because it contained “multiple, randomly chosen, nonsensically named” and “made-up” domain names used “to create a misleading impression the e-mails were

⁴ The “header” of an e-mail is “the source, destination, and routing 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, or purporting to identify, a person initiating the message” (15 U.S.C. § 7702(8)).” (*Kleffman, supra*, 49 Cal.4th at p. 340, fn. 5; see also *Rosolowski, supra*, 230 Cal.App.4th at p. 1411, fn. 4.)

from different sources when they were in fact all from a single source.” (*Id.* at pp. 1097-1098.) As *Balsam* explained, “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 p. 1101, fn. omitted.) Here, the sender domain name “identifies the actual sender on its face” — Foot Locker. As result, *Balsam* does not assist DeWitt.

Even if we assume for the sake of argument the header in the e-mail attached to the complaint failed to identify Foot Locker — which it does not — the complaint still fails to allege a violation of section 17529.5, subdivision (a)(2) because Foot Locker’s “identity is readily ascertainable from the body of the email[.]” (*Rosolowski, supra*, 230 Cal.App.4th at p. 1407.) A “header line in a commercial e-mail advertisement does not misrepresent the identity of the sender merely because it does not 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, provided the sender’s identity is readily ascertainable from the body of the e-mail[.]” (*Ibid.*) Here, the identity of the sender is readily ascertainable from the body of the e-mail, which identifies Foot Locker four times and identifies the sender as “Footlocker@e.footlocker.com.” The e-mail is an advertisement for Foot Locker’s products and provides a hyperlink to Foot Locker’s website and a means to contact Foot Locker’s customer service department. The e-mail also provides an unsubscribe notice as well as a physical address for Foot Locker. It is simply not plausible Foot Locker “falsified, misrepresented, or forged” the header information (§ 17529.5, subd. (a)(2)), or attempted to conceal its identity, because the clear purpose of e-mail is to encourage customers to purchase products on Foot Locker’s website. (*Rosolowski, supra*, 230 Cal.App.4th at p. 1416.) We conclude the complaint fails to state a cause of action for misrepresented header information in violation of section 17529.5, subdivision (a)(2). (*Rosolowski, supra*, at p. 1414.)

B. The Complaint Fails to Allege Facts Sufficient to State a Claim for Violating Section 17529.5, Subdivision (a)(3)

Section 17529.5, subdivision (a)(3) prohibits e-mail subject lines “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.” The complaint alleges defendants sent e-mails with “false or misleading” subject lines and that the “subject line information [was] presented on the pretense that [d]efendants had an established or pre-existing commercial e-mail relationship with [DeWitt] or that [DeWitt] had somehow previously specifically consented or subscribed to receiving commercial e-mails” from defendants. These allegations fail to state a claim for a misleading subject line in a violation of section 17529.5, subdivision (a)(3). There is nothing misleading in the subject line of the e-mail attached to the complaint. The subject line refers to white sneakers, which are advertised in the e-mail.

DeWitt’s reliance on *Hypertouch , Inc. v. ValueClick, Inc.* (2011) 192 Cal.App.4th 805 (*Hypertouch*) does not alter our conclusion. In *Hypertouch*, some subject lines stated “the recipient of the e-mail can get a free gift” and others suggested “the recipient can obtain something free for doing a particular task[.]” (*Id.* at p. 840.) Other e-mails contained “a variety of phrases that might indicate to the recipient” there were “terms and conditions that must be fulfilled to obtain the gift[.]” (*Ibid.*) The *Hypertouch* court held section 17529.5, subdivision (a)(3) is violated where an e-mail’s subject line creates an impression contradicted by the body of the e-mail. (*Hypertouch, supra*, at p. 838.) Here and in contrast to *Hypertouch*, there is no such false impression. The e-mail’s subject line is simple and straightforward: it refers to white sneakers, which are advertised in the body of the e-mail. Considered with the body of the e-mail, there was nothing misleading about how one might purchase white sneakers. Nothing in the subject line is likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the content of the e-mail. (*Rosolowski, supra*, 230 Cal.App.4th at p. 1418.)

The complaint’s general allegations about the remainder of the e-mails DeWitt allegedly received from defendants do not state a claim for a violation of section 17529.5, subdivision (a). As we have explained, the complaint alleges defendants sent various unspecified e-mails that violated section 17529.5, but the complaint *does not* identify the e-mails’ header or subjection line information or explain how this information violated section 17529.5, subdivision (a). Although we are required to accept as true the well-pleaded allegations in the complaint, we do not accept the truth of contentions, deductions or conclusions of law. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1.) The complaint’s allegations that various unspecified e-mails contained misleading header and subject line information are conclusions of law, which we are free to ignore. (*Id.* at p. 6.)

II.

The Denial of Leave to Amend Was Not an Abuse of Discretion

DeWitt contends the court abused its discretion by denying him leave to amend the complaint. When a demurrer is sustained without leave to amend, “we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.” [Citation.]” (*State of California ex rel. Bowen v. Bank of America Corp.* (2005) 126 Cal.App.4th 225, 239, quoting *First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1662.) “[N]either the trial court nor this court will rewrite a complaint. [Citation.] Where the appellant offers no allegations to support the possibility of amendment . . . there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend.” (*AREI II Cases* (2013) 216 Cal.App.4th 1004, 1020.)

In opposition to the demurrers, DeWitt did not request leave to amend. At the hearing — when DeWitt finally asked the court to allow him to amend the complaint — he did not offer any new allegations supporting the possibility of amendment, nor explain how he could cure the defects in the complaint by amendment. Instead, he made a vague claim he could “include” more details and e-mails. This is insufficient to justify allowing

DeWitt leave to amend. DeWitt already amended his complaint once, and in the absence of a showing he was capable of curing the defects, the court acted well within its discretion in denying leave to amend.

We conclude the operative complaint failed to state facts sufficient to allege a violation of section 17529.5 and the court did not abuse its discretion by denying leave to amend. (*Rosolowski, supra*, 230 Cal.App.4th at p. 1418.) DeWitt does not challenge the court's conclusions regarding his negligence and declaratory relief claims. Having reached this result, we need not address the parties' remaining arguments. (*Ibid.*)

DISPOSITION

The judgment of dismissal is affirmed. Defendants shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

Jones, P.J.

We concur:

Simons, J.

Needham, J.

APPENDIX

Gmail - Keep It Clean, Keep It Classy with Fresh White Sneakers!



Keep It Clean, Keep It Classy with Fresh White Sneakers!

1 message

Foot Locker VIP <Footlocker@e.footlocker.com>

Wed, May 22, 2013 at 2:32 PM

Reply-To: Foot Locker VIP <support-b766pwmb57hq1qau0uu1aqcg8aeqka@e.footlocker.com>

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Foot Locker - 111 S. 1st Avenue - Wausau, WI 54401

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