IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
[DIVISION 2]

MARK FERGUSON, on behalf of himself and all others similarly situated,

Plaintiff and Appellant,

vs.

FRIENDFINDERS, INC. et al.,

Defendants and Respondents.

CASE NO. A092653
(Superior Court No. 307309)

Appeal from the Superior Court of the County of San Francisco, No. 307309

The Honorable David A. Garcia, Judge.

APPELLANT'S OPENING BRIEF

JOHN L. FALLAT
STEVEN D. SCHROEDER
California State Bar No. 114842
California State Bar No. 118582
Law Offices of John L. Fallat
907 Sir Francis Drake Blvd
Suite 100
Kentfield, CA 94904-1502
Phone: (415) 457-3773
Fax: (415) 457-2667

TIMOTHY J. WALTON
California State Bar No. 184292
Internet Attorney
1204 Mayette Avenue
San Jose, CA 95125-4031
Phone: (408) 772-3861
Fax: (408) 264-8141

Attorneys for Appellant

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Treatises, Law Reviews, and Internet References:

1. INTRODUCTION

The question before this court is a simple one: may consumers in California sue California businesses and individuals for relief from unwanted, unsolicited and objectionable Internet electronic mail (hereinafter "email") advertising, absent Congress' express approval of such suits? The answer is an unqualified "yes". Yet, the court below improperly sustained demurrers without leave to amend as to all four of Appellant's causes of action. Apparently relying on a finding that the California Legislature did not have the power to enact California Business and Professions Code section 17538.4, the trial court took the extraordinary step of denying Appellant relief even before the Respondents answered the complaint. As a matter of law, the lower court erred in sustaining the demurrers without leave to amend the complaint. As a matter of public policy, the court erred in denying relief to a class of consumers who have been damaged by the Respondents' practice of advertising in an unfair and unlawful manner.[1] Appellant respectfully requests that this Court reverse the trial court's judgment and remand for further proceedings.

[1] *See Hotmail v. Van$MoneyPie* (N.D.Cal. 1998) 7 U.S. Patent Quarterly 2d 1020, 1022, 1998 WL 388389 (stating, "The transmission of spam is a practice widely condemned in the Internet Community"). For a discussion on spamming, see generally Susan E. Gindii (1997) Lost & Found in Cyberspace: Informational Privacy in the Age of the Internet, 32 San Diego L.Rev. 1153; Anne E. Hawley (1997) Comment Taking Spam Out of Your Cyberspace Diet: Common Law Applied to Bulk Unsolicited Advertising via Electronic Mail 66 U.M.K.C. L.Rev. 381.

2. STATEMENT OF THE CASE

A. Nature of Action and Relief Sought

All the Respondents in this case are California residents (CT 1). They stand accused of sending spam [*See America Online, Inc. v. IMS* (E.D.Va.1998) 24 F.Supp.2d 548, 549 (defining "spam" as "unauthorized bulk e-mail advertisements")] and email [*See People v. Lipsitz* (1997) 663 N.Y.S.2d 468, 470 (describing electronic mail sent over the Internet)] in violation of California law. Appellant MARK FERGUSON represents a class of consumers who received email from the Respondents (CT 2). Appellant's class action complaint referenced California Business and Professions Code sections 17200, 17500 and 17538.4 (CT 3). Appellant seeks both legal and equitable relief (CT 14).

B. Summary of Material Facts

On or before July 27, 1999, Respondents began sending unsolicited commercial email advertisements to Appellant and others, in violation of California law (CT 4). Appellant alleged damage to his computer (CT 5). Respondents' email included falsified identity and source email information, gave recipients no option about how to have an email address removed from the list, and unlawful information in the subject line (CT 10-11).

C. Judgment/Ruling of Superior Court and Statement of Appealability

Respondents demurred to Appellant's complaint on several grounds, including that California Business and Professions Code Section 17538.4 is constitutionally infirm because it violates the Commerce Clause of the United States Constitution (CT 16 & 17). The San Francisco Superior Court held that the California Legislature does not have

authority to regulate any aspect of the Internet because regulation of the Internet is exclusively the domain of Congress pursuant to the Commerce Clause of the Constitution (CT 77 & 78). The court stated no other reason for dismissing the complaint without leave to amend. *Id*.

The Superior Court of California, County of San Francisco, by the Honorable David A. Garcia, Judge, rendered its final judgment for Respondents on July 17, 2000. *Id*. The Judgment was entered on July 17, 2000. *Id*. Notice of Appeal from the Judgment was timely filed on September 20, 2000. (CT 79, 81 & 82). The appeal is from a judgment that finally disposes of all issues between the parties. (RT 5/18/00 5:23-27).

D. Standard of Review

This appeal arises after the trial court erroneously sustained Respondents' demurrer without leave to amend. This Court must treat the demurrer as admitting all material facts properly pled in the complaint. *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 549, 99 Cal.Rptr. 745, 492 P.2d 1137; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713, 63 Cal.Rptr. 724, 433 P.2d 732. Further, the court must give the complaint a reasonable interpretation, reading it as a whole and its parts in their context *Delgado v. American Multi-Cinema, Inc*. (1999) 72 Cal.App.4th 1403, 1406, 85 Cal.Rptr.2d 838 (quoting *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318, 216 Cal.Rptr. 718, 703 P.2d 58) liberally construing allegations in the complaint with a view to attaining substantial justice among the parties, *King v. Central Bank* (1977) 18 Cal.3d 840, 858 (quoting *Youngman v. Nevada Irrigation Dist*. (1969) 70 Cal.2d 240, 244-245, 74 Cal.Rptr. 398, 449 P.2d 462). Because the lower court sustained the demurrer, this Court must determine whether the complaint states facts sufficient to constitute a cause of

action. *Delgado, supra,* 72 Cal.App.4th at 1406 (quoting *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318, 216 Cal.Rptr. 718, 703 P.2d 58). And because the demurrer was sustained without leave to amend, this Court must decide whether there is a reasonable possibility that the defect can be cured by amendment. *Id*. If the plaintiff can cure the defect, the trial court has abused its discretion and this Court must reverse. *Id.*

3. ARGUMENT

A. CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 17538.4 IS CONSTITUTIONAL BECAUSE THE CALIFORNIA LEGISLATURE HAS THE AUTHORITY TO REGULATE CALIFORNIA BUSINESSES, WHETHER THEY USE THE INTERNET OR NOT

1. The U.S. Supreme Court Has Set The Boundaries Of Permissible State Action In Relation To Interstate Commerce

The U.S. Constitution provides that Congress has exclusive authority to regulate domestic interstate and foreign commerce. *U.S. CONST*. Art, I, § 8, cl. 3. The implied restriction on the States' power is commonly referred to as the "negative" or "dormant" commerce clause. *Barclays Bank v. Franchise Tax Bd. of California* (1994) 512 U.S. 298, 310, fn. 9, 129 L.Ed.2d 244, 257, 114 S.Ct. 2268, 2276. However, just because a state law affects interstate commerce does not make it invalid. *Partee v. San Diego Chargers Football Co.* (1983) 34 Cal.3d 378, 382, 194 Cal.Rptr. 367, 668 P.2d 674. To determine whether a state law violates the restriction, a court must first ask whether the law "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce." *Oregon Waste System v. Dept. of Environmental Quality of Oregon* (1994) 511 U.S. 93, 99, 128 L.Ed.2d 13, 21, 114 S.Ct. 1345, 1350 (citing *Hughes v. Oklahoma* (1979) 441 U.S. 322, 336, 60 L.Ed.2d 250, 261-262). The party challenging the statute's validity bears the burden of showing

discrimination. *Id*. Respondents could not show any overt discrimination to the court below because California Business and Professions Code section 17538.4 does not discriminate against interstate commerce on its face. In fact, nondiscriminatory regulations that have only incidental effects on interstate commerce are Constitutional unless the burden on interstate commerce clearly exceeds the local benefits. *Edgar v. MITE Corp*. (1982) 457 U.S. 624, 640 73 L.Ed.2d 269, 282, 102 S.Ct. 2629, 2640. Laws that regulate evenhandedly should be upheld. *Id*. at 390 (quoting *Pike v. Bruce Church, Inc*. (1970) 397 U.S. 137, 142, 25 L.Ed.2d 174, 90 S.Ct. 844). But even if an ordinance discriminates against interstate commerce by treating in-state and out-of-state interests differently, benefiting the former and burdening the latter, it may still be valid if the State has "no other means to advance a legitimate local interest." *C & A Carbone, Inc. v. Town of Clarkstown, New York* (1994) 511 U.S. 383, 392, 128 L.Ed.2d 399, 114 S.Ct. 1677.

The California statute in question was not designed to regulate conduct outside California's borders, [*Compare, Baldwin v. G.A.F. Seeling* (1935) 294 U.S. 511, 79 L.Ed. 1032, 55 S.Ct. 497 (improper attempt to regulate milk prices outside State borders) and *Edgar v. MITE Corp*., *supra*, 457 U.S. 624], and the burden on interstate commerce is slight. *See* Cal. Bus. & Prof. § 17538.4 (requiring truthful information and the addition of subject line characters indicating the nature of the advertisement). An advertiser need only add the character string "ADV:" or "ADV:ADT:" to the subject line of email sent to California residents. *Id*. All of the other requirements specified in the statute, such as truthful information about identity of the advertiser, are implied in California Business and Professions Code Sections 17200 and 17500. Describing the nature of the

communication is a small price for the otherwise free method of transmitting a commercial message to millions of recipients.

Healey v. The Beer Institute (1989) 491 U.S. 324, 105 L.Ed.2d 275, 109 S.Ct. 2491 sets the outer boundaries of the reach of the dormant commerce clause: only those state actions which affect commerce occurring "wholly outside" the territory of the legislating state are unconstitutional. In *Healy*, the beer industry sued state officials challenging the constitutionality of a beer-price-affirmation statute which required out-of-state shippers to change their marketing and sales practices in states bordering Connecticut. *Id*. at 329 The District Court upheld the statute, but the Second Circuit Court of Appeals and the U.S. Supreme Court both found the Connecticut statute unconstitutional. The Supreme Court held that the statute had the practical effect of regulating commerce occurring wholly outside the state's borders. *See id.* at 332-348 (using the term "wholly outside" six times). In contrast, because California has a nexus with the regulated advertising activity in that the senders of the regulated email are all California residents, the California legislature has the power to regulate these activities.

2. Binding California Precedent Should Hold More Weight Than Mere Persuasive Authority From Another Jurisdiction

The Fourth District Court of appeals has held that "Internet communications… do not… insulate [lawbreakers] from prosecution simply by reason of their usage of modern technology." *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 195, 94 Cal.Rptr.2d 453; *see also* RT 5/18/00 at 11:9-16 (citing *Hatch*). Despite specific citation to this case, the trial court wholly ignored the Fourth District's opinion. RT 5/18/00 at 5:23-27.

In contrast, the Respondents cited *American Library Association v. Pataki* (S.D.N.Y. 1997) 969 F.Supp. 160 in support of their argument, and the court below cited the New York decision in its order. However, the New York case did not consider a statute regulating commercial email, as the California statute does, but rather a law purporting to criminalize certain material unsuitable for viewing by children. *Id*. at 165. And, unlike the California statute at issue in the instant case, "the Act represents an unconstitutional projection of New York law into conduct that occurs ***wholly outside*** New York." *Id*. at 169 (emphasis added).

New York has other authority which may be more persuasive than *American Libraries Association v. Pataki.* In *People v. Lipsitz* (1997) 633 N.Y.S.2d 468, 1997 N.Y. Misc. LEXIS 382, a New York state court agreed with the *Hatch* court, stating, "The Attorney-general has clear authority to seek to restrain illegal business practices by a local business in relation to both in-State and out-of-State residents, notwithstanding that these practices occur on the Internet." *Id.* at 474. New York has "no compelling reason to find that local legal officials must take a 'hands off' approach just because a crook or con artist is technologically sophisticated enough to steal on the Internet." *Id.* at 475.

The trial court in the instant case appeared to agree with this reasoning when it admitted that "we can regulate what people send to our children in California regarding unsolicited pornographic email by pedophiles." (RT 5/18/00 14:16-19).

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3. The Instant Case Does Not Involve Any Interstate Issue

A statute may be unconstitutional for its actual effect, but not for hypothetical cases which are not before the court (RT 5/18/00 11:6-21). At this stage of the litigation, the court must accept as true all allegations in Appellant's complaint. Since all of the litigants are California residents, (CT 1, 2, 3 & 4) (RT 5/18/00 13:19-20), there is no reason to believe that the email at issue in this lawsuit ever left California.

The Respondents argued below that the statute is facially deficient. (RT 3/30/00 15:23) (RT 5/18/00 at 9:19-23). The California Supreme Court has stated:

> A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. [Citation.] "'To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute . . . . Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.'" [Citations.] *Tobe v. City of Santa Ana,* (1995) 9 Cal.4th 1069, 1084, 892 P.2d 1145, 40 Cal.Rptr.2d 402

Respondents argued below that a California resident anticipated by the statute might be out-of-state at the time of receipt. (RT 5/18/00 9:10-21) However, the validity of a statute is not based upon hypothetical situations, but only those facts before the court, (RT 5/18/00 11:6-21), and California has a nexus under the facts of this case because all of the Respondents are California residents. (RT 5/18/00 11:16-21) (RT 5/18/00 13:19-20).

4. The United States Congress Has Had Plenty Of Opportunity To Regulate Spam but has Failed to Act.

The first bill to regulate spam email was introduced into Congress more than three years ago. Four such bills were introduced into Congress in 1997: The Netizen's Protection Act of 1997, H.R. 1748, 105th Cong. 1st Sess. (1997) (introduced by Representative Christopher Smith of New Jersey); Unsolicited Commercial Electronic Mail Choice Act of 1997, S. 771, 105th Cong. 1st Sess. (1997) (introduced by Senator Frank H. Murkowski of Alaska); Electronic Mailbox Protection Act of 1997, S. 875, 105th Cong., 1st Sess. (1997) (introduced by Senator Robert Torricelli of New Jersey); and the Data Privacy Act of 1997, H.R. 2368, 105th Cong. 1st Sess. (1997) (introduced by Representative Billy Tauzin of Louisiana). The current Congress is considering several competing bills. *See* David E. Sorkin, Spam Laws: 107th Congress, at <http://www.spamlaws.com/federal/list107.html>. Even members of Congress acknowledge that federal law is slow to respond to technological advances. "Congress has a hard time being fleet-footed enough to keep up with an industry where business plans often are outdated after weeks if not a few months. It makes governing - even with the best of intentions - an extraordinary challenge." Sen. John Kerry (D-Mass), as quoted by Beth Bacheldor, *Undue Influence?*, Information Week, October 9, 2000, at 68. In the absence of Federal regulation, the California legislature has a compelling interest to protect residents of the state. Thus, it was well within its jurisdiction to enact Business and Professions Code §17538.4.

B. THE COURT ERRED IN SUSTAINING THE DEMURRERS WITHOUT LEAVE TO AMEND

1. California Has Well-Established Precedent Allowing Leave To Amend

A basic rule of appellate review requires this Court to construe the allegations of a complaint liberally in favor of the pleader. *See* Code Civ. Proc. § 452; *Buxbom v. Smith* (1944) 23 Cal.2d 535, 542, 145 P.2d 305. A demurrer tests only the legal sufficiency of a complaint, not its factual truth. *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497. On appeal, this Court must deem to be true all material facts properly pled. *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501. A plaintiff need plead only those facts showing that he may be entitled to *some* relief. *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496, 86 Cal.Rptr. 88, 468 P.2d 216.

Whether the plaintiff is entitled to any relief at the hands of the court against the defendants is "a pure question of law." *CAMSI IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1530, 282 Cal.Rptr. 80. This Court has stated that a "demurrer should not be sustained where a plaintiff can cure a defective complaint by amendment or where the pleading, liberally construed, can state a cause of action." *Jager v. County of Alameda* (1992) 8 Cal.App.4th 294, 296-97.

If it is reasonably possible that a plaintiff can cure a defective complaint by amendment, or that the pleading liberally construed can state a cause of action, the trial court should not sustain a demurrer without leave to amend. *Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, 118 113 Cal.Rptr. 102, 520 P.2d 726. A trial court abuses its discretion by sustaining a general demurrer without leave to amend if it appears from the complaint that under applicable substantive law there is a reasonable possibility that an amendment could cure the complaint's defect. *Heckendorn v. City of San Marino*

(1986) 42 Cal. 3d 481, 486 (citing *Vater v. County of Glenn* (1958) 49 Cal.2d 815, 82, 323 P.2d 85; *C & H Foods Co. v. Hartford Ins. Co.* (1984) 163 Cal.App.3d 1055, 1062, 211 Cal.Rptr. 765). Here, Appellant offered to amend his complaint and Respondents did not object. (RT 3/30/00 7:26-28 and 9:23-28). The court below should have given Appellant the opportunity to amend his complaint.

2. Even The Respondents Admitted That Leave To Amend Would Be Proper

Respondents stated in their Reply Memorandum of Points and Authorities that the Appellant should have an opportunity to amend his third and fourth causes of action. (CT 49). The lower court's decision to sustain a demurrer to all four causes of action without leave to amend is inexplicable. The second cause of action, trespass to chattel, is based on common law and does not rely on California Business & Professions Code section 17538.4, (CT 13-14), while the third and fourth causes of action rely on statutes not found to be unconstitutional. (CT 12). The lower court seriously erred in finding that Appellant cannot state a claim for legal or equitable relief.

C. THE DEMURRERS TO THE COMPLAINT LACKED MERIT

1. The Lower Court Refused To Consider The Cause Of Action For Negligence Per Se

Instead of providing a reason for its ruling, or guidance about how the negligence cause of action might be amended, the lower court merely expressed "befuddlement" and stated that "it just doesn't fit." (RT 3/30/00 3:22-25). The court further expressed its confusion by stating that recipients of spam do not need to read the email before deleting it. (RT 3/30/00 10:4-7). In fact, spammers have gotten more clever and are using subject

lines such as "information you requested" and "Re:phone call" to entice the recipient to open unsolicited commercial email. Appellant appropriately pled negligence per se as required. (CT 11) (RT 3/30/00 3:16-21). The cause of action is not limited to personal injury actions. (RT 3/30/00 5:2-22) (RT 5/18/00 5:21-27) (RT 3/30/00 13:1-2). As long as the statute in question is valid, then the Respondents' violations of the statute give rise to a cause of action for those citizens intended to be protected by the statute (CT 10).

2. The Tort of Trespass to Chattel Does Not Rely On California Business and Professions Code Section 17538.4

Unsolicited commercial email violates the recipient's privacy. Susan E. Gindii, *Lost and Found in Cyberspace: Informational Privacy in the Age of the Internet* (1997) 34 San Diego L. Rev. 1153, 1167. The U.S. Supreme Court has held that there is no right "to send unwanted material into the home of another". *Rowan v. U.S.Post Office Dept.* (1970) 397 U.S. 728, 738, 90 S.Ct. 1484, 25 L.Ed.2d 736, and that rejecting the right of a person to bar "solicitors, hawkers, and peddlers from his property... would tend to license a form of trespass." *Id.* at 736.

Taking control over another person's computer without consent constitutes a trespass to chattel. *See* Restatement (Second) of Torts section 217(b) (stating that dispossessing or intermeddling with property in possession of another amounts to trespass to chattel). In *Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 54 Cal.Rptr.2d 468, the trial court found defendants liable for conversion and fraud, but on appeal, the Fourth District correctly characterized the tort as trespass to chattel. Sending email asserts control over the recipients' computers for as long as the email remains on the recipients' hard drives. (CT 12). Spam also deprives the end user of the use of their

system during download. Thus, the added time caused by downloading spam takes time and money from the end user. Two California Superior Courts and the Federal District Court for the Northern District of California have stated that unsolicited email may amount to a trespass. *Earthlink Network, Inc. Cyber Promotions, Inc.* (Super. Ct. L.A. County, May 21,1997) No. BC167502; *Intel Corp. v. Hamidi* (Super.Ct. Sacramento County, April 28, 1999) 1999 WL 450944, No. 98AS05067; *Hotmail v. Van$MoneyPie*, *supra*, 47 U.S.P.Q.2d 1020. Courts outside California have similarly found spam email to be a form of trespass. *See, e.g., CompuServe, Inc. v. Cyber Promotions, Inc.* (S.D.Ohio 1997) 962 F.Supp. 1015, 1028 (granting plaintiff's request for preliminary injunction barring defendant from sending spam to service subscribers).

The appellees are likely to argue that *San Diego Gas and Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 55 Cal.Rptr.2d 724 changed the law of California. CT 21. The California Supreme Court in that case stated that intangible intrusions that do not cause physical damage to property constitute a nuisance, but not a trespass. *San Diego*, *supra*, 13 Cal.4th at 936. Appellant contends that *San Diego* did not change the law of California because computer intrusion, including the sending of unwanted email, causes physical damage to personal property. (CT 12-13) The comparison of perceived damages caused by electromagnetic fields is substantially different than the actual invasion to the user's computer through unsolicited email. For example, at a physical level, email (or any record of computer intrusion) is represented by etchings on a silicon chip. When a computer user downloads email from a mail server, the silicon is physically altered to represent the information that makes up the email. Deleting email leaves holes in the file system called fragmentation. Paul Hoffman, Unsolicited Bulk

Email Definitions and Problems, <*http://www.imc.org/ube-def.html*>. This fragmentation causes physical damage to a system by slowing down the processor. *Id*. Even simply running a defragmentation utility can cause a hard drive extra wear. *Id*. <http://oliver.efri.hr/~crv/security/bugs/NT/ntfs.html> Thus, unwanted email causes physical damage to personal property.

Furthermore, while the email is downloading to the local hard drive, the computer user is denied the ability to use email. In *Thrifty-Tel*, the damage to the plaintiff was in its subscriber's denial of access to phone lines. *Thrifty-Tel*, *supra*, 46 Cal.App.4th at 1564. Intermeddling with chattel is actionable where there "is harm to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel." Restatement (Second) of Torts, section 218 cmt. e. (1977). Downloading unsolicited email is a physical disruption. *See America Online, Inc. v. LCGM, Inc.* (E.D.Va.1998) 46 F.Supp.2d 444, 448-449; *AOL v. IMS* (1998) 24 F.Supp.2d 548, 48 U.S.P.Q.2d 1857. The lower court insisted on a description of damages in the complaint (RT 3/30/00 5:5-6), but did not give Appellant an opportunity to amend his complaint to include the specific description, despite an offer to so amend. (RT 3/30/00 7:27-28 and 9:23-28). The complaint alleged a continuing act of trespass (CT 12) and "possession and control." *Id*. Appellant could amend the complaint to allege more specific damages if given the opportunity.

The respondents will also likely argue that Appellant's cited cases are not relevant because they involved trespass to ISP[2] computers rather than consumer computers. The

[2] Internet Service Providers. *See Shea v. Reno*, (S.D.N.Y. 1996) 930 F.Supp. 916, 926 (describing ISPs as "commercial entities... offer[ing] modem access to computers or networks linked directly to the Internet.").

respondents will probably attempt to distinguish the situations on the basis that consumer computers do not receive the quantity of spam that ISPs must process. (RT 3/30/00 18:13-16) This argument relies on the fallacy that excessive trespass differs in nature from a single instance of trespass. However, the respondents will not be able to point to a single authority supporting the view that a single instance of trespass is never actionable. Nor can they argue that the stated class' aggregate damage is *de minimus*. Instead, they will probably suggest that an individual email compares with minuscule amounts of air pollutants. While airborne molecules may or may not cause damage to one's lungs, every unsolicited email sent by Respondents inflicted damage on the class plaintiffs' computers. The amount of spam consumers receive every day is increasing. Joanna Glasner, *Oh Yum: There's More Spam*, Wired News, October 27, 2000, at <http://www.wired.com/news/culture/0,1284,39832,00> (reporting that junk mail has quintupled in the last year). The right of advertisers must be balanced against the right of every person "to be let alone." *Rowan*, *supra*, 397 U.S. at 736.

Hotmail v. Van$MoneyPie, *supra*, supports appellant's position that unsolicited email is trespass. In that case, Hotmail Corporation sued a spammer for sending email to plaintiff's computers. The district granted plaintiff's motion for a preliminary injunction on a number of grounds, including trespass to chattel. *Id*. at *7-8. The court found that the plaintiff's computers were its personal property and that the property had been damaged. *Id*. at *7. Appellant MARK FERGUSON is a representative plaintiff for a class of people who own personal property that has been damaged by the Respondent's intentional interference in the possession of that personal property. (CT 12). Therefore,

the lower court should not have sustained Respondents' demurrer to the trespass to chattel cause of action without leave to amend.

3. Appellant Could Amend His Causes Of Action Under California Business and Professions Code sections 17200 And 17500 To Allege Unfair, Not Merely Unlawful, Business And Advertising Practices

Using the Internet as a means of communication does not relieve the advertiser of obligations under California law. *Hatch, supra*, at 195. Here, the lower court ruled that the United States Congress has such exclusive domain over the field that California businesses who advertise using the Internet need not comply with California advertising laws affecting all other advertisers, namely California Business and Professions Code section 17500. (CT 53-54).

Even if appellant is incorrect in his belief that California Business and Professions Code section 17538.4 is constitutionally sound, simple amendments to the complaint would result in valid causes of action stated against the defendant. The complaint stated, "Defendants' email transmissions were misleading advertising and members of the public were likely to be deceived." (CT 10). If this court grants appellant the opportunity to amend the complaint, then the complaint would state a valid cause of action against Respondents that their conduct is a violation of Business & Professions Code Sections 17200 and 17500. The lower court's refusal to allow amendment of the complaint

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constitutes reversible error because it denies Appellant the opportunity to a fair trial on the merits.

4. CONCLUSION

Because the court below erred in finding the California Business & Professions Code Section 17538.4 unconstitutional, and because the court should not have sustained demurrers without leave to amend to all four causes of action even if the statute is unconstitutional, this Court should reverse the lower court decision, find Business & Professions Code Section 17538.4 constitutional, allow the case to go forward on the merits on all four causes of action, and award appellant's attorney fees and costs for having brought this appeal under the common law private attorney general doctrine and California Code of Civil Procedure Section 1021.5.

Respectfully Submitted,

DATED: 3/23/01

John L. Fallat
Attorney for Plaintiff and Appellant Mark Ferguson

DATED: 3/23/01

Steven D. Schroeder
Attorney for Plaintiff and Appellant Mark Ferguson

DATED: March 22, 2001

Timothy J. Walton
Attorney for Plaintiff and Appellant Mark Ferguson

PROOF OF SERVICE AND DELIVERY

I, JENNIFER M. BEARD, declare that:

I am at least 18 years of age and not a party to the above-entitled action. My business address is 907 Sir Francis Drake Blvd., Suite 100, California; I am employed in Marin County, California.

I served the foregoing APPELLANT'S OPENING BRIEF on March 23, 2001, by depositing copies thereof in the United States mail in Kentfield, California, enclosed in sealed envelopes, with postage fully prepaid, addressed to the persons listed below:

Ira P. Rothken
THE ROTHKEN LAW FIRM
1050 Northgate Drive, Suite 520
San Rafael, CA 94903

I also delivered five copies of such brief to the Supreme Court on 3/23/01, and on 3/23/01, deposited one copy with the clerk of the Superior Court of California, County of San Francisco.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 23rd day of March, 2001, at Kentfield, California.

Jennifer M. Beard

JENNIFER M. BEARD