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 REPLY BRIEF

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1. INTRODUCTION

Appellant sued Respondents for sending unlawful commercial email ("UCE"), in violation of both statutory and common law. Respondents demurred to the complaint, and the court below sustained the demurrers on the stated ground that California does not have the right to regulate Internet activity. (CT at 77-78.) On appeal, the Respondents rest their arguments on several erroneous assumptions. Appellant has stated valid causes of action against Respondents and this Court should reverse and remand the action for further proceedings.

2. ARGUMENT

A. RESPONDENTS ASSUME WITHOUT CITATION TO AUTHORITY OR THE RECORD THAT COMMERCIAL EMAIL IS EQUIVALENT TO COMMERCIAL POSTAL MAIL

Respondents assume that UCE is analogous to advertising using the U.S. Postal Service. (*See* Respondents' Brief at 3 (stating "There is no difference in principal between unsolicited commercial email and unsolicited commercial materials delivered by the Post Office").) But as Plaintiff raised below (RT 3/30/00 at 5), email comes as postage due. (*See generally* CAUCE, *The Problem* (http://www.cauce.org/about/problem.shtml (describing the costs of UCE).) A business wishing to advertise using the U.S. mail would have to pay for the privilege. (*See* 39 USC 3621 (authorizing Board of Governors to establish rates for U.S. Postal Service.) Yet with email, the recipient pays the cost of relaying the message by email. (Scott Hazen Mueller, *The Receiver Pays For Spam* at http://www.spam.abuse.net/spam/receiver.html.)

B. RESPONDENTS ASSUME WITHOUT CITATION TO AUTHORITY OR THE RECORD THAT BUSINESSES HAVE AN INHERENT RIGHT TO ADVERTISE IN ANY MANNER OF THEIR CHOOSING

At first blush, it might seem obvious that businesses have an inherent right to advertise. But there are defined limits to that right. Respondents tried to argue below that the First Amendment protects the activity of advertising over email, but the lower court correctly discarded the argument. (CT at 21 - 33.) Businesses do not have the right to advertise using the personal property of others. It is difficult to imagine someone arguing that businesses have the right to paint a logo on your car. Indeed, the U.S. Supreme Court has weighed in on the idea, stating that intrusive advertising is a form of trespass. (*Rowan v. U.S. Post Office Dep't* (1970) 397 U.S. 728, 736, 90 S.Ct. 1484, 25 L.Ed.2d 737.)

Respondents fear that potential regulation of commercial email "would effectively block all unsolicited email advertising except that of the most limited kind, such as advertising guaranteed to be purely local." (Respondents' Brief at 14.) The Respondents implicitly assume that UCE is completely legal in the absence of state regulation, even as they acknowledge the judgments in favor of Internet Service Providers that brought legal action prior to the passage of any statute specifically regulating email. (*See, e.g., Hotmail v. Van$Money Pie* (N.D.Cal. 1998) 7 U.S.P.Q.2d 1020.)

C. RESPONDENTS ASSUME WITHOUT CITATION TO AUTHORITY OR THE RECORD THAT EVERY "PRACTICAL EFFECT" IS ENTITLED TO DEFERENCE

In making their arguments about the constitutionality of the statute in question, Respondents seek to have it both ways. They claim that the statute is "facially deficient," but then argue that the practical effect of extraterritorial regulation is what is at issue.

(See Respondents' Brief at 7 - 8.) The Respondents are confusing two different tests of whether a statute violates the dormant commerce clause. "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 the individual." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, 892 P.2d 1145, 40 Cal.Rptr.2d 402; *see also* Jack L. Goldsmith & Alan O. Sykes, The Internet and The Dormant Commerce Clause, 100 Yale L.J. 785, 789-790 (2001) (discussing facially discriminatory regulation analysis, balancing test, extraterritoriality and inconsistent regulatory burdens).)

Despite the Respondents' assertions that the statute is invalid "on its face," their brief concentrates on the purported extraterritorial effect of the statute. (See Respondents' Brief at 8 - 12) Yet, Respondents can point to no actual extraterritorial effect because there are none in evidence. Respondents raise only hypothetical concerns about the extraterritorial effect of the regulation.

Indeed, they must strain to find any such effect at all. Perhaps a California resident downloaded the offending email while traveling outside the state. Such a scenario has no effect on the dormant commerce clause unless the sender of UCE were to change his or her commercial behavior based on the possibility of such a scenario. The Respondents in the instant case did not change their behavior based on any extraterritorial scenario. They flouted the law, violating it in every aspect. The Respondents suggest some conflict with the law of another state, but there is nothing in the record showing any attempt to comply with the law of either jurisdiction.

The Respondents claim "There is no practical way to ascertain which addressees are California residents." (Respondents' Brief at 24.) Yet, they also claim that all the

email they sent was in response to "an 'opt-in' request by those visiting the website." (Respondents' Brief at 3, fn. 2.) There is no reason why a web site could not ask for state of residence at the same it collects the email address of the email recipient. In addition, advertisers could easily look up the address associated with a domain name very easily. (See Register.com at http://www.register.com.)

D. RESPONDENTS ASSUME WITHOUT CITATION TO AUTHORITY OR THE RECORD THAT APPELLANT'S DAMAGES ARE SLIGHT

The Respondents' assertions regarding Appellant's case rests on another assumption: that the injury to Appellant is *de minimus*. The issue of damages is rarely dispositive at this early stage of litigation because facts alleged in the pleadings are deemed to be true. Respondents can point to no evidence actually quantifying Appellant's damages because the complaint defers affixing a specific amount until proof is adduced at trial. But the Respondents' assumption is attractive: they argue that Appellant is complaining of the effort required to hit the delete key once.

The assumption is faulty, however, because unwanted email carries a huge price tag. The European Union estimates that UCE costs recipients over $9 billion per year, and the advertiser pays only a small fraction of this amount. (Robert MacMillan, *Spam Costs Users $9.4 Billion - EU Study*, NewsBytes at http://www.newsbytes.com/news/01/161432.html (February 2, 2001).) Because it costs almost nothing to send self-serving messages to millions of people, the amount of UCE is increasing. (Faye Jones, *Spam: Unsolicited Commercial E-mail By Any Other Name*, 14 J. Internet L. 1, note 72 and following text (September 1999) at http://www.gcwf.com/articles/journal/jil_sept99_1.html.) Contrary to the Respondents'

assertions, UCE itself, not state regulation of UCE, threatens the viability of the Internet as a useful medium. The Coalition Against Unsolicited Commercial Email estimates that if only one percent of all businesses in America sent just one message per year, it would result in 657 UCE ads per user per day. (Katharine Mieszkowski , *Why Is This Man Smiling?*, ON Magazine, available at http://www.onmagazine.com/on-mag/magazine/article/0,9985,166397,00.html (August 2001).)

3. CONCLUSION

The record on appeal reflects a number of valid reasons for reversing the lower court's decision. This Court should heed the desire of the populace and the law of civil procedure by allowing Appellant to continue his action against Respondents.

Respectfully Submitted,

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