

## BRIAN KINDSVATER Attorney at Law

February 17, 2005

Sunil Brahmbhatt  
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2700 N. Main Street, #945  
Santa Ana, CA 92705

Re: OCM v Food For Humans  
Food For Humans v OCM  
Food For Humans v OCM and Brahmbhatt

Dear Mr. Brahmbhatt:

I am writing to follow my email yesterday and to put in writing a settlement demand for your client, OCM, Inc., its owners, and for you and your office. To get right to the heart of the matter, the lawsuit you filed is one of the most frivolous and outrageous complaints I have ever seen.

The settlement demand for resolution of all claims against your office, and for the junk fax that is the subject of my client's original claim, is \$10,000. That demand expires Friday, February 18<sup>th</sup> at noon. If you ever see another demand it will be in the context of a malicious prosecution lawsuit and it will likely be for substantially more. This is your one and only opportunity to resolve matters at a comfortable level. Before you ignore this letter or send a thoughtless response, I strongly encourage you to immediately consult with another attorney to evaluate your situation.

There are three pleadings my client will be filing:

- Motion to transfer for wrong venue – and for sanctions
- SLAPP Motion – and for sanctions
- Malicious prosecution lawsuit – all sanctions

### Improper Venue

The lawsuit you filed, *OCM, Inc. v. Food for Humans, Inc.*, Orange County Superior Court Case No. 05CL00175, states that "The venue and jurisdiction of Orange County is appropriate as Plaintiff OCM, is the true defendant and venue and jurisdiction are proper in Orange County as OCM has its principal place of business in Orange County."

I think most first year law students know that this is never an appropriate basis for venue. Alleging the plaintiff is the defendant to establish venue is a non sequitur. Your client will get its chance to be a defendant, but it does not have that status in this case. Your client initiated this lawsuit. It did not need to, but it did. That means it is the plaintiff. OCM is not the defendant. But you do not have to take my word for it. Code of Civil Procedure section 308 states:

"[T]he party complaining is known as the plaintiff, and the adverse party is the defendant."

Code of Civil Procedure section 395.5 reveals that a defendant corporation such as Food For Humans, Inc., can only be sued (1) where a contract is made or performed; (2) where an obligation or liability arises or where a breach occurs, or (3) the corporation's principal place of business.

Category 1 does not apply because there is no contract between our clients.

Venue is improper per Category 3 because Food For Humans, Inc.'s principal place of business is in Sonoma County. Paragraph 1 of the Complaint notes that "Food For Humans, Inc., is a duly organized Corporation validly existing under the laws of the State of California with its principal office in Guerneville, California."

Although many in Orange County may not know offhand where Guerneville is, Sonoma County is proud of this small town. As noted on Sonoma County's official website at <http://www.sonomacounty.com/aboutsonoma/cities.html>

"CITIES AND TOWNS of Sonoma County .... Guerneville's plaza, shops, restaurants, cafes, pubs and clubs, and lodgings in its busy downtown draw people from all walks of life. Annual events include the Russian River Blues and Jazz Festivals, both held on the River, a winter holiday parade of lights on Main Street and Stumptown Daze. The historic pin-truss bridge now carries only foot traffic over the river. Two miles north of town, Armstrong Redwood State Reserve covers 700 acres of the awe-inspiring trees, many of which are old-growth."

The next time your client is in Sonoma County, and that time is coming soon, be sure time is taken to see the majestic Redwood trees. The peacefulness and beauty can work wonders for a rabid mind.

As for Category 2, your complaint alleges that Food For Humans filed a small claims action against OCM. That action was filed in Sonoma County. The complaint notes the small claims matter alleged claims such as trespass, which of course makes venue proper in Sonoma County.

The complaint alleges that OCM disagrees that it has liability and initially seeks a declaration that it is not liable for sending junk faxes. Notwithstanding the fact that the Santa Clara County Superior Court has already issued a judgment holding that OCM is violating the law and must pay damages for its actions, a party sued in one county cannot simply claim "I am not liable" and use that as a basis for claiming venue is proper in another county. That would make the

statutory venue rules meaningless. In any event, a denial of claims brought in Sonoma County evidences that the issues arise in Sonoma County.

Your lawsuit then alleges that Food For Humans improperly filed more than two small claims actions during 2004 for more than \$2500. Those actions were filed in Sonoma County. They also involved other parties. Regardless, again the conduct involves acts in Sonoma County.

Of course, Food For Humans did nothing in Orange County. There is no basis for venue in Orange County, and you obviously know that given the tortured allegation that plaintiff is the defendant.

In addition, the statutory rules governing the appropriate venue must be met for all causes of action. (*Capp Care, Inc. v. Superior Court* (1987) 195 Cal.App.3d 504, 508.) If you do not have any law books or statutes in your office you can read the *Capp Care* case for free at

<http://www.lexisnexis.com/clients/CACourts/>

Just follow the instructions and enter the case citation to read the opinion.

You will note that if the venue requirements are not met for every cause of action a defendant corporation can move to transfer the case to the county of its principal place of business. The court noted that transfer is mandatory.

In this matter neither of your alleged causes of action satisfy the venue requirements. That is why my client will be filing a motion to transfer venue to Sonoma County per Code of Civil Procedure sections 396b and 397(a). The transfer will be mandatory. As noted by Weil and Brown, California Practice Guide: Civil Procedure Before Trial, 2004, p. 3-130, para. 3:551, "the court *must* order the action transferred to any 'proper' county requested by defendant." The proper county is of course Sonoma County. That is the county of defendant Food For Humans, Inc.'s principal place of business.

Sanctions in the form of expenses and attorneys will also be sought as permitted by Code of Civil Procedure section 396b. Sanctions will be appropriate if an offer to stipulate to change venue is reasonably made and rejected. Consider this letter my offer to stipulate to change venue to Sonoma County. Another factor is whether your selection of Orange County was made in bad faith given the facts and law. Again, if you have *any* doubts about this issue I urge you to immediately seek the advice of another attorney.

#### SLAPP Motion

In whatever court this action ends up in, whether it stays in Orange or moves to Sonoma, a SLAPP motion will be immediately brought seeking the dismissal of the lawsuit and for additional sanctions.

The lawsuit you have filed literally has "SLAPP LAWSUIT" written all over it. The lawsuit boldly says that Food For Humans has sued OCM, that OCM disagrees that it has liability, so it is filing its own lawsuit seeking "declaratory relief" that

it is not liable. You cannot do that. Alleging a defense to liability is not a basis for filing a new lawsuit to assert that defense.

Declaratory relief is available when rights or duties need to be established under a written agreement. (Code of Civil Procedure section 1060.) Declaratory relief is inappropriate in other circumstances, particularly when the issue can be raised as a defense to a claim. (*CJL Construction, Inc. v. Universal Plumbing* (1993) 18 Cal.App.4<sup>th</sup> 376, 391.) You cannot convert a tort claim into a declaratory relief action by seeking a declaratory relief of liability issues and defenses. As stated by the *CJL* court, if another form of relief is available then declaratory relief is improper, and the court specifically referred to declaratory relief as being an improper claim when a cause of action has already accrued or when the matter can be raised as an affirmative defense.

OCM's obligations under the TCPA will be litigated in the context of Food For Human's claims. This negates OCM's ability to file a separate lawsuit to present its defenses under the guise of a declaratory relief claim.

Moreover, and quite significantly, you are intentionally perverting the small claims process by trying to make small claims court irrelevant. Any defendant sued in small claims court could simply deny the claims and file a separate action in the Superior Court asserting that denial.

The courts have made clear that you cannot file a retaliatory lawsuit because Food For Humans has filed a prior case. The action Food For Humans brought is protected First Amendment Activity in a judicial proceeding. You are suing because Food For Humans sued, and that is clearly improper and subject to the SLAPP statute. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4<sup>th</sup> 1106.) SLAPP motions are proper to dismiss lawsuits based on prior lawsuits or which seek to inhibit future claims. (*Navellier v. Sletten* (2002) 29 Cal.4<sup>th</sup> 82.) In *Equilon Enterprises, LLC. v. Consumer Cause, Inc.* (2002) 29 Cal.4<sup>th</sup> 53, a unanimous Supreme Court affirmed the court of appeal, which had affirmed the trial court, which held that the precise claims you have alleged are subject to the SLAPP statute in circumstances that are less egregious than this case.

Here, there is no question that the substance of your OCM complaint has no merit.

OCM makes a conclusionary claim that it is not liable under the TCPA – the federal statute prohibiting junk faxes. Actually, there is no question about OCM's liability, there are many dozens of cases around the country and statements by the Federal Communications Commission on this topic, and OCM has already been found to be liable in the Santa Clara Court.

OCM claims any lawsuit for its junk faxes must be brought under California Business and Professions Code section 17538.45 and not the federal law. Initially, section 17538.45 applies to email and not faxes. There was a section 17538.4 of the California Business and Professions Code that regulated junk faxes, but that law was repealed in 2002 to make clear that federal law controlled in this matter. You should review AB 2944 to learn more. Finally, the

interplay between the Business and Professions Code and the federal TCPA was expressly decided against OCM's position in *Kaufman v. ACS Systems, Inc.* (2003) 110 Cal.App.4<sup>th</sup> 886.)

OCM claims that a state court does not have jurisdiction to adjudicate rights under a federal statute. First, I refer you back to your first year of law school. Second, the federal statute expressly provides for jurisdiction in the state courts. (47 USC section 227(b)(3).) Third, *Kaufman* is controlling ("[D]o plaintiffs have a private right of action allowing them to file a TCPA action in state court? We answer that question in the affirmative because the TCPA permits the states to prohibit private TCPA actions in their courts, and the California Legislature has not done so."

OCM seeks damages for violation of Business & Professions Code section 17200. However, damages are not recoverable under that statute. (*Korea Supply Co. v. Lockheed Martin* (2003) 29 Cal.4<sup>th</sup> 1134.)

Proposition 64 approved last year changed the standing requirements and OCM does not have standing to pursue its 17200 claim in any event.

Finally, and perhaps the best is saved for last, you allege that Food For Humans filed more than two small claims actions during 2004 that sought more than \$2500 in damages - citing the cases against Capitalwerks, Heatrock, and Gideon & Associates. Your client's damages for this escapes me, but in any event the allegation is demonstrably false. If you had spent but 30 seconds looking at these small claims filings you would know your allegation is false.

I highly recommend that you look at the court filings. Or, you can see the documents for yourself when they are attached to the sanctions motion.

#### Malicious Prosecution

It is obvious that you have never read the statutes and cases pertinent to these issues, and that you have never looked at the small claims cases by Food For Humans you claimed were improper.

Rather, you intentionally filed a retaliatory lawsuit and then demanded as a 'settlement' that Food For Humans walk away from its legitimate claims. That is extortion - filing a frivolous lawsuit with the goal of causing my client to expend costs and attorney's fees for the purpose of leveraging a dismissal of my client's claims.

You have succeeded in causing costs and fees to be incurred, and I expect that you will be paying those amounts. You have filed at least two frivolous lawsuits in Orange County that make substantially the same allegations, undoubtedly expecting that the defendants would give up their claims. You were wrong. Please pay attention to your deadline because we will be moving swiftly to put an end to this nonsense and to make sure that you and your client never do this again.

Very truly yours,

BRIAN KINDSVATER

cc: Food For Humans