

NO. A092653

IN THE COURT OF APPEAL OF CALIFORNIA

FIRST APPELLATE DISTRICT

(Division 2)

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

Plaintiff/Appellant,

vs.

FRIENDFINDER, INC., ANDREW B. CONRU, CONRU
INTERACTIVE, INC., et al.,

Defendants/Respondents.

Appeal from the Superior Court
In and For the County of San Francisco
Hon. David A. Garcia
Case No. 307309

RESPONDENTS' BRIEF

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Unfair Competition Case.
(See Bus. & Prof. Code §17209 and Cal. Rules of Court, Rule 16(d).)

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INTRODUCTION

This case presents an important question of first impression in California about the limits imposed by the United States Constitution on state regulation of the Internet. It primarily involves Business & Professions Code Section 17538.4¹, which specifies the content and positioning of information that must be included in unsolicited email advertisements. Because of the statute's excessive breadth and because of the national reach of the Internet (where geographical identifications are typically absent), the statute has the practical effect of regulating such advertisements nationally. Similar statutes enacted in other states but differing in detail can and do impose conflicting obligations on email advertisers that cannot all be satisfied and that, taken together with California's statute, have the practical effect of prohibiting such advertising altogether. Detailed and conflicting state regulations, if permitted, could stifle Internet development.

Principles enunciated by California courts, by the United States Supreme Court and by courts in other jurisdictions (including federal courts in California) require a determination that section 17538.4

¹ All further statutory references are to the Business & Professions Code unless otherwise indicated.

impermissibly burdens interstate commerce. Detailed specification of information that must be included in Internet email advertising is a matter of a national concern and can only be defined by Congress. Plaintiff's cause of action under the Unfair Business Practices Act (sections 17200 *et. seq.*) depends critically on section 17538.4 and cannot be maintained consistent with the United States Constitution. None of the other alleged causes of action is cognizable. The trial court correctly sustained defendant's demurrer to all causes of action without leave to amend.

Although the case raises a novel and important question, plaintiff's opening brief fails to address the issues properly. In particular, plaintiff erroneously states that "The San Francisco Superior Court held that the California Legislature does not have the 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)." (Appellant's Opening Brief at 2-3) On the contrary, the Constitution allows California to regulate many aspects of Internet communications and the Legislature has properly done so in connection with other matters. Only section 17538.4 is at issue here.

Until there is a valid statute that regulates unsolicited email advertising (enacted by either Congress or the California Legislature), there is nothing "unlawful," "unfair" or "misleading" about the emails alleged in the complaint. There is no difference in principle between unsolicited commercial email and unsolicited commercial materials delivered by the Post Office. Either can be regulated if the regulations are consistent with the federal system.

For these reasons, and arguments presented in more detail below, the judgment must be affirmed.

STATEMENT OF THE CASE

Plaintiff's first amended complaint alleged that defendants sent unsolicited advertising by means of Internet email.² (CT 10:17-19.)

Plaintiff alleged that the email advertisements violated section 17538.4 (*Id.* at 10:22-23.) because:

² Defendants deny that they sent unsolicited email advertising but contend that any advertisements were sent pursuant to an "opt-in" request by those visiting their website. Defendants understand that the facts alleged in the first amended complaint are not yet in issue and that the allegations are assumed to be true for purposes of this proceeding.

"the subject lines failed to begin with the characters 'ADV'; the first line of the text of the email messages failed to contain information about how recipients could have their email addresses removed from future advertising campaigns; the email messages failed to provide a valid return email address to which Plaintiffs could respond; and the headers of the email messages were altered to mask the identity of the sender." (*Id.* at 10:26-114.)

Plaintiff alleged no other substantive facts. On the basis of the facts alleged, plaintiff claimed class action status (*Id.* at 10:7-14) and purported to state causes of action for: (1) negligence per se; (2) trespass; (3) unfair business practices pursuant to section 17200 ; and (4) unlawful advertising practices pursuant to section 17500. (*Id.* at 9-14.) Other than alleging that defendants "took possession of Plaintiffs' computer processors, hard drives, Random Access Memory and Internet mail accounts," (*Id.* at 12:8-10), no damages were suggested.

Defendants Friendfinder, Inc., Andrew B. Conru and Conru Interactive demurred to all causes of action. (CT 15-17.) After a hearing on March 30, 2000 (RT I), the court order further briefing. (CT 53-54.) A second hearing was held on May 18, 2000. (RT II.) Demurrers to all causes of action were sustained without leave to amend and judgment was entered in favor of defendants. (See CT 77-78.) Plaintiff appealed. (CT 79-83.)

LEGAL DISCUSSION

I.

BECAUSE THE DEMURRERS WERE SUSTAINED WITHOUT LEAVE TO AMEND, THE COURT ASSUMES THE TRUTH OF ALL FACTS PROPERLY PLEADED BY THE PLAINTIFF BUT NOT CONTENTIONS OR CONCLUSIONS; AND PLAINTIFF MUST SHOW A REASONABLE LIKELIHOOD THAT AMENDMENT WILL CURE THE DEFECTS.

It is well settled that, on appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, appellate courts assume the truth of all facts properly pleaded by the plaintiff, but not contentions, deductions or conclusions of fact or law. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 [96 Cal.Rptr.2d 354].) If the demurrer was properly sustained as to the allegations made, plaintiff bears the burden of proving to this court that there is a reasonable possibility that amendment will cure the defects and "must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Ibid.* (inner quotation marks and citation omitted).) "The assertion of an abstract right to amend does not satisfy this burden." (*Ibid.*)

“Allegations must be factual and specific, not vague or conclusory.”

(*Id.* at 44.)

Here, plaintiff relies on conclusory statements to support alleged causes of action. E.g., “Defendants’ email transmissions were misleading advertising and members of the public were likely to be deceived.” (Appellant’s Opening Brief at 16.) Although plaintiff asserts that “simple amendments to the complaint would result in valid causes of action,” (*Ibid.*), “factual and specific” allegations are not proposed. (*See Rakestraw* at 44, quoted *supra.*) Under these circumstances, leave to amend would be an empty gesture and a waste of judicial resources.

II.

BUSINESS AND PROFESSIONS CODE SECTION 17538.4 IMPERMISSIBLY BURDENS INTERSTATE COMMERCE AND IS FACIALLY UNCONSTITUTIONAL.

A. Defendants Have Standing To Assert The Unconstitutionality Of Section 17538.4.

In several places in his opening brief, plaintiff argues that defendants may not raise the constitutional infirmity of section 17538.4 because the complaint alleges that defendants are California residents. (e.g., Appellants' Opening Brief at 2, 6 and 8.) The issue is

one of *standing*. (7 Witkin, *Summary of California Law* (9th ed. 1988), “Constitutional Law,” §§ 59 *et. seq.*) “The party attacking [a statute] must therefore show some injury, actual or threatened.” (*Id.*, § 59.) Here, defendants are directly threatened by an action that is based on a statute unconstitutional on its face.

Tobe v. City of Santa Ana (1995) 9 Cal.4th 1069, 1084 [40 Cal.Rptr.2d 402, 892 P.2d 1145], cited and quoted in Appellant’s Opening Brief at 8, demonstrates that the statute is to be judged on its face and not on the basis of defendants’ alleged involvement:

“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.”

When, as here, there has been a decision on a demurrer, the record does not permit inquiry into a statute’s application. (*Gates v. Municipal Court* (1982) 135 Cal.App.3d 309, 314-315 [185 Cal.Rptr. 330].)

As shown in the next point by quotation from *Healy v. The Beer Institute* (1989) 491 U.S. 324 [109 S.Ct. 2491, 105 L.Ed.2d 275] (hereinafter *Healy*), the substantive law provides that a court must consider *possible consequences* of statute challenged under the "dormant commerce clause" implicit in the United States Constitution.

Hence, procedure and substance unite in requiring the court to consider the statute on its face in the light of *possible* application to any person. Whether a valid statute might have been enacted that would reach the particular defendants in this case is irrelevant.

B. Under the "Dormant Commerce Clause" Implicit in the United States Constitution, A State's Regulation Impermissibly Burdens Interstate Commerce If, As a Practical Matter, Such Regulation Directly Controls Commerce Occurring Wholly Outside the Boundaries of the State.

Plaintiff correctly states that the Commerce Clause of the United States Constitution (art. I, § 8), which grants to Congress the exclusive power "To regulate Commerce with foreign Nations, and among the several States," has a "negative" implication or "dormant" restriction that prohibits states from regulating interstate commerce. (Appellant's Opening Brief at 4; *see generally* Note, "*Who Controls the Internet? States' Rights and the Reawakening of the Dormant Commerce Clause*," 73 So.Cal.L.Rev. 1424, 1430-1431 (2000), hereinafter Note.)

Because of the various ways in which states regulate commerce, the dormant commerce clause is not a single doctrine but a bundle of

principles. (Note at 1431.) The most common categories of cases involve (1) a regulation that discriminates against interstate commerce or (2) a nondiscriminatory regulation where burdens on interstate commerce must be weighed against the putative local benefits flowing from such regulation. (See *Oregon Waste Systems v. Dept. of Environmental Quality* (1994) 511 U.S. 93, 99 [114 S.Ct. 1345, 128 L.Ed.2d 13], stating the principle as to discriminatory regulation and contrasting that principle with the weighing test stated in the leading case, *Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142 [90 S.Ct. 844, 25 L.Ed.2d 174] and *see also* Appellant's Opening Brief at 4-5; Note at 1431-1432.)

In addition to these common categories of cases:

“yet another approach has been used which focuses upon whether state laws have the effect of controlling extraterritorial activities which lack direct connection with the regulating state.” (3 Antieau & Rich, *Modern Constitutional Law* (2d ed. 1997), § 43.22 at page 51.)

"Effective extraterritorial control" is what is at issue here.

Hence, the fact that section 17538.4 does not discriminate against interstate commerce is irrelevant. Nor is a weighing test appropriate. (*Cf.* Appellant's Opening Brief at 4-5.)

The applicable principle governing effective extraterritorial

control was stated in *Healy, supra*, which affirmed:

"the established view that a state law that has the 'practical effect' of regulating commerce wholly outside the State's borders is invalid under the Commerce Clause." (491 U.S. at 332.)

"Taken together, our cases concerning the extra-territorial effects of state economic regulation stand at a minimum for the following propositions: First, the 'Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State,' *Edgar v. MITE Corp.*, 457 U.S. 624, 642-643 (1982) (plurality opinion); ... Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. ... Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." (491 U.S. at 336-337)

Although plaintiff argues that "The California statute in question was not designed to regulate conduct outside California's borders," (Appellant's Opening Brief at 5), the principles quoted from *Healy, supra*, apply "regardless of whether the statute's extraterritorial

reach was intended by the legislature."

Plaintiff also argues that "hypothetical situations," such as a California resident traveling out of the State are not before the court and should not be considered. (Appellant's Opening Brief at 8.)

Again, *Healy*, as quoted *supra*, refutes this argument: the court must consider "what effect would arise if not one, but many or every, State adopted similar legislation." Hypothetical situations are clearly in issue.

The limits of permissible extraterritorial control were neatly parsed in *Air Transport Association of America v. City and County of San Francisco* (N. D. Cal. 1998) 992 F.Supp. 1149. The San Francisco Board of Supervisors passed an ordinance that required companies contracting with the City to provide benefits to their employees' domestic partners to the same extent as were provided to employees' spouses. (992 F.Supp. at 1157.) The ordinance applied not only to the contractor's operations within San Francisco, to work involving real property owned by San Francisco wherever located and to work involving a City contract performed anywhere within the United States but also to "any of a contractor's operations elsewhere in the United States." (*Ibid.*) Airline trade organizations challenged the

ordinance's validity. The court held that most provisions of the ordinance were constitutionally valid, but the last one (quoted above) violated the dormant commerce clause because "the City effectively regulates certain extraterritorial practices of City contractors." (*Id.* at 1162.) The City did have the right to control extraterritorial conduct relating to a City contract no matter where the work was performed "because the City would have entered into the contract." (*Ibid.*; see also *S.D. Myers, Inc. v. City and County of San Francisco* (9th Cir. June 14, 2001) 01 C.D.O.S. 4894, again involving corporate benefits owed to domestic partners under the San Francisco ordinance.)

C. Impermissible Extraterritorial Control Is Shown if There is a Possibility of Conflicting Regulation by Several States or if the Medium of Commerce is One Such That Regulation Must Be of a National Character.

As stated in the quotation from *Healy, supra*, determining the validity of a statute that effectively controls conduct occurring wholly outside a state's boundaries requires evaluation of the "practical effect" that "would arise" if other States enacted similar legislation that differ in details. Likewise, in *Edgar v. MITE Corp.* (1982) 457 U.S. 624, 642 [102 S.Ct. 2629, 73 L.Ed.2d 269], the Court struck

down an Illinois law requiring state approval of out-of-state tender offers in part because:

"if Illinois may impose such regulations, so may other States; and *interstate commerce* in securities transactions generated by tender offers *would be thoroughly stifled*." (Emphasis added.)

Healy involved a Connecticut statute that required out-of-state shippers of beer to affirm that their posted prices for products sold to Connecticut wholesalers were, as of the moment of posting, no higher than the prices of those products sold in neighboring states.

"The Commerce Clause problem with the Connecticut statute appears in even starker relief when it is recalled that if Connecticut may enact a contemporaneous affirmation statute, so may each of the border states and, indeed, so may every other State in the Nation." (491 U.S. at 339.)

The "maximum price would almost surely be the minimum price as well." (*Id.* at 340.) The result would be "price gridlock." (*Ibid.*)

If one state, such as California can specify the content and positioning of information that must be included in unsolicited email advertising, so may every other state. If California's statute can reach communications occurring extraterritorially, so may statutes enacted by other states. An email advertiser would, as a practical matter, have to comply with the statutes of every state. The most onerous requirements would have to be observed everywhere, even as to email

carried entirely within a state that does not impose any regulation whatsoever. Even more seriously, the potential welter of conflicting obligations would effectively block all unsolicited email advertising except that of the most limited kind, such as advertising guaranteed to be purely local. Advertising that even might be "interstate" would be "thoroughly stifled." (*Edgar, supra.*)

The discussion in *Healy* following the reference to possible "price gridlock" in the extract quoted above continued by declaring that the:

"kind of potential regional and even national regulation of the pricing mechanism for goods [as would result from the Connecticut statute] is reserved by the Commerce Clause to the Federal Government and may not be accomplished piecemeal through the extraterritorial reach of the individual state statutes." (491 U.S. at 324.)

A long line of United States Supreme Court decisions establishes that some forms of commerce require a national system of regulation and that the individual states are excluded from interfering with the national prerogative. In *Gibbons v. Ogden* (1824) 24 U.S. (9 Wheat.) 1, 16-17, the United States Supreme Court struck down a New York State law purporting to grant to New York citizens an exclusive monopoly over navigation of New York waters because, under the Constitution:

"the commerce of the States was to be a unit; and the system by which it was to exist and be governed, must necessarily be complete, entire and uniform."

The doctrine of complete, entire and uniform national regulation was later adapted to prohibit particular states' attempts to regulate interstate railroads and vehicular highway traffic. (*Wabash, St. L. & P. Ry. Co. v. Illinois* (1886) 118 U.S. 557 [7 S.Ct. 4, 29 L.Ed. 244]; *Southern Pacific Co. v. Arizona* (1945) 325 U.S. 761 [65 S.Ct. 1515, 89 L.Ed. 1915]; *Bibb v. Navajo Freight Lines* (1959) 359 U.S. 520 [79 S.Ct. 962, 3 L.Ed.2d 1003] ; *Kassel v. Consolidated Freightways Corp.* (1981) 450 U.S. 662 [101 S.Ct. 1309, 67 L.Ed.2d 580].) In *Bibb*, for example, the State of Illinois attempted to regulate the size and shape of mud flaps on trucks traveling on interstate highways through the state, but the Court held that mud flap regulation "is not one of those matters admitting of diversity of treatment, according to the special requirements of local conditions." (359 U.S. at 529 (inner quotation marks and citation omitted).)

Likewise, in *NCAA v. Miller* (9th Cir. 1993) 10 F.3d 633, 636, the court struck down a Nevada law requiring specified procedures in any hearing involving alleged violations of league regulations by Nevada schools, players and boosters because the law would have the

"practical effect" of dictating what the NCAA could do in other states. "[E]nforcement procedures must be applied even-handedly and uniformly on a national basis." (*Id.* at 638, quoting from the district court's opinion.) There would be "*potential interaction or conflict* with similar statutes in other jurisdictions." (*Id.* at 639, emphasis added.) (*Accord, Partree v. San Diego Chargers Football Co.* (1983) 34 Cal.3d 378, 384 [194 Cal.Rptr. 367, 668 P.2d 674] (state antitrust law could not be invoked because "[p]rofessional football is a nationwide business") and *City of Oakland v. Oakland Raiders* (1985) 174 Cal.App.3d 414, 418 [220 Cal.Rptr. 153 (City's attempt to exercise eminent domain over football franchise "is the precise brand of parochial meddling with the national economy that the Commerce Clause was designed to prohibit").)

Statutory requirements for the content and positioning of information in unsolicited email advertising, such as are set forth in section 17538.4, are not appropriate for California or any other individual state. If any such prescriptions are to be made, it is Congress that must make them. These conclusions follow directly from established features of the Internet to which we now turn.

D. Dormant Commerce Clause Problems are of Critical Importance in Defining the Reach of Permissible State Regulation of the Internet Because of the Internet's National Reach and Because of the Absence of Geographical Identification in Communications Using that Medium.

Although the Internet became available to consumers only during the 1990's, its unique features have already been recognized by the nation's courts. Technology has created:

“a unique medium — known to its users as ‘cyberspace’ — located in no particular geographical location, but available to anyone, anywhere in the world, with access to the Internet.” (*Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 851 [117 S.Ct. 2329, 138 L.Ed.2d 874].)

”To paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps ‘no there there,’ the ‘there’ is everywhere where there is Internet access.” (*Digital Equipment Corp. v. AltaVista Tech., Inc.* (D. Mass. 1997) 960 F.Supp. 456, 462.)

“Several major national ‘online services’ such as America Online, CompuServe, the Microsoft Network, and Prodigy offer access.” (*Reno v. ACLU, supra*, at 521 U.S. 850.) There is no centralized point from which services can be blocked. (*Id.* at 853.)

In *American Libraries Association v. Pataki* (S.D.N.Y. 1997) 969 F.Supp. 160, the court invoked the dormant Commerce Clause

and struck down a New York Penal Law section that prohibited an individual from sending images with sexual content to a minor.

"The conclusion that the Act must apply to interstate as well as intrastate communications receives perhaps its strongest support from the nature of the Internet itself. The Internet is wholly insensitive to geographical distinctions. In almost every case, users of the Internet neither know nor care about the physical location of the Internet resources they access. Internet protocols were designed to ignore rather than document geographic locations." (969 F.Supp. at 170.)

"Even in the context of e-mail, ... a message from one New Yorker to another New Yorker may well pass through a number of states en route ... Thus, a message from an Internet user sitting at a computer in New York may travel via one or more states before reaching a recipient who is also sitting at a terminal in New York" (*Id.* at 171.)

Although the *Pataki* court affirmed the legitimacy of protecting children from pedophiles, (*Id.* at 177) it concluded that New York could not regulate the Internet to achieve that objective:

"The courts have long recognized that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level. The Internet represents one of those areas; effective regulation will require national, and more likely global, cooperation. Regulation by any single State can only result in chaos, because at least some States will likely enact laws subjecting Internet users to conflicting obligations. Without the limitations imposed by the Commerce Clause, these inconsistent regulatory schemes ***could paralyze the development of the Internet altogether.***" (*Id.* at 180 (emphasis added).)

(See also *American Civil Liberties Union v. Johnson* (10th Cir. 1999) 194 F.3d 1149, 1161-1162 , following the reasoning set forth in *Pataki*.)

Here, section 17538.4, taken together with other state statutes, could paralyze unsolicited email advertising on the Internet. There is nothing special about unsolicited email advertising that distinguishes it from solicitations for charities, materials promoting the programs of special interest groups or requests to participate in opinion surveys. (See *44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 501 [116 S.Ct. 1495, 134 L.Ed.2d 711] (erosion of commercial speech doctrine); *R.A.V. v. St. Paul* (1992) 505 U.S. 377, 382 [112 S.Ct. 2538, 120 L.Ed.2d 305] (content-based regulations presumptively invalid).) If one can be regulated, so can all. The resulting potential flood of legislation and litigation could, as a practical matter, paralyze "this new marketplace of ideas." (*Reno v. ACLU, supra*, at 521 U.S. 885.) Serious care should be exercised to avoid any such paralysis.

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E. The Dormant Commerce Clause Requires This Court to Declare that Business & Professions Code Section 17538.4 Is Unconstitutional Because The Statute, As a Practical Matter, Directly Controls Commerce Occurring Wholly Outside the Boundaries of California, Because of the Possibility and Reality of Conflicting State Regulations Involving Unsolicited Email Advertising and Because Any Detailed Specification of Information to be Included in Such Advertising Is Reserved for Congress.

As stated in the opening paragraph of the Note, *supra*, 73

So.Cal.L.Rev. at 1421:

"The Internet has permanently and unmistakably changed the face of commerce. While legislators have been trying to determine how existing law can be practically applied to the Internet, lawyers and legal scholars realize why it cannot. The inability to apply existing law elegantly to the Internet has prompted a sea of legislation specifically drafted to traverse the cyberspace age. These new and anticipated regulations have, in turn, caused a literal resurrection of the Dormant Commerce Clause."

Evaluation of the constitutionality of section 17538.4 requires a detailed consideration of its provisions and of the "sea of legislation" in which it is only one current and in which conflicting currents can breed a potential storm that might wreck the Internet.

Section 17538.4, provides, in, pertinent part:

(a) No person or entity conducting business in this state shall ... electronically mail (e-mail) or cause to be e-mailed, documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit unless:

...

(2) In the case of e-mail, that person or entity establishes a toll-free telephone number or valid sender operated return e-mail address that the recipient of the unsolicited documents may call or e-mail to notify the sender not to e-mail any further unsolicited documents.

(b) All unsolicited ... e-mailed documents subject to this section shall include a statement informing the recipient of the toll-free telephone number that the recipient may call, or a valid return address to which the recipient may write or e-mail, as the case may be, notifying the sender not to ... e-mail the recipient any further unsolicited documents to the ... e-mail address, or addresses, specified by the recipient.... ***In the case of e-mail, the statement shall be the first text in the body of the message and shall be of the same size as the majority of the text of the message.*** (emphasis added)

(c) Upon notification by a recipient of his or her request not to receive any further unsolicited ... e-mailed documents, no person or entity conducting business in this state shall ... e-mail or cause to be e-mailed any unsolicited documents to that recipient.

(d) In the case of e-mail, this section shall apply when the unsolicited e-mailed documents are delivered to a California resident via an electronic mail service provider's service or equipment located in this state. For these purposes "electronic mail service provider" means any business or organization qualified to do business in this state that provides individuals, corporations, or other entities the ability to send or receive

electronic mail through equipment located in this state and that is an intermediary in sending or receiving electronic mail.

(e) As used in this section, "unsolicited e-mailed documents" means any e-mailed document or documents consisting of advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit that meet both of the following requirements:

(1) The documents are addressed to a recipient with whom the initiator does not have an existing business or personal relationship.

(2) The documents are not sent at the request of, or with the express consent of, the recipient.

...

(g) In the case of e-mail that consists of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit, ***the subject line of each and every message shall include "ADV:" as the first four characters.*** If these messages contain information that consists of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit, that may only be viewed, purchased, rented, leased, or held in possession by an individual 18 years of age and older, ***the subject line of each and every message shall include "ADV:ADLT" as the first eight characters.*** (emphasis added)

Section 17538.4 is far-reaching. It governs every “person or entity conducting business in this state” and all unsolicited email advertising sent “via an electronic mail service provider’s service or equipment located in this state.” (§§ 17538.4(a) and (d)) An “electronic email service provider” is “any business or organization

qualified to do business in this state that provides ... the ability to send or receive electronic mail through equipment located in this state” or that is "that is an intermediary in sending or receiving electronic mail." (*Id.*, subsection (d).)

The phrases “conducting business in this state” and “qualified to do business in this state” are not well-defined but their meaning appears to be indistinguishable from that invoked by the formulaic “doing business in this state” that is the traditionally broad, elastic standard for identifying the propriety of an exercise of personal jurisdiction. (See 2 Witkin, *California Procedure* (4th ed. 1997), "Jurisdiction," §§ 133-134; the Judicial Council Comment to Code of Civil Procedure § 410.10 (West’s Annotated Codes); and *Bancroft & Masters, Inc. v. Augusta National, Inc.* (9th Cir. 2000) 223 F.3d 1082 (Internet context).) Hence, any business that might be subject to the jurisdiction of the California courts must reckon with section 17538.4 if it is constitutionally valid, regardless of where that business is located.

Although section 17538.4 governs only unsolicited email advertising sent to a “California resident,” there is no knowledge or notice element. The statute applies if the recipient turns out to be a

“California resident” even though the sender of an unsolicited email advertisement had no way to determine that fact. A peripatetic California resident might have several email accounts, including one maintained at a local East Coast service provider.

“onehappyfella@aol.com” might be living anywhere in the country or even overseas. Indeed, “onehappyphoenixarizonafella@aol.com” might turn out to be a “California resident” despite contrary appearances. (See *Uteley v. Allstate Insurance Co.* (1993) 19 Cal.App.4th 815, 824 [24 Cal.Rptr.2d 1] (affirming the proposition that a person may have several residences at the same time and for different purposes) and the Judicial Council Comment to Code of Civil Procedure § 410.10, *supra*.)

Typically unsolicited email advertising is sent in "bulk," that is to lists of recipients processed by automation. (See Sorkin, "Technical and Legal Approaches to Unsolicited Electronic Mail," 33 U.S.F.L.Rev. (2001) 325, 331.) There is no practical way to ascertain which addressees are California residents.

Despite apparent localization of section 17538.4 to email sent from a person or entity "conducting business in this state" to "California residents," the elasticity of terminology and the absence of

notice or knowledge means that the "*practical effect*" (*Healy, supra*) of the statute is to reach to all unsolicited email advertising carried by the Internet, subject only to rare exceptions where the sender can verify that California law does not apply. The reach is, therefore, nationwide and general.

The content and positioning requirements of section 17538.4 are specific and detailed. "[T]he subject line of each and every message shall include 'ADV:' as the first four characters."

(§ 17538.4(g).)

"If these messages contain information that consists of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extensions of credit, that may only be viewed, purchased, rented, leased, or held in possession by an individual 18 years and older, the subject line of each and every message shall include 'ADV:ADLT' as the first eight characters." (*Ibid.*)

(There is considerable ambiguity in this last requirement because so many terms are undefined, e.g. "disposition;" in addition, the statute is ambiguous as to whether the reference to materials that can acquired "only by an individual 18 years or older" refers to an age requirement imposed by law or one imposed by terms of agreement in the offer, e.g., acquisition through purchase by means of a credit card held in the name of the purchaser.)

In addition, the statement informing the recipient of the toll-free telephone number or address to which to send a notification that no further emails should be sent must "be the first text of the message." (§ 17538.4(b).)

Hence, section 17538.4 imposes nationwide obligations as to detailed information and the positioning of that information in "each and every message." These requirements cannot be maintained consistent with the dormant commerce clause.

It is manifest that, if California can impose such requirements, so may every other state. There is no reason to suppose that the multiple requirements can be simultaneously obeyed. As stated in connection with the quotations from *Healy, supra*, the mere *possibility of conflicts* with statutes enacted in other states is sufficient to condemn section 17538.4. In addition, examination of some particular statutes demonstrates that *actual conflicts* are present.³ For example, there is direct conflict with 18 Pa. Cons. Stat. section 5903(a.1) which prohibits the transmission of an email message containing explicit sexual materials "unless the first nine characters in the subject line are 'ADV-ADULT.'" (Sorkin, *supra*, 35 U.S.F.L.Rev.

³ Statutes are available at <http://www.spamlaws.com>.

at 381.) It is impossible to comply with the laws of both California and Pennsylvania.

Many states impose no requirements on unsolicited email advertising and other states impose requirements more onerous than those imposed by California. (Sorkin, *supra*, at p. 368 *et. seq.*) Delaware criminalizes unsolicited bulk commercial e-mail if the sender knew that there was a reasonable possibility that the recipient was in Delaware. (*Id.* at 369.) West Virginia prohibits the transmission of "bulk electronic mail messages" (another term of art — see Sorkin, *supra*, at 330) that contain "sexually explicit materials," including "a visual depiction, in actual or simulated form... [of] nudity, human genitalia, or any act of natural or unnatural sexual intercourse" if the sender "has reason to know" that the address is held by a West Virginia resident. (W.Va. Code Ann. § 46A-6G-2(4).) Just as citizens of other states should not be subjected to California's invalid statute, so Californians need protection from overreaching proscriptions enacted elsewhere. This is the essence of the national compact enforced through the dormant commerce clause.

Plaintiff emphasizes the purported evil effects of unsolicited email (Appellant's Opening Brief at 1-2) and complains that Congress

has failed to act. (*Id.* at 9.) He should not be so discouraged. (*See* Sorkin, *supra*, at pp. 368-369, noting that bills were passed by the Senate in 1998 and by the House of Representatives in 2000 and that, although neither became law, another bill is being considered by the current Congress.) Perhaps Congressional deliberation is supported by caution appropriate to the fast-changing Internet environment. In any event, it is clear that the "national information superhighway," like the navigable waters, cross-country railroads and interstate highways, "is not one of those matters admitting of diversity of treatment, according to the special requirements of local conditions." (*Bibb, supra*, 359 U.S. at 529 .) "[E]nforcement procedures must be applied even-handedly and uniformly on a national basis. (*NCAA v. Miller* (9th Cir. 1993) 10 F.3d 633 at 638, quoted *supra*.) Section 17538.4 "is the precise brand of parochial meddling with the national economy that the Commerce Clause was designed to prohibit." (*City of Oakland v. Oakland Raiders*, quoted *supra*, at 174 Cal.App.3d 418.) Whether or not Congress is derelict in its national duties is not a matter for the California Legislature to decide. It is Congress that will have to prescribe content and positioning of information in unsolicited email advertising. Section 17538.4 impermissibly

invaded the prerogative of Congress and must be declared invalid under the dormant commerce clause.

F. California Retains the Power to Regulate Internet Communications in a Manner Consistent with the Dormant Commerce Clause and Has Done So in Connection with Other Matters.

The unconstitutionality of section 17538.4 does not mean that the California legislature has no power at all to regulate unsolicited email advertising. At pp. 1446-1448 of the Note, the author argues that section 17538.45 “serves as a good example of how a state law targeted directly at the Internet can be tailored narrowly enough to withstand Dormant Commerce Clause scrutiny.” (Note at 1446.) Section 17538.45 imposes liability on one who sends unsolicited email advertising using an “electronic mail service provider’s equipment located in this state in violation of that electronic mail service provider’s policy.” There is an in-state *initiation* requirement that:

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“lessens the burden on interstate commerce in two ways. First, the out-of-state spammer need not concern himself with California’s law. Second, this eliminates the problem of inconsistent legislation.” (*Id.* at 1448.)⁴

Hatch v. Superior Court (2000) 80 Cal.App.4th 170 [94 Cal.Rptr.2d 453], on which plaintiff relies, has no bearing on the issues presented here. In *Hatch*, defendant was charged with violations of the Penal Code for acts occurring wholly within California and the court rejected the argument that prosecutors would attempt to enforce the criminal law extraterritorially. (*Id.* at 80 Cal.App.4th 196-197.) The Penal Code sections had mental elements of knowledge, notice and intent that are entirely absent in § 17538.4. (See *Hatch* at 80 Cal.App.4th 182-184.) Nonetheless, *Hatch* shows that California is not devoid of power to regulate Internet communications constitutionally.

⁴ Because a constitutionally valid statute regulating unsolicited email advertising may be possible, the court may be tempted to rewrite section 17538.4 to conform to constitutional requirements. (See *Kopp v. Political Practices Committee* (1995) 11 Cal.4th 607, 660 *et. seq.* [47 Cal.Rptr.2d 108, 905 P.2d 1248].) Appellant has not suggested how such a revision could be carried out. The kind of wholesale revisions necessary to save the statute would involve the court “in precisely the type of judicial policymaking and encroachment on the legislative function, against which the *Kopp* court warned.” (*Ceridian Corp. v. Franchise Tax Board* (2000) 85 Cal.App.4th 875, 889 [102 Cal.Rptr.2d 611] (statute invalid under the dormant commerce clause could not be salvaged).)

In *State of Washington v. Heckel* (Washington Supreme Court, filed June 7, 2001) (copy attached), the court held that a statute that prohibited deceptive practices in connection with unsolicited email advertising did not impermissibly burden interstate commerce.

Deceptive practices are properly proscribed by both Congress and the States. It is well settled that "Where Congress has proscribed certain interstate commerce,... it does not offend the Commerce Clause for states to discriminate or burden that commerce." (*Pic-A-State, Inc. v. Commonwealth of Pennsylvania* (3d. Cir. 1994) 42 F.3d 175, 179 (prohibition of sales of out-of-state lottery tickets complemented federal law).) *Heckel* is also inapposite for reasons stated in the final paragraph before the Conclusion of that decision, which held that the statute in question:

“reaches only those deceptive UCE [unsolicited commercial e-mail] messages directed to a Washington resident or initiated from a computer located in Washington; in other words, the Act does not impose liability for messages that are merely routed through Washington or that are read by a Washington resident who was not the actual addressee.”

These restrictions are not present in section 17538.4 which regulates messages "delivered to a California resident" by an "intermediary" that is "qualified to do business in this state." (§ 17538.4(d))

In sum, the California Legislature has the power to regulate Internet communications when such regulation can be imposed consistent with the United States Constitution. This power cannot save section 17538.4. That statute impermissibly invades the national prerogative. The decision of the trial court should be affirmed.

III.

PLAINTIFF’S FIRST CAUSE OF ACTION FOR “NEGLIGENCE PER SE” FAILS TO STATE FACTS SUFFICIENT TO WITHSTAND A DEMURRER AND NO SAVING AMENDMENTS ARE SHOWN.

In his first cause of action, plaintiff alleged that “Defendants’ violations of statutes and regulations constitute *negligence per se*.” (CT 11:21-23) Statutes cited are Business & Professions Code sections 17200, 17500 and 17538.4. No “regulations” are referenced in the first amended complaint. As shown above, section 17538.4 is constitutionally invalid. Sections 17200 and 17500 will not support a cause of action for negligence per se which seeks damages. (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116 [96 Cal.Rptr.2d 485, 999 P.2d 718].) More seriously, none of the factual allegations support a cause of action for negligence per se.

Negligence per se is based on Evidence Code section 669(a)

that provides that:

"[t]he failure of a person to exercise due care is presumed if: (1) he violated a statute, ordinance, or regulation of a public entity; [and] (2) the violation proximately caused a death or injury to person or property."

First, There is no issue of due care. In *California Service Station and Automobile Association ("CSAA") v. American Home Assurance Co.* (1998) 62 Cal.App.4th 1166, 1176 [72 Cal.Rptr.2d 182], the court refused to allow a negligence per se theory based on the insurer's failure to adhere to Insurance Code provisions and regulations promulgated thereunder. "These statutes do not create a negligence duty of care. They prohibit misrepresentations, and are thus analogous to torts of fraud and deceit, not the tort of negligence." Exactly the same situation is present here.

The CSAA court relied on prior authorities which:

"held that an underlying claim of ordinary negligence must be viable before the presumption of negligence under Evidence Code section 669 can be employed." (*Id.* at 62 Cal.App.4th 1178.)

"[T]he Evidence Code section 669 presumption of negligence applies only after determining that the defendant owes the plaintiff an independent duty of care, which has not been demonstrated here." (*Id.* at 1180.)

There is no claim of negligence here and no cause of action

alleging negligence per se can be entertained.

Second, there is no actionable injury, under Evidence Code section 669(a) or otherwise. There is no suggestion of an injury to a person or property based on the receipt of unsolicited email advertising that does not contain information required and positioned according to section 17538.4 as opposed to advertising without such content or positioning. How would plaintiff's alleged injury be lessened if such prescriptions were followed? As discussed in the next point, plaintiff's claim that the receipt of unsolicited email advertising somehow "damages" his computer is devoid of merit.

As plaintiff notes, the trial court stated that the negligence per se theory "just doesn't fit." (Appellant's Opening Brief at 11.) The trial court was correct. Nor can the theory be made to fit these facts. The judgment should be affirmed.

IV.

PLAINTIFF'S SECOND CAUSE OF ACTION FOR TRESPASS FAILS TO STATE FACTS SUFFICIENT TO WITHSTAND A DEMURRER AND NO SAVING AMENDMENTS ARE SHOWN.

Plaintiff argues that a "trespass to chattels" cause of action is properly based on the time lost through downloading unsolicited

email advertisements and the creation of "holes in the file system called fragmentation" when such email is deleted. (Appellant's Opening Brief at 13.) This argument truly tries to make a mountain out of a molehill. "The law disregards trifles." (Civil Code § 3533.)

Plaintiff also argues that "at a physical level, email (or any record of computer intrusion) is represented by etchings on a silicon chip" and that "the silicon is physically altered to represent the information that makes up the email." (Appellant's Opening Brief at 13.) This argument is factually false and we challenge plaintiff to support it by citation to competent authority. In the first instance, computer operations are based on *transient signals* and not by physical alterations of the chips. To the extent signals are stored in nonvolatile memory (i.e. through preservation of data when the computer is turned off), the storage is by means of millions and billions of minute "switches" incorporated in magnetic devices such as hard drives. Computers are designed to process massive quantities of information without substantial damage or wear or tear and nothing plaintiff has written supports a contrary conclusion.

It was to forestall meaningless, trivial and/or spite lawsuits that the Supreme Court held in *San Diego Gas and Electric Co. v.*

Superior Court (1996) 13 Cal.4th 893, 895 [55 Cal.Rptr.2d 724, 920 P.2d 669] that electric and magnetic fields arising from power lines could not support a cause of action for trespass. The reasoning applies here.

There is authority for the proposition that transmitting massive quantities of unsolicited email advertising can constitute trespass to chattels when such emails are transmitted with the knowledge that such transmissions will substantially interfere with the computers serving the recipients. Typically, those charged with such a tort continue sending such email after having been told to cease and desist. (*CompuServe, Inc. v. Cyber Promotions, Inc.* (S.D. Ohio 1997) 962 F.Supp. 1015 (after being asked to stop transmitting massive quantities of unsolicited email, defendants increased the volume); *America Online, Inc. v. IMS* (E.D. Va. 1998) 24 F.Supp.2d 548, 550 (60 million messages); *America Online, Inc. v. LCGM, Inc.* (E.D Va. 1998) 46 F.Supp.2d 444, 448 (92 million messages); *Hotmail Corp. v. Van\$ Money Pie, Inc.* (N.D. Cal. 1998) 47 U.S.P.Q.2d 1020, 1022 ("hundreds of thousands of misdirected responses" resulting from forged return addresses))

Plaintiff relies on *Thrifty-Tel v. Bezenek* (1996) 46 Cal.App.4th

1559 [54 Cal.Rptr.2d 468] (Appellant's Opening Brief at 12.) In *Bezenek*, defendants' teen-aged sons acquired access codes and used them to make unauthorized calls using the computerized switching network at the center of the operations of plaintiff, a small telephone company. On a single day, the children generated over 1300 calls, overburdening the system and denying access to subscribers. (46 Cal.App.4th at 1564.) The court awarded plaintiff over \$33,720 in purported compensatory damages (based on telephone tariffs), plus attorney fees and costs. (*Id.* at 1565.) The court of appeals reversed, in part because "Thrifty-Tel presented no evidence at trial of actual damages." (*Id.* at 1569.) The court was concerned that a damages award based on a tariff "might produce a windfall in instances of de minimis hacking." (*Ibid.*) The court was also concerned that plaintiff had not notified the parents of the hackers and thus failed to mitigate its damages. (*Id.* at 1568.)⁵

From the cases, it is clear that, to be actionable, the interference

⁵ In any event, *Bezenek* appears not to survive *San Diego Gas & Electric Co.*, *supra*, because the more recent Supreme Court case reinterpreted *Wilson v. Interlake Steel Co.* (1982) 32 Cal.3d 229 [185 Cal.Rptr. 280, 649 P.2d 922] on which both *San Diego Gas & Electric Co.* and *Bezenek* relied. (Compare *Bezenek* at 46 Cal.App.4th 1566, n.6, with *San Diego Gas & Electric Co.* at 13 Cal.4th 936.)

with use must be on a substantial scale; the cause of action "could not be maintained in the absence of some form of damage." (*CompuServe, Inc. v. Cyber Promotions, supra*, 962 F.Supp. at 1022, the leading case.) The *CompuServe* court distinguished such cases as an unwelcome pulling on the ears of a pet dog and a two minute search of truck. (*Ibid.*) Plaintiff's alleged interference with his computer is comparable to these nonactionable cases.

Here, there is no allegation that plaintiff or anyone else notified these defendants that their advertisements were considered objectionable. Plaintiff received no more than a few isolated email advertisements. There must be a mental element and a lower quantitative limit to a valid cause of action under this theory that have not here been satisfied. If sending someone an unwanted email message constitutes trespass, the cause of action is not limited to unsolicited email advertisements. Any unwanted email message could be the basis for a cause of action.

The trial court correctly ruled that plaintiff had failed to state a proper cause of action for trespass to chattels. Plaintiff presents factually absurd factual statements in his opening brief that would authorize lawsuits based on trivial annoyances. He cannot support his

claims by anything substantive. The judgment should be affirmed.

V.

**PLAINTIFF'S THIRD CAUSE OF ACTION FOR UNFAIR
BUSINESS PRACTICES FAILS TO STATE FACTS SUFFICIENT
TO WITHSTAND A DEMURRER AND NO SAVING
AMENDMENTS ARE SHOWN.**

An action under the Unfair Competition Act (sometimes called the Unfair Business Practices Act), Business & Professions Code sections 17200 *et. seq.*, is premised on an "unlawful, unfair, or fraudulent business practice" or any act prohibited by section 17500. (§ 17200) However, without an underlying substantive violation, the cause of action cannot be maintained. (*Klein v. Earth Elements* (1977) 59 Cal.App.4th 965, 970 [169 Cal.Rptr.2d 623] ("there is absolutely nothing deceptive or sharp about the company's behavior"); *Californians for Population Stabilization v. Hewlett Packard* (1997) 58 Cal.App.4th 273 [67 Cal.Rptr.2d 621].) A "perfunctory contention" is insufficient. (*Blank v. Kirwin* (1985) 39 Cal.3d 311, 329 [216 Cal.Rptr. 718, 703 P.2d 58].)

Here, plaintiff based the third cause of action in his first amended complaint on two sets of allegations. First, "Defendants' transmission of email advertisements was unlawful for violation of

California Business & Professions Code Section 17538.4" (CT 13:9-10.) For the reasons stated above, this claim cannot be pursued. The dormant commerce clause prohibits any reliance on the section 17538.4 that would burden interstate commerce.

Plaintiff also alleged:

"Plaintiffs are informed and believe and thereon allege that Defendants and each of them caused the email transmission of a commercial advertisement in a manner designed to deceive Plaintiffs and mislead Plaintiffs as to the actual origin of the email transmission. ... ¶ Defendants email transmissions were misleading advertising and members of the public were likely to be deceived." (CT 13:6-12.)

This is a "perfunctory contention" devoid of factual substance.

Plaintiff is, of course, in possession of the e-mails he claims are violative of the statute. He is also knowledgeable about the identities of defendants. There is nothing hidden from him that requires allegations on "information and belief." If plaintiff seriously intends to proceed on this theory, he must state a basis that is "factual and specific, not vague or conclusory." (*Rakestraw*, discussed in point I, *supra*, at 81 Cal.App.4th 44.) His unsupported assertion that: "If this court grants appellant an opportunity to amend the complaint, the complaint would state a valid cause of action" (Appellant's Opening Brief at 16) is nothing more than the "assertion of an abstract right to

amend" that does not satisfy his burden. (*Rakestraw, supra*, at 81 Cal.App.4th 43.)

The real basis of the third cause of action, section 17538.4, is constitutionally flawed. There is nothing else. The trial court properly sustained defendants' demurrers without leave to amend and its judgment should be affirmed.

VI.

PLAINTIFF'S FOURTH CAUSE OF ACTION FOR UNLAWFUL ADVERTISING PRACTICES FAILS TO STATE FACTS SUFFICIENT TO WITHSTAND A DEMURRER AND NO SAVING AMENDMENTS ARE SHOWN.

The fourth cause of action in plaintiff's first amended complaint is titled "Unlawful Advertising Practices" and apparently invokes Business & Professions Code sections 17500 that prohibits "False Advertising." The charging allegations reiterate those alleged in the third cause of action, discussed above, that:

"Plaintiffs are informed and believe and thereon allege that Defendants and each of them caused the email transmission of a commercial advertisement in a manner designed to deceive Plaintiffs and mislead Plaintiffs as to the actual origin of the email transmission. ¶ Defendants email transmissions were misleading advertising and members of the public were likely to be deceived." (CT 13:21-25.)

The allegations of the fourth cause of action suffer from the

same defects as those discussed in connection with the third cause of action, *supra*. There are nothing but conclusions and perfunctory contentions and no facts to support any relief under any theory. In particular, there are no allegations of facts that might support a finding of anything that might “mislead Plaintiffs as to the actual origin of the email transmission” or of anything improper.

In *State Board of Funeral Directors v. Mortuary in Westminster Memorial Park* (1969) 271 Cal.App.2d 638, 642 [76 Cal.Rptr. 832], the court exercised independent judgment in reviewing a trial court decision. The fact that a mortuary and cemetery were both located in Westminster Memorial Park and advertised together could not sustain a cause of action for false or misleading advertisements.

“Nothing in [the advertisements] is directed toward ownership entities or licensing, and it is doubtful that any person reading the advertisements would think about these matters one way or another.” (*Ibid.*)

For these reasons and those stated *supra* in connection with the third cause of action, the judgment of the trial court as to this cause of action should be affirmed.

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CONCLUSION

The constitutionality of section 17538.4 is a substantial issue. Careful examination of its provisions in the light of controlling authority establishes that California cannot prescribe the content and positioning of information in Internet email communications where such prescriptions have the practical effect of regulating such communications nationwide. The situation is exacerbated by the likelihood, and, indeed the fact, that California's statutory regulation conflicts with regulations imposed by other states. The principle is of general application and does not depend on the particular subject matter of unsolicited email advertising. Conflicts arising from such detailed state regulation would seriously impede the flow of otherwise legitimate Internet commerce and communications and stifle Internet development.

If unsolicited email advertising is to be so closely regulated, it is Congress that must enact the legislation.

Once section 17538.4 is removed from plaintiff's complaint, there is nothing left of substance. Plaintiff is attempting to allege remote causes of action on the basis of insupportable contentions and conclusions.

For all of these reasons, the trial court correctly entered judgment in favor of defendants and against plaintiff. The decision should be affirmed.

Dated: June 22, 2001

Respectfully submitted,
ROTHKEN LAW FIRM

Ira P. Rothken, Esq.

Robert Kovsky, Esq.

Attorneys for Defendants and
Respondents Friendfinder, Inc.,
Andrew B. Conru, and Conru
Interactive, Inc.

PROOF OF SERVICE

Ferguson v. Friendfinder, Inc., et al.
California Court of Appeal, First Appellate District, Division Two
Case No. A092653

I am over the age of 18 years, employed in the county of Marin, and not a party to the within action; my business address is 1050 Northgate Drive, Suite 520, San Rafael, California, 94925.

On June 25, 2001, I served the within:

RESPONDENTS' BRIEF

on the parties in said action and on the Attorney General of California and the District Attorney of San Francisco (pursuant to Rule 16(d) of the California Rules of Court) by US MAIL by placing the document listed above in a sealed envelope with first class postage thereon fully prepaid, in the United States mail at San Rafael, California, addressed as set forth below:

Mr. John L. Fallat
Law Offices of John L. Fallat
907 Sir Francis Drake Blvd. #100
Kentfield, CA 94904-1502

Attorney General of California
Consumer Law Section
P.O. Box 944255
Sacramento, CA 94244-2550

District Attorney of San Francisco
Consumer Law Section
880 Bryant Street
San Francisco 94103

I also delivered via RESCUE DELIVERY five copies of such brief to the Supreme Court of the State of California and deposited one copy with the clerk of the Superior Court of California, City and County of San Francisco for delivery to Hon. David A. Garcia.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 25, 2001, at San Rafael, California.

JARED R. SMITH