



1 December 26, 2008

9:51 a.m.

2 P R O C E E D I N G S

3 THE COURT: Line 4 is Vantage Interactive versus  
4 Householter, 08-480288.

5 MR. SINGLETON: Good morning, Your Honor. Jason Singleton  
6 appearing for -- that's actually Kneeland Engineering, Joel  
7 Householder.

8 MR. BURGOYNE: Good morning, Your Honor. Hank Burgoyne,  
9 Kronenberger Burgoyne, on behalf of Vantage Interactive.

10 THE COURT: All right. This is a demurrer of Vantage.

11 MR. SINGLETON: Do you want to start, hang.

12 MR. BURGOYNE: Yes, Your Honor. Vantage submits to the  
13 tentative. We'll reserve a couple seconds of goodwill to see  
14 if there's anything we need to respond to.

15 THE COURT: Okay.

16 MR. SINGLETON: Fair enough.

17 Your Honor, there was a little confusion on my part,  
18 having read the tentative ruling, as to what specifically the  
19 Court was seeking in the amended complaint. It was a little  
20 ambiguous.

21 At one point the tentative ruling said there is a carve  
22 out for falsity, and another at the end. It mentions that  
23 you'd have to prove common law fraud to --

24 THE COURT: I think the bottom line is you had better put  
25 in whatever you can possibly put in that you believe is  
26 sufficient to satisfy the carve out. And I would not leave out  
27 anything.

28 MR. SINGLETON: Okay. Fair enough. So I guess we're --

1 my suspicion is that we're going to put in, as we put in our  
2 opposition, we're going to put that in the amended complaint.  
3 And I assume there will be a successive demurrer, and we'll  
4 probably be back here again and doing it all again.

5 THE COURT: I'm sure you are. I mean --

6 MR. SINGLETON: I don't know --

7 THE COURT: There's no California law on this point. I  
8 think clearly the trend of the cases is to say that the carve  
9 out means common law fraud. I'm not saying that there's not a  
10 question about that, but I don't find much authority to support  
11 the notion that something less than that was contemplated.

12 Clearly Congress intended, I think, to occupy this field.  
13 It makes sense for Congress to occupy this field, given the  
14 nature of Internet communications. There frankly needs to be a  
15 standard, a national standard.

16 Obviously when Congress adopts things, people put things  
17 in the legislation that they may not -- this one is not as  
18 clear as it could be. But I'm hard-pressed to read the intent  
19 of Congress and come to a conclusion that the carve out means  
20 something other than common law fraud.

21 Now, having said that, this is an evolving area and at  
22 this point I think we should just leave it at that and all I  
23 can do is to, as I said before, is I think you need to put  
24 in -- I wouldn't leave anything out, all right.

25 MR. SINGLETON: Okay.

26 THE COURT: And then we'll see where this all goes.

27 MR. SINGLETON: Indeed. I do have a few points in there,  
28 may be more relevant at the second demurrer than now, but I'm

1 going to put them out there, at least for the Court's  
2 consideration.

3 If we have to show detrimental reliance, I would just as  
4 soon the Court sustain a demurrer without leave to amend so we  
5 can get right to the First District Court of Appeal. Because  
6 e-mails are not directed to the ISP, they're directed to the  
7 ISP and user clients. And the same problem which faced the  
8 state attorney general. If you have to show detrimental  
9 reliance on the misrepresentation, no ISP and no attorney  
10 general will ever be able to state a claim that is not  
11 preempted under the Business and Professions Code.

12 And I can just submit to the Court and stipulate that my  
13 client will not be, as an ISP, be able to show detrimental  
14 reliance on the subject e-mails.

15 THE COURT: Okay. Maybe what you need to do -- you see,  
16 one of the things that happens in something like this, I think  
17 you need to make sure in the complaint you have -- in the  
18 complaint, not in your argument, you need to make very clear  
19 the specific role of your client in the nature of the  
20 communications. You cannot assume, in fact it would be a  
21 serious error to assume, that the judicial officers are going  
22 to have the slightest idea how these communications work among  
23 the various entities as these messages are transferred, all  
24 right.

25 So if you want to build the record to maximize your  
26 arguments, then I think you need to make sure that the  
27 complaint itself reflects it.

28 MR. SINGLETON: Indeed, indeed. Just a couple of other

1 comments for the Court's consideration.

2 Neither the Cleftman opinion nor the Omega opinion, which  
3 I assume -- I'm guessing the Court's probably read them, from  
4 listening to the Court's comments, neither of those really  
5 state that a showing of common law fraud is required. Only the  
6 Wong case does. And my impression of the Wong case is it's  
7 just an artifact of one court paraphrasing another, without  
8 having actually done the analysis.

9 So at some point, given the fact that the cases are all  
10 over the place, I think if the Court were to do its own  
11 independent analysis of what preemption actually requires, and  
12 that it's narrowly construed unless Congress clearly evidences  
13 otherwise, that I don't think that there's a requirement that  
14 there be common law fraud to survive preemption.

15 So I -- my only point being, I would just ask the Court,  
16 when we finally get to it, that it conduct its own independent  
17 analysis.

18 THE COURT: Well, no, that's -- that's fine. And that's  
19 an appropriate request.

20 In something like this, it's usually better to have two  
21 bites of the apple than one, so that the issues are clearly  
22 framed. At the same time, I think you need to consider the  
23 consequence of regulating these kinds of messages. If in fact  
24 citizens in fifty states, attorney generals in fifty states can  
25 commence actions based on different legal standards in fifty  
26 states.

27 MR. SINGLETON: I did get that rationale from -- I don't  
28 know if it was Cleftman or Omega, but I did actually

1 contemplate that some. And it is kind of a... cerebral  
2 concepts to wrestle with. It certainly is not the most  
3 straightforward analysis but, nonetheless, to me the dichotomy  
4 comes, you know, can the State of California regulate false  
5 advertising in the scope of an e-mail message, and how does  
6 that interact with the preemption clause? And it's not the  
7 most straightforward analysis.

8 But we will put everything that we can that we'd clarify  
9 in the complaint, and we'll take another stab at it and come  
10 back and try again, I guess.

11 MR. BURGOYNE: Okay. Just a couple of comments, Your  
12 Honor. Hank Burgoyne on behalf of Vantage.

13 One, just to clear up, there -- I think Mr. Singleton's  
14 firm was trying to give the impression in their papers that the  
15 law has developed in the federal courts as preemption should be  
16 disregarded. Just a reminder that the preemption language at  
17 issue is in a federal statute.

18 We would look to the federal courts to tell us what that  
19 means. So I don't think it's important at this point that we  
20 haven't had a California court of sufficient consequence  
21 confirm what all the federal courts have been telling us and  
22 what I think Your Honor just summarized; that the law is  
23 clearly developing, as Your Honor described.

24 Second point I just want to make. I think there is some  
25 disagreement in the opinions, in the federal opinions about  
26 whether by sounding in fraud, as the monographics (ph.), the  
27 Omega World Travel court first began the discussion, whether  
28 that means a plaintiff must plead and prove all five elements

1 of fraud, at least as we would have it in California or, at the  
2 very least, that there was some material statement  
3 intentionally made to deceive, with knowledge on the part of  
4 the speaker that it was false. That seems to be, at a minimum,  
5 what the federal courts are saying is required in order to  
6 overcome preemption.

7 And I think when you look at Plaintiff's proposed  
8 amendment, I mean, I have a serious issue. To give a little  
9 bit of background, this is a case that is, in a sense, an  
10 outgrowth of a federal case brought by another Mr. Singleton's  
11 clients.

12 Mr. Singleton represents a couple of organizations. They  
13 purport to be ISPs. They're organizations that take e-mails  
14 sent to closed accounts, administrative accounts and it  
15 appears, in some cases, accounts they create for the purpose.  
16 They take e-mails sent to those accounts. They turn off all  
17 SPAM filtering, which is usually conducted at another level and  
18 sometimes by an outside organization, such that they receive  
19 messages they never would have received.

20 They bundle them up. They send them directly to  
21 Mr. Singleton, who keeps a database at his firm and has  
22 employees and contractors who search and sort this database,  
23 trying to find e-mails that they can then use to generate  
24 lawsuits.

25 It's the farthest thing from what the U.S. Congress or the  
26 California Legislature intended by e-mail marketing  
27 enforcement. It does actually make sense that there would be  
28 this requirement of some sort of fraudulent intent, intent to

1 mislead with knowledge and falsity, of course, the hallmark of  
2 fraud being falsity. Otherwise you could have a situation like  
3 we're seeing here, which is anyone who purports to be an ISP  
4 comes along, happens to have an e-mail that they claim passed  
5 through their systems and now they're bringing a claim because  
6 there's statutory damages out there and they're significant if  
7 you can bundle up a bunch of e-mails.

8         When you look at these e-mails that have been submitted to  
9 the Court, there's not a single false statement in a subject  
10 line. There is nothing in the complaint suggesting who sent  
11 them, much less what the relationship to Vantage Interactive  
12 would have been much, much, much less that Vantage would have  
13 had any idea they were sent, or what they said, or that Vantage  
14 had knowledge or intent. There's nothing.

15         And if you look at Mr. Singleton's proposed amendment,  
16 there's nothing in there.

17         Mr. Singleton's initial complaint goes on and on about FTC  
18 regulations governing free authors. There's nothing in the  
19 subject lines or the e-mails that so much as suggest that  
20 anything will be given away for free.

21         Mr. Singleton's papers variously suggest the e-mails  
22 appear to have been sent by an author. At other times they  
23 suggest they appear to have been sent by McDonalds. And that's  
24 actually in the proposed amendment. And at other times  
25 Mr. Singleton says, "We don't it know who sent them." And  
26 still at other times he complains that whoever owns the domain  
27 names from which they appear to have been sent used a privacy  
28 service, which is common place across a number of industries,

1 such that it wasn't immediately obvious to some of you who  
2 might inquire who actually owns the domain name.

3 There's nothing in the proposed amendment that would begin  
4 to satisfy any requirement that a complaint even speak to  
5 fraud.

6 This is an outgrowth of another federal case that was  
7 stayed for, in part, the Plaintiff's failure to make any  
8 showing against our client. Mr. Singleton simply took another  
9 one of his plaintiffs, who feeds e-mails into this database,  
10 and brought another claim against an organization that he  
11 thinks is related to our other client, I think, for the purpose  
12 of getting discovery to continue to build a case which the  
13 federal court has stayed.

14 This -- we can allow an amendment here, but we all know  
15 what's going to happen: We're going to come back. It's going  
16 to cost my client and others so many thousand dollars to  
17 rebrief it and put an end to this. And my guess is we'll be  
18 back here again some months from now when Mr. Singleton brings  
19 another complaint, trying to find another side door.

20 Sorry to take so much of the Court's time, but I think  
21 better to discuss this now than to have all of us spend so much  
22 more time on an amendment that, based upon everything we see in  
23 the papers, there is no reasonable possibility it's going to  
24 satisfy the test.

25 MR. SINGLETON: If I might have twenty seconds, Your  
26 Honor?

27 THE COURT: Sure.

28 MR. SINGLETON: Okay. This client, Joel Householter, has

1 been in businesses and ISPs since before enactment of the  
2 CAN-SPAM act, or Business and Professions 17529.5.

3 I absolutely dispute all of the allegations -- everything  
4 that he's raised about my client being a professional plaintiff  
5 is utterly without merit and I can't wait for the opportunity  
6 to present it to a jury.

7 Beyond that, the falsity of these e-mails will come out  
8 when we get to summary judgment. I don't think there's merit  
9 to discussing now as to whether or not this is just a vehicle  
10 to conduct discovery. The e-mails are false and we'll get to  
11 that when we get to summary judgment.

12 MR. BURGOYNE: Just to add, Your Honor, we can't -- we all  
13 know that's not how it works. You don't throw out an e-mail  
14 which appears to be patently true and, without any explanation  
15 whatsoever of why its false, or what it might offend, who sent  
16 it, how the supposed defendant would ever have known it was  
17 sent much less that it was sent or what it said or why it was  
18 misleading, you can't simply say to the Court, "Don't worry.  
19 When we get in front of a jury, we'll convince them."

20 And I think recognizing that very point, that counsel just  
21 made, Your Honor should, I really think, reconsider whether or  
22 not it's worth permitting an amendment.

23 I think the issue -- it might be to counsel's advantage to  
24 have a better-prepared complaint, but I think this one  
25 sufficiently presents the issue that we all know we're going to  
26 end up arguing to the appeals court, which is in the end  
27 whether or not there has to be some indicia of fraud in order  
28 for a state claim to not be preempted.

1 THE COURT: Well... I have no doubt that the argument will  
2 be renewed. I believe that the record just needs to be fully  
3 vetted before there's a final decision as to whether this  
4 complaint goes forward. And, as I said before, I think it  
5 would behoove both of you in the next round to assume that the  
6 reader knows absolutely nothing about how e-mails are  
7 transmitted, nor has no understanding of such terms as -- that  
8 are regularly and commonly used, all right.

9 And with that all said and done, one can make a final  
10 determination as to where these things go. All right. Thank  
11 you.

12 MR. BURGOYNE: Very well. Thank you, Your Honor.

13 MR. SINGLETON: Thank you.

14 THE COURT: The tentative ruling is adopted.

15 MR. SINGLETON: Thank you.

16 (10:08 a.m.)  
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