June 12, 2018

The Hon. Arthur Danner
Santa Cruz Superior Court
701 Ocean Street
Department 9
Santa Cruz, CA 95060

Re: *Redenbacher v. Juris Publishing, Inc., et al.*;
S.C. Sup. Ct. No. CV 149760

Dear Judge Danner:

Plaintiff Gary Redenbacher submits this letter in response to the letter of defendants Michael Kitzen and Juris Publishing, Inc. regarding authority submitted by Mr. Redenbacher at the January 13, 2005 demurrer hearing.

I. THE *OMNIBUS* DECISION IS INAPPOSITE

Defendants cite the Texas case *Omnibus* for the proposition that they did not commit a trespass or conversion by sending junk faxes to Redenbacher and likely thousands of other Californians. However, the *Omnibus* case and other authority cited only relates to the issue of whether a tort was committed based on deprivation of use of the facsimile machine. The case does not pertain to "paper" or "ink," which is what Redenbacher alleges defendants converted.

Admittedly, on its face, the *Omnibus* decision is not entirely clear as to whether it refers only to the trespass to the fax machine, as opposed to the "paper" and "ink." I believe, as did the Illinois court whose opinion I produced at the Demurrer hearing [*Whiting Corporation v. MSI Marketing, Inc.* 2003 TCPA Rep. 1141 (Ill. Cir. Apr. 3, 2003)], that the better reading is that the *Omnibus* case referred only to the trespass to fax machine, but it isn't entirely clear at first.

So, I called the attorney for the plaintiff, Omnibus International, Inc. He sent me the "Plaintiffs' Original Petition and Request for Class Certification," a copy of which is attached as Exhibit 1. The "Original Petition" in Texas is like a "Complaint" in California. A review of the "Original Petition" resolves the issue.

On page 3, paragraph 10, plaintiff states that it "received the facsimile and suffered damages including, but not limited to, costs for paper, ink, toner, disk space, telephone service, personnel, and/or maintenance costs." Significantly, that's the **only** mention of "paper" and "ink" in the "Petition."

Page 4, paragraph 15-16, is the "Trespass to Chattels" cause of action. Here's the entire cause of action:

> 15. In the alternative, without waiving any other cause of action herein, and incorporating the Factual Allegations above and all other allegations herein which are not inconsistent with the cause of action alleged here, the Defendants are liable to the Plaintiff and class members for trespass to their chattels. The Defendants intentionally interfered with the Plaintiff's and class members' facsimile machines in a manner that is inconsistent with or in defiance of the Plaintiff's and class members' right to exclusive use and possession of their facsimile machines.
>
> 16. Plaintiff asserts that the Defendants' trespasses to chattels were committed by Defendants individually and in combination, concert, and conspiracy with all other Defendants.

Significantly, other than the general incorporation, the "Trespass to Chattels" cause of action contains no specific reference to the conversion or consumption of "paper" or "ink." Were there no incorporation paragraph, then there would be absolutely no question as to whether the plaintiff alleged "paper" and "ink" damages.

So, the issue is, "was a cause of action alleged for 'trespass' against the 'paper' or 'ink' based on the incorporated language?" The answer is "no." Although the plaintiff alleged "damages to paper and ink" earlier in the "Original Petition," it never alleged the other elements of trespass, *viz.*, there is no allegation of interference with the "paper" or "ink," nor is there any allegation that they were "consumed" or even used. Redenbacher, on the other hand, alleges that "paper" and "ink" were "consumed."

Obviously, *Omnibus* only focused on the damages to the facsimile machine. The plaintiff's case could **never** rise any higher than the allegations in the pleadings.

In further support of this point, there is no "conversion" claim in the *Omnibus* case. This fact is very significant, because it indicates that the plaintiff in *Omnibus* was not focusing on the "paper" and "ink" (which is obviously "converted," or "consumed," when there is a fax). The *Omnibus* plaintiff only focused on the damages to the fax machine, or else "conversion" would have been alleged.

So, it's obvious what was going on in *Omnibus*—the case is about what happened to the fax machine. Redenbacher's case is about the "paper" and "ink." *Omnibus* has no relevance whatsoever.

If the Court requires a declaration that the *Omnibus* Complaint is authentic, counsel requests an additional extension of time to procure it.

II. THE *CHAIR KING* II DECISION IS INAPPOSITE

As *Chair King II* relies on *Omnibus*, it is also irrelevant. *Chair King II* was filed by the same law firm as *Omnibus*, and there is apparently no "conversion" claim (according to defendants' summary of the decision). Because the *Chair King II* court reasoned that "for liability to attach, the wrongful interference with the chattel must have caused actual damage to the property or deprive the owner of its use for a substantial period of time," as defendant quotes, then the decision obviously did not pertain to "paper" or "ink," which Redenbacher has alleged were "consumed" in the facsimile.

III. THE UNPUBLISHED OPINIONS ARE PERSUASIVE AUTHORITY

It is ironic that defendants argue that Redenbacher cannot rely upon the unpublished opinions. Defendants cited an unpublished opinion, *Ticketmaster Corp. v. Tickets.com, Inc.* (2000) U.S. Dist. LEXIS 12987, *17, in their written Reply brief. Believing that it was an inappropriate citation, I wrote to defendants' counsel and requested that defendants withdraw their brief and re-submit without the unpublished opinion. At the time, I believed that citation of the unpublished opinion was inappropriate. Indeed, Ninth Circuit Rule 36-3 says that unpublished opinions cannot be relied upon in the 9th Circuit. Defendants' counsel wrote back to me and stated that rule 36-3 "pertains to federal courts in the Ninth Circuit only" so that the citation was appropriate. In other words, defendants' counsel adopted the position that it was fine to cite unpublished opinions! [I haven't produced the letters between us, because they contain settlement communications].

I now believe that defendants' counsel was right, and I wasn't previously aware of it until I received the letter. After I received the letter, and relying on defendants' counsel's position, I decided to gather other "persuasive" authority to support Mr. Redenbacher's position. I now believe that, other than California state authority, any authority may be argued to be "persuasive." Indeed, California Rule of Court 977 only pertains to California authority:

> Rule 977. Citation of opinions
> (a) Unpublished opinion
> Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.

So, the citations of unpublished opinions were proper—they can be "persuasive" authority.

Incidentally, however, Redenbacher only cites the out-of-state opinions in the event that this Court finds that California authority regarding "trespass" and "conversion" is not "controlling." Redenbacher believes, for the reasons set out below, that California authority is "controlling."

IV. RESPONSE TO DEFENDANT'S ANALYSIS OF OUT-OF-STATE AUTHORITY

Redenbacher will not address defendants' analysis of his out-of-state authority herein. The cases and statements therein speak for themselves—each and every cited opinion states that a junk fax is essentially a trespass to chattel and/or conversion. Suffice to say, Redenbacher adamantly maintains that each of the cases referenced by him shows the reasoning of another court that the consumption of "paper" and "ink" by fax is a conversion and/or a trespass to chattel.

Redenbacher does address one point that defendants make based on the *Intel Corp v. Hamidi* case. Defendants argue in their submission that, "in light of *Intel*, plaintiff Redenbacher may not allege a trespass to his ink and paper merely because he does not approve of the content of a given fax transmittal." **Redenbacher does not allege "trespass" because he does not approve of the content—he alleges "trespass" and "conversion" because defendants "consumed" his paper and ink without permission.** The content is irrelevant. So, even if California law does prohibit "trespass" claims solely based on content, that point is irrelevant. Nothing changes the fact that Mr. Redenbacher has alleged a wrongful consumption of paper and ink, and he need allege no more to prove his case. Indeed, defendants have not even requested this court to take judicial notice of how a facsimile machine functions, nor have they made any request for judicial notice regarding value, so the "consumption of paper and ink" allegation suffices in itself. No authority cited by defendant stands for the position that this allegation is somehow undermined by virtue of the fact that the "consumption" was accomplished by a facsimile machine. No authority cited by defendant stands for the position that Redenbacher's "consumption of paper and ink" argument is somehow undermined by the fact that he additionally objects to the content. Yet, defendants have tried to somehow twist Redenbacher's argument into one based on content, and then they say that a "trespass" cannot be based on content. Defendants whole argument is based on a false premise.

Defendants contend in Section IV of their submission that "the decision of a court of last resort of another state . . . is persuasive" "where the law of this state is uncertain." **California law is not uncertain**, so it should be relied upon. The analysis need not be unnecessarily complicated:

> The elements of a "conversion" are the plaintiff's ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages. *Spates v. Dameron Hospital Association* (2003) 114 Cal.App.4th 208, 221 *citing Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 543-544.

> Redenbacher alleged:

> a. that he "never . . . gave defendants permission to send faxes of any kind to [him]." FAC, par. 26;

b. that . . . defendants deliberately transmitted their unsolicited advertisements to plaintiff's machine causing the machine to print the unsolicited faxes by consuming paper and ink which were the property of plaintiff. FAC, par. 27;
c. that. . . plaintiff was damaged. FAC par. 28.

Defendants' case *Thrifty-Tel, Inc.* sets out the elements of a "trespass to chattels":

'Trespass to chattel' lies where intentional interference with possession of personal property has proximately caused injury." *Thrifty-Tel, Inc. v. Bezenek* (1996) 54 Cal.Rptr.2d 468

Redenbacher alleged that the transmission by defendant "caused some injury" to his "chattel," and he need allege no more.

There is no reason to go past California authority in this case. Redenbacher alleged the elements of trespass and of conversion, and the Demurrer(s) should be overruled.

Sincerely,

John C. Brown

JCB/aep

cc: Colleen Duffy Smith, Esq.