

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Edward Michael O'Brien,

Plaintiff,

v.

Visa International Corp.,
Mastercard Corp.,
Chase Manhattan Bank,
Citibank, Inc.,
First Premier Bank,
RB Express, Inc.,

Defendants.

COMPLAINT

Civil Action No. 03-05020 MLR (MANx)

I. OPENING STATEMENT

1. Plaintiff, Edward Michael O'Brien ["PL"], brings civil action under authority of the Sherman Act (1897), the Restatement (Second) of Torts and the Telephone Consumer Protection Act of 1991 for treble damages sustained when Visa U.S.A, Inc. ["Visa"], Mastercard, Inc. ["MC"], Chase Manhattan Bank ["Chase"], Citibank, Inc. ["CB"], First Premiere Bank ["FPB"] and RB Express, Inc. ["RB"] violated federal and state laws with conduct that included (a) trespass to chattels, (b) unlawful telephone usage, (c) accessing email accounts without authorization, (d) restraining trade and commerce, (e) increasing monopoly by unlawful methods and (f) using interlocking directorates.

2. Defendants, in close working relationship including interlocked directorates and/or interlocked executive groups, sent, and/or approved the sending of, solicitations to PL's email addresses [*michaelob@angelfire.com* and *saviorg@angelfire.com*] that caused injury of the type federal and state laws were legislated to prohibit. Solicitations restrained trade and commerce by increasing Defendants revenues derived from exclusive dealings in conformity with Visa/MC rules and policies recently proven in violation of United States Codes Title 15, sec. 1.

3. Visa, MC and respective boards of directors/memberbanks, oversee and regulate members ["issuers"] via internal rules promulgated and enforced with monopoly power and they are co-liable for members' and agents' violations of federal and state laws pertaining to email solicitations.

4. Private civil action is brought, and defendants summoned, pursuant to the Sherman Act (1897) (15 U.S.C., sec. 1, 2, 15 and 19); the Restatement (Second) of Torts, [REST. 2d of Torts, sec. 17, 217(b)]; the Telephone Consumer Protection Act of 1991 (47 U.S.C., sec. 227); California Business and Professions Codes, sec. 17538.4, 17538.41 and California Penal Codes, sec. 502.

II. JURISDICTION AND VENUE

1. All defendants maintain offices, transact business, and/or are found in the Central District of California, within the meaning of 15 U.S.C. sec. 22.

3. This Court has personal jurisdiction over each defendant, and venue is proper under 15 U.S.C., sec. 22 and 28 U.S.C., sec. 1391(b).

III. PARTIES

A. Defendants:

1. RB Express, Inc. is a bulk email sender of little known reputation.

[*unsub-stpt@maui.dlbnetwork.net*]

Business address: 1158 26th St., Suite 597, Santa Monica, CA 90403

2. Visa International Corp., and subsidiary Visa U.S.A., Inc., are associations of independent banks structured as membership associations. Both Visa organizations are organized under the laws of the State of Delaware, with principal place(s) of business in San Francisco, California.

Visa credit cards are the world's most widely used form of "plastic" payment. As of December 2000, more than \$1.8 trillion in products and services were purchased using Visa cards, and Visa's worldwide market share, at 60 percent, was greater than that of all other major payment cards combined. There are more than one(1) billion Visa, Visa Electron, Interlink, PLUS, and Visa Cash cards in the market today. Visa-branded cards are accepted at more than 28 million locations in 144 countries, making Visa the closest thing there is to a universal currency.

Visa International Corp. has ultimate authority over Visa U.S.A., Inc. However, Visa International has delegated substantial authority to its regional boards. Visa U.S.A.'s authority to regulate, even matters solely within the United States, is subject to Visa International's policies and direction.

Corporate address: Visa International, PO Box 8999, San Francisco, CA 94128-8999

3. MasterCard International has a comprehensive portfolio of well-known, widely accepted payment brands including MasterCard, Cirrus and Maestro. With approximately 25,000

MasterCard, Cirrus and Maestro members worldwide, MasterCard serves consumers and businesses, both large and small, in 210 countries and territories. For the year ended December 31, 2002, gross dollar volume exceeded US\$1.14 trillion. MasterCard can be reached through its website at www.mastercardinternational.com.

Corporate address: MasterCard International Incorporated, General Counsel, 2000 Purchase Street, Purchase, New York 10577-2509

4. Citigroup, Inc. is a pre-eminent financial services company, with some 200 million customer accounts in more than 100 countries. Bank began in 1812; subsidiaries include Travelers, since 1864; Smith Barney, founded in 1873; and Banamex, which was formed in 1884 as a result of the merger of Banco Nacional Mexicano and Banco Mercantil Mexicano.

Other major brand names under Citigroup's trademark red umbrella include Citi Cards, CitiFinancial, CitiMortgage, CitiInsurance, Primerica, Diners Club, Citigroup Asset Management, The Citigroup Private Bank and CitiCapital.

Corporate address: U.S. Service Center, 100 Citibank Drive, P.O. Box 769004, San Antonio, TX 78245-9004

5. First Premier Bank is the sister organization of Premier Bankcard, headquartered in Sioux Falls, South Dakota. First Premier Bank owns the credit card accounts and credit card loans of Premier Bankcard. Premier Bankcard is the service provider for those accounts.

Premier Bankcard is one of the nation's leading credit card providers to the underserved, yet creditworthy market. Since 1989, the organization has helped millions of individuals and families establish or re-establish their credit. Premier is among the top 20 Visa and MasterCard credit providers, and currently serves over 2.2 million customers nationwide.

Corporate offices: 601 S. Minnesota Ave., Sioux Falls, SD 57104, (605) 357-3000

B. Plaintiff Edward Michael O'Brien is a graduate of the University of California and former U.S. Marine Corps Captain (Vietnam Era) and recipient of the Spirit of America Honor Medal. Mr. O'Brien is currently sole proprietor of Golf O'Brien Company, and founding president of SAVIORG, a California public charity [Title 26 U.S.C., sec. 509(a)2 / 501(c)3]. PL is the author of *Give & Get*, a book on tax-savings from charitable donations, and is the inventor/owner

of GOLF COACH, the first (1989) software product to enable golfers to acquire, process, analyze and present golf statistics on PC, MINI and MAINFRAME computers. Mr. O'Brien played professional golf on the California Golden State Tour in 1992, and is currently a resident of Santa Barbara, California and Princeville, Hawaii.

Business address: P.O. Box 91003, Santa Barbara, California:
fax 805-893-8016

IV. DEFINITIONS

1. "*spam*: n. Unsolicited e-mail, often of a commercial nature, sent indiscriminately to multiple mailing lists, individuals, or newsgroups; junk e-mail.

"Spam" probably inspired by a comedy routine on the British television series *Monty Python's Flying Circus*, in which the word is repeated incessantly. [The American Heritage Dictionary of the English Language, Fourth Edition, Copyright 2000 by Houghton Mifflin Company. Published by Houghton Mifflin Company. All rights reserved.]

2. "Technical Definition: An electronic message is 'spam' IF (1) the recipient's personal identity and context are irrelevant because the message is equally applicable to many other potential recipients; AND (2) the recipient has not verifiably granted deliberate, explicit, and still-revocable permission for it to be sent; AND (3) the transmission and reception of the message appears to the recipient to give a disproportionate benefit to the sender."
[<http://www.spamhaus.org/definition.html>]

3. "*chattel* n. an item of personal property which is movable, as distinguished from real property (land and improvements)." [Law.Com: Legal Dictionary;
<http://dictionary.law.com>]

4. *intermeddling*: intr.v. intermeddled, intermeddling, intermeddles: To interfere in the affairs of others, often officiously; meddle.

[The American Heritage Dictionary of the English Language, Fourth Edition. Copyright 2000 by Houghton Mifflin Company. Published by the Houghton Mifflin Company. All rights reserved.]

V. STATEMENT OF ISSUES

1. Whether or not Defendants actions complained of herein breached United States Codes, Title 15, sec. 1 by monopolistically restraining trade and commerce.
2. Whether or not Defendants actions complained of herein breached United States Codes, Title 15, sec. 2 by increasing Visa/MC's monopoly in the general purpose credit card market by unlawful means.
3. Whether or not Defendants actions complained of herein breached United States Codes, Title 15, sec. 19 by formation/use of interlocking directorates.
4. Whether or not Defendants breached American and/or English Common Law (trespass to chattels) and/or the Restatement (Second) of Torts when they sent unsolicited email messages to the Plaintiff.
5. Whether or not Defendants breached the Telephone Consumer Protection Act of 1991 ["TCPA"] when they sent unsolicited email messages to the Plaintiff.
6. Whether or not Defendants breached California Business & Professions Codes, sec, 17538.4 and 17538.41 when they sent unsolicited email messages to the Plaintiff.
7. Whether or not Defendants breached California Penal Codes, sec. 502 when they sent unsolicited email messages to the Plaintiff.

VI. SUMMARY OF ARGUMENT

1. All Defendants restrained interstate trade and illegally increased monopoly in credit card markets when they sent unsolicited email to PL and thousands of other consumers increasing Visa/MC marketshare and, thereby, increasing Visa/MC market power to curtail trade with competitors via restrictions placed on members' dealings with competitors.
2. Spam increased marketshare illegally (sec. 2 violation). More marketshare increased impact of (damages from) members refusal to deal (sec. 1 and violation).
3. Defendants conviction in *United States v. Visa/Mastercard* proves use of interlocking directorates.

4. Defendants breached English and/or American Common Law (trespass to chattels) and the Restatement (Second) of Torts when they sent unsolicited email messages to Plaintiff because electronic signals generated and sent by computer have been held in many cases to be sufficiently physically tangible to support a trespass cause of action. Additionally, Defendants email directly injured PL personally in mind, reputation and pocketbook not indirectly by injury to Plaintiff's email account (memory space) on host's server.

5. Defendants breached the TCPA and 47 C.F.R. 64.1200(5) when they used computers to send unsolicited advertisements via telephone lines (internet) to Plaintiff's email accounts residing on a remote server because unsolicited email compelled PL to defray cost(s) of unwanted advertisements/solicitations.

6. Defendants breached California Business & Professions Codes, sec. 17538.4 when they sent plaintiff email that did not display a toll-free telephone number or valid sender operated return e-mail address so that the recipient of the unsolicited documents could call or e-mail to notify the sender not to e-mail any further unsolicited documents.

7. Defendants breached California Business & Professions Codes, sec. 17538.4 and 17538.41 when they knowingly accessed Plaintiff's email accounts (themselves accessible via cellular telephone) and, without permission, added new messages to prior received messages saved in accounts.

8. Defendants breached California Penal Codes, sec. 502 when they knowingly and without permission accessed Plaintiff's email accounts via the internet.

VII. ARGUMENT

A. Electronic Signals Trespass and Cause Injury:

1. Electronic signals generated and sent by computer have been held to be sufficiently tangible to support a trespass cause of action. *Thrifty-Tel, Inc. v. Bezenek*, 56 Cal. App. 4th 1559, 1567 (1996); *State v. McGraw*, 480 N.E. 2d 552, 554 (Ind. 1985) (Indiana Supreme Court recognizing in dicta that a hacker's unauthorized access to a Computer was more in the nature of trespass than criminal conversion); and *State v. Riley*, 121 Wash. 2d 22, 846 P.2d 1365 (1993) (computer hacking as the criminal offense of 'computer trespass' under

Washington law). It is undisputed that plaintiff has a possessory interest in its computer systems. Further, defendants' contact with plaintiff's email clients is clearly intentional. Although electronic messages may travel through the Internet over various routes, the messages are affirmatively directed to their destination.

2. In the present case, Plaintiff's person (regular attenuation to email accounts) was Defendants destination for email sent, not server hosting PL's email accounts. Server only a means to an end.

3. "Defendants' intentional use of plaintiff's proprietary computer equipment exceeds plaintiff's consent and, indeed, continued after repeated demands that defendants cease such use is an actionable trespass to plaintiff's chattel. The First Amendment to the United States Constitution provides no defense for such conduct." [CompuServe v. Cyber Promotions, Inc., 962 F. Supp. 1015 (S.D. Ohio 1997)]

4. Here the related issue is not proprietary computer equipment but rather human equipment, brain and balance sheet (finances). The human brain (mind) can be , and in this case was, trespassed upon when Defendants sent unsolicited, improperly constructed email that compelled Plaintiff's read/edit/delete in order to do a "good job" during the business day.

5. "Viewing the facts in the light most favorable to Destination, we conclude that Destination's own figures do not rebut the admitted facts that unsolicited fax advertisements shift significant advertising costs to consumers." [*Destination Ventures, Ltd. v. FCC*, 46 F.3d 54 (9th Cir. 1995); *Central Hudson Gas and Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566; *Board of Trustees v. Fox*, 492 U.S. 469, 480]

6. Defendants unsolicited email shifted significant advertising costs to Plaintiff O'Brien. Email clients like those at Angelfire.com are substantially similar to virtual facsimile "machines". (ie. software rendered fax machines).

7. Very recently the Legislature of the State of California concluded that fax transmission was sufficiently similar to email transmission to qualify the latter for new regulations and penalties justified under *Central Hudson* and other federal/state cases.

8. "The California State Senate on Thursday approved a bill that would make it illegal to send unsolicited e-mail

advertising and allows people to sue spammers for \$500 per unwanted message." ["California bill lets you sue spammers"; Reuters; May 23, 2003, 4:30 AM PT; Story Copyright 2003 Reuters Limited. All rights reserved.]

9. "Spam now accounts for 46 percent of all e-mails sent, said Enrique Salem, president of Bright mail, a San Francisco company that helps Internet providers block spam before it reaches users inboxes. He told lawmakers that half of e-mail will be spam by December, up from 7 percent in 2001.

Spam costs U.S. businesses \$10 billion each year in lost productivity, Salem told the Senate Committee on Commerce, Science and Transportation.

'E-mail messaging has fundamentally changed the way we communicate,' said committee Chairman John McCain, R-Arizona. 'The growing affliction of spam, however, may threaten all of this.'

Congress has in the past been reluctant to crack down on spam, in part because of lobbying from retailers, marketing firms and others who use such e-mail for their businesses. But with the problem worsening, lawmakers appear more likely to pass something this year.

A bill proposed by Sens. Conrad Burns, R-Montana, and Ron Wyden, D-Oregon, would ban deceptive subject lines, require valid return addresses and order spammers to obey consumer requests to stop sending them e-mail.

Sen. Charles Schumer, D-New York, who wants a national "do-not-spam" registry that consumers could join, proposed an international treaty to fight spam.

"As soon as we tighten up our laws here and institute vigorous enforcement, those who want to violate our laws move abroad," Schumer said.

10. Even though lobbyists and other powers have been very effective in precluding passage of numerous "anti-spam" bills introduced in Congress (1999-2003), handwriting-is-on-the-wall. Spammers have been weighed in the socio-political balance...and the time has come (issues ripened) to bring forth private civil action(s) that create precedent accurately impacting direct and proximate *consumer injury* targets. This case is appropriately directed toward the goal.

B. Defendants Restrained Trade and Commerce:

1. EscrowAmerican, Inc., LLC #0412409 located at 6060 Browntown Road, Chattanooga, Tennessee, provides escrow services for online business transactions. PL needed an escrow service to help sell products offered at [<http://www.angelfire.com/biz2/savicom>] and decided to use EscrowAmerican, Inc. in year 2000.

2. Just recently, PL learned that EscrowAmerican, Inc. denies all consumers use of Discovery, American Express and all other credit cards competitive with Visa/Mastercard. PL lost sales to consumers who insisted on using credit cards that were competitive with Visa/Mastercard.

3. "The buyer pays EscrowAmerican with a MasterCard, Visa or wired money. EscrowAmerican is an online system and accepts only online transactions; this helps to speed the purchasing process. EscrowAmerican will accept electronic checks in the near future." [<http://www.escrowamerican.com>]

4. This is a graphic example of how the Visa/Mastercard monopoly in general purpose credit card markets continues to promulgate rules for merchant implementation of Visa credit card acceptance systems negatively and illegally impacting competition, trade and commerce. In exchange for the ability to accept Visa and Mastercard credit card purchases, EscrowAmerican, Inc. is prohibited from accepting Discover, American Express, JCB and all other credit cards competitive with Visa/MC. Anticompetitive restrictions placed on merchants injured countless consumers and businesses in the United States and worldwide, including PL. Injuries are likely to continue unless this case and similar actions are successful in curtailing Defendants illegal practices.

5. "...Visa, MasterCard and their member banks have agreed not to issue cards on smaller competing credit card networks, such as Discover and American Express. These exclusionary rules deny consumers the ability to choose from among a maximum variety of card products.

6. America's consumers have lost out. They have lost the benefit of vigorous competition between the two largest credit card networks, which means that they have not enjoyed the innovation that competition brings. For example, smart cards -- cards that use a computer chip that will expand the ways consumers can make purchases -- have been delayed for about a decade.

7. Second, consumers have lost the benefits of competition among the entire credit card industry, including not only Visa and MasterCard but also their smaller rivals. Some consumers, for example, prefer to get their credit card of choice from their bank -- but are unable to. Some of these banks want to offer cards from smaller networks -- but they are unable to.

8. Every American consumer has a vital stake in a competitive credit card industry. There is simply no substitute for real competition." [PRESS RELEASE; WEDNESDAY, OCTOBER 7, 1998; WWW.USDOJ.GOV; PREPARED REMARKS OF ATTORNEY GENERAL JANET RENO ON DOJ CASE AGAINST VISA AND MASTERCARD]

9. Visa's restraint of trade via restrictive rules collusively made and ubiquitously promulgated via global monopoly power, was *per se* violation of 15 U.S.C., sec. 1 and 2; REST. 2d of Torts, sec. 17, 217(b); the Telephone Consumer Protection Act of 1991 (47 U.S.C., sec. 227); California Business and Professions Codes, sec. 17538.4, 17538.41 and California Penal Codes, sec. 502 and was especially offensive (malicious) in light of prohibitions announced and recently upheld by appellate review re *U.S. v. Visa/Mastercard* [98 Civ. 7076 (BSJ)].

10. Special note: Although probably not RICO liable for lack of organized crime involvement (otherwise qualified), survey of online casinos reveals fact only Visa/Mastercard credit cards are acceptable for purchase of electronic chips. Final Judgment in *U.S. v. Visa/Mastercard* reveals how Visa/Mastercard "cornered" online gambling and many related markets. While case was under appeal, Visa/Mastercard continued very same anticompetitive policies/conduct that prompted United States Department of Justice to file complaint in 1998.

11. To date Visa/MC continues to cause antitrust injury via compelled exclusive dealing by its credit card issuers. One of their sales methods is spam. One of their victims was Plaintiff O'Brien.

C. Defendants Monopolized:

1. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a

corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." [United States Codes, Title 15, sec. 2]

2. Persons, Visa and Mastercard, combined with persons, Chase Manhattan Bank, Citibank, Inc., First Premier Bank, and RB Express, Inc., to increase Visa/MC monopoly marketshare in the general purpose credit card market via spam.

3. "Monopolization in contravention of 15 USCS, sec. 2 occurs whenever one with monopoly power commits unreasonable restraint of trade in violation of 15 USCS, sec. 1. *Auburn News Co. v Providence Journal Co.* (1980, DC RI) 504 F Supp 292, 6 Media LR 2333, 1980-81 CCH Trade Cases sec. 63640, rev'd on other grounds, remanded (1981, CA1 RI) 659 F2d 273." [15 USCS, sec. 2, n6]

4. Visa and Mastercard, one in exercise of market power, were convicted in *U.S. v Visa, et al.* of unreasonable restraint of trade in violation of 15 USCS, sec. 1. Therefor, defendants contravened Title 15, sec. 2.

D. Prior Conviction Sufficient For Sec. 19 Liability:

1. The United States Department of Justice complained against defendants in re *U.S. v. Visa/Mastercard*, for violation of Title 15, United States Codes, section 1. [*United States of America v. Visa U.S.A., Inc., and Mastercard International, Inc.*, CV 98-7076 (BSJ), Complaint, p.1-2]

2. DOJ complaint alleged two forms of sec. 1 violation (a) Count One: restraint of competition with each other via "dual governance" and (b) Count Two: restraint of competition via restrictions placed on bank members compelling them to refuse to do business with Visa/MC competitors (American Express, Discover/Novus, Diners Card, et al.). [*Ibid.*]

3. "Visa International is an appropriate and necessary defendant as to Count Two of the government's complaint before trial and at the close of the government's case, Visa International moved to dismiss the claims against it on the ground that it was not an appropriate defendant in this case. Plaintiff argues, and the court agrees, that Visa International is a necessary defendant as to Count Two of the complaint because it has the authority to adopt exclusionary by-laws in the United States.

4. Visa International is a Delaware association owned by its members. Visa International owns the Visa brand and licenses that brand to Visa U.S.A., which in turn sublicenses the use of that brand to its member banks. (See Allen (Visa U.S.A.) Dep. at 26-28.) Visa International's 'role is dominant' on issues relating to the Visa brand. (See Tr. 5391-92 (Williamson, Visa Int'l).)

5. Visa U.S.A. relies upon Visa International processing centers for all transactions, including domestic ones. (See Tr. 5390 (Williamson)). Moreover, 'Visa USA as a region is very dependent upon Visa International for all of its technology development.' (Tr. 4743 (Knox, Visa U.S.A.); accord McEwen (Visa U.S.A.) Dep. at 36-37.) Visa International By-law Section 15.02, entitled 'Fundamental Principles,' defines the relationship between the Visa International Board of Directors and its Regional Boards, including the Visa U.S.A. Board. The Visa International Board has sole authority to regulate interregional matters. In addition, intraregional matters having a significant effect on the worldwide Visa program may be preempted or regulated by the International Board of Directors. (See Ex. P-1168 at VI000056.) Under Section 15.02(d), the Visa International Board possesses the final power to classify matters as interregional, intraregional or intraregional having significant effect on worldwide Visa programs. (See Tr. 3296 (B. Katz, Visa U.S.A./Visa Int'l); Ex. P-1168 at VI000056.) Because Visa International has the authority to declare whether Visa U.S.A. By-law 2.10(e) is 'interregional' or 'intraregional having significant effect on worldwide Visa programs,' it therefore has the authority under Section 15.02 to preempt or regulate the Visa U.S.A. Regional Board on this matter.(29)

6. Visa International By-law Section 15.05, 'Conflicts or Controversies,' provides an independent basis on which the Visa International Board could regulate Visa U.S.A. By-law 2.10(e). 'Conflicts and/or controversies' subject to Visa International Board consideration are those 'involving claims that the rules, regulations and/or policies of a Regional Board' that (a) 'adversely affect members (or their owners or members) operating in other regions' or (b) 'are inconsistent with the rules, regulations and/or policies, or otherwise not in the best interests of the corporation' (Ex. P-1168 at VI000057 (emphasis added).) The Visa International Board can resolve the conflict or controversy with approval by three-fourths of the 'eligible voting membership of the Board of Directors (with the Regional Directors representing such region ineligible to vote).' Such a vote will be binding upon the Regional Board. (Ex. P-1168 at VI000057.)

Under Section 15.05, the Visa International Board therefore has the power to preempt a Visa U.S.A. policy that is inconsistent with what it determines to be the best interests of the Visa International corporation. (See Tr. 3300 (B. Katz, Visa U.S.A./Visa Int'l)).

7. In the past, Visa International has provided affirmative encouragement for By-law 2.10(e) and would have passed its own international version of that rule absent intervention from foreign competition authorities. (See Tr. 3288-89 (B. Katz)). In June 1996, the Visa International Board delegated authority to the United States Region, among others, to ensure that the United States Region knew the International Board supported a continuation of By-law 2.10(e). (See *id.* at 3290-92 (B. Katz); Ex. P-0661 at V030425-26.) Since Visa International has the power to impose its own version of By-law 2.10(e) unless legally prevented from doing so, Visa International's motion to dismiss is denied." [*United States of America v Visa U.S.A., et al.*, 98 Civ. 7076 (BSJ)].

8. "As the court has found liability under Count Two it grants, in part, the remedies requested by the Government. As an initial matter, the court notes that there is no reason to believe that abolishing the exclusionary rules would be disruptive to the governance of the associations." [*Ibid.*]

9. Although the United States District Court in the Southern District of New York convicted defendants on Count Two they were acquitted on Count One.

10. "Sec. 19. Interlocking directorates and officers

(a)(1) No person shall, at the same time, serve as a director or officer in any two corporations (other than banks, banking associations, and trust companies) that are--

(A) engaged in whole or in part in commerce; and

(B) by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws;" [Title 15, United States Codes, chap. 1, section 19]

11. Defendants are not, by any conventional definition, "...banks, banking associations, and [or] trust companies". Their claim for not-for-profit status and title "association", as tenuous as it is in light of Visa's

revenues from 1.1 billion cards doing 27.1 billion transactions worldwide involving some \$1.2 trillion, was apparently accepted by district court in *U.S. v. Visa/Mastercard* without objection. [<http://www.visa.com> - Corporate Report]

12. Although the district court determined that certain forms of competition (association-with-association) were actually increased via the Visa/MC pro-competitive relationship with each other, certain other forms of competition (association-with-corporation) were restrained by same relationship fostering anticompetitive policies/rules/conduct. American Express, Inc., Discover/Novus, Inc., Diners Club, Inc., and other general purpose credit card market competitors, are for-profit corporations that directly and indirectly issue credit and debit cards and they are, clearly, not *associations* as Visa/MC declare themselves to be.

13. According to above cited district court decision, Visa and Mastercard are, within certain parameters, 'competitors' and, on sum, display sufficient pro-competitive attributes inter shared directorates to obtain Court's denial of conviction on Count One, noted above. Court did, however, convict on Count Two and that fact proves Defendants liability under sec. 19 alleged in cause of action.

14. "'Competitors' within meaning of 15 USCS, sec. 19 are companies that vie for business of same prospective purchasers, even if products they offer, unless modified, are sufficiently dissimilar to preclude single purchaser from having choice of suitable product from each. *TRW, Inc. v Federal Trade Com.* (1981, CA9), 647 F2d 942, 1981-1 CCH Trade Cases, sec. 64077." [15 U.S.C., sec. 19, n 3]

15. "Implicit in million-dollar net worth requirement of 15 USCS, sec. 19 is legislative judgment that size of interlocked corporations is critical inquiry, and not quantity of competition; minimal nature of competition between corporations with interlocking boards is not defense to 15 USCS, sec. 19, since interlocks are intended to be reached without regard to amount of commerce that might be effected. *Borg-Warner Corp.*(1983) 101 FTC 863." [15 U.S.C., sec. 19, n 3]

15. Competitors, Visa and Mastercard, use interlocking directorates and/or shared executive committee membership to coordinate, create, promulgate and enforce rules that compel members (credit card issuers) to eliminate competition by American Express, Discover/Novus, Diners Club, et al.

against Visa/MC in general purpose credit card and debit card markets. Issuers on-going compliance with associations' rules/policies restrict product availability (restrain trade); increase market power (monopolize) and increase issuers revenues via practices that intentionally (unavoidably) injure certain percentages of consumers/businesses.

16. "Purpose of sec. 8 of Clayton Act (15 USCS, sec. 19) is to nip in bud incipient violations of antitrust laws by removing opportunity or temptation to such violations through interlocking directorates. United States v Sears, Roebuck & Co. (1953, DC NY), 111 F Supp 614." [*Ibid.*, n2]

17. Defendants, no longer incipient but rather full blown in violation of antitrust laws, had (have) regular opportunity to make, affirm and/or modify anticompetitive rules and orders via interlocking directorates. Offenders were not nipped-in-bud at the incipient stage because, heretofore, no person (public or private) brought sec. 19 claim(s) against them.

18. "...the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws;" (emphasis added) does not expressly or impliedly limit liability for restraint or elimination of competition between defendants themselves but rather refers to elimination of *competition* in any market that "...would constitute a violation of any of the antitrust laws;".

19. Conviction of Defendants under sec. 1, Count Two in *U.S. v. Visa/Mastercard*, constitutes proven violation of sec. 1, an 'antitrust law', as referred to in 15 U.S.C., sec 19 (a)(B).

20. Therefore, even with affirmation of pro-competitive factors negating Visa/MC sec. 1 liability in association-with-association markets, proven liability for restraint of trade and monopolization in association-with-corporation markets proves defendants breached sec. 19.

21. Attorney General of the United States (public enterprise) missed above referenced Count Two rationale for Defendants sec. 19 liability, but "Little Attorney General" (free enterprise) picked it up...validating spirit/letter/purpose of sec. 15, envisioned and commissioned by Congress.

E. Trespass To Chattels:

1. Defendants Intermeddled With Plaintiff's Property:
 - a. PL, like many other owners of email accounts hosted by Angelfire.com, takes very seriously email that comes into his accounts. If not literally compelled PL is strongly urged, much like a ringing telephone urges, to daily read/process constant streams of incoming email messages that are relevant and irrelevant to PL's affairs.
 - b. PL, like most people, has limited time during each workday to access, read and save/delete email messages. The presence of irrelevant spam (especially when titles are deceptive) consumes valuable time and presence-of-mind focused on litigation, business, personal affairs, etc. because PL must read/delete spam in order to keep his email accounts under Angelfire's 4 megabyte memory limitation. Exceeding limitation can be grounds for termination of an account.
 - c. "'Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of...the personal property, the owner has a cause of action for trespass' to chattel, but not for conversion." [*Thrifty-Tel, Inc. v Bezenek*, 54 Cal. Rptr. 2d 468 (1996)]
 - d. "The Court of Appeal majority placed much weight on the notice that 'any unlawful interference, however slight, with the enjoyment by another of his personal property, is a trespass.'" [*Intel Corp. v Hamidi*, 114 Cal.Rptr.2d 244, 247 (Cal.App. 3 Dist. 2001)]
 - e. Defendants actions can be accurately characterized as "intermeddling".
 - f. "Likewise, the Restatement Second of Torts, section 217 includes in the definition of trespass to chattel the intentional use or 'intermeddling' with a chattel in the possession of another." [*Id.*, sec. 217(b)]
 - g. "The tort of trespass to chattels 'lies where an intentional interference with the possession of personal property has proximately caused injury.'" [*Supra.*, *Thrifty-Tel, Inc. v Bezenek*]
 - h. Defendants intermeddling proximately caused quantifiable injury to PL.
 - i. "The undisputed facts establish that Melle committed a trespass to chattels in violation of Virginia Common Law.

Although authority under Virginia law respecting an action for trespass to chattels is sparse, case law suggests that trespass to chattels is indeed actionable in Virginia. See *Vines v. Branch*, 244 Va. 185, 190, 416 S.E.2d 890, 894 (1992) ("Where a person has illegally seized the personal property of another and converted it to his own use, the owner may bring an action in trespass, trover, detinue. or assumpsit One who commits a trespass to chattel is liable to its rightful possessor for actual damages suffered by reason of loss of its use.") (emphasis added) (citations omitted)). A trespass to chattels occurs when one party intentionally uses or intermeddles with personal property in rightful possession of another without authorization. See RESTATEMENT (SECOND) OF TORTS sec. 217 (b)." [*AOL v. IMS, Gulf Coast Marketing, & TSF*, Civil Action 98-0011-A: Memorandum Opinion re Count V: Trespass to chattels under Virginia Common Law]

j. Sending spam to Plaintiff's email addresses, intentionally interfered with the possession of Plaintiff's property and/or intermeddled with Plaintiff's property (email accounts : saved email messages).

k. "The chief importance of the theory today, according to Prosser, is that there may be recovery for interferences with the possession of personal property that are not sufficiently important to be classed as conversion, i.e., as a 'little brother of conversion'." (5 Witkin, Summary of Cal. Law (9th ed. 1988, 1999 Supp.) Torts, sec. 627A, p.390; see *id.*;, sec. 610, pp. 707-708.)

l. However, the tort [of trespass to chattels] has reemerged as an important rule of cyberspace. [*Intel Corp. v Hamidi*, 114 Cal.Rptr.2d 244, 247 (Cal.App. 3 Dist. 2001)]

m. On scores of occasions (1999 thru 2003) Defendants directly, indirectly and intentionally sent damaging spam to PL's email accounts. Defendants "...intentionally use[d] or intermeddle[d] with personal property in rightful possession of another without authorization."

n. "Accordingly, the Court of Appeal majority was forced to rely on two other, consequential harms: 'loss of productivity...and by the time [plaintiff] spent trying to halt the distractions...(spam).'" [*Supra.*, *Intel v. Hamidi*]

o. Defendants actions caused Plaintiff's loss of productivity and time necessary to (1) read/delete spam and (2) halt distractions via filter configurations, consumer

complaints and, absent other administrative remedy, federal litigation.

2. Private Nuisance:

a. Defendants created a nuisance by physically invading Plaintiff's interest in the private use and enjoyment of property (two email accounts). Invasions (spam) required time consuming editing and, thereby, decreased Plaintiff's enjoyment of (a) economical interaction with email clients, (b) electronic (instant) correspondence and (c) reading only relevant messages.

b. "Appellants admit that their [property] is not contaminated and that aside from alienability, their use of the property remains unaffected. Nevertheless, appellants argue that they are entitled to relief under a theory of private nuisance. In tort, one may be damaged but not suffer a legal injury. See *Rosenthal v. Carson*, 27 A.2d 499, 501 (Pa.Super. 1942). Although appellants have clearly alleged damages, we must decide whether they were a result of a compensable injury." [*Stewart R. Golen v. The Union Corporation*, in the Court of Common Pleas of Philadelphia County, Civil No. 1992-305, September 1995: <http://www.dpg-law.com/opinions/pa-super/9809/6170-golden.html#821D>]

c. Defendants nuisance caused compensatory injury in forms of (a) time-consumption (expense) and (b) vexation (emotional distress).

d. "This Commonwealth follows the Restatement (Second) of Torts' formulation of private nuisance. See *Kembel v. Schlegel*, 478 A.2d 11, 14 (Pa.Super. 1984). The Restatement defines a private nuisance as 'a non-trespassory invasion of another's interest in the private use and enjoyment of land.' 4 Restatement Torts, 2d, sec. 821D, p. 100." [*Ibid.*]

e. Even should liability for literal trespass be denied, defendants incurred liability for infliction of private nuisance.

f. "Admittedly, a broad reading of the Restatement definition could include appellants' claim. It has been noted that the concept of nuisance is broad enough to encompass virtually all harms. See *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715 (Mich. S.C. 1992). Thus, courts must determine sensible limits to liability under this potentially sweeping concept. After careful consideration, we conclude that private nuisance only recognizes injuries

that require physical presence on the property in order to be perceived." [*Ibid.*]

g. Spam's physical existence in form of electronic signals is no longer seriously questioned. Defendants spam placed in PL's email accounts constituted private nuisance if not trespass. Use of nuisance methods to increase monopoly is illegal monopolization.

h. "The phrase 'interest in the use and enjoyment of land' is used in this Restatement in a broad sense. It comprehends not only the interests that a person may have in the actual present use of land for residential, agricultural, commercial, industrial and other purposes, but also his interests in having the present use value of the land unimpaired by changes in its physical condition . . . 'Interest in use and enjoyment' also comprehends the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land. Freedom from discomfort and annoyance while using land is often as important to a person as freedom from physical interruption with his use or freedom from detrimental change in the physical condition of the land itself. This interest in freedom from annoyance and discomfort in the use of land is to be distinguished from the interest in freedom from emotional distress . . . The latter is purely an interest of personality and receives limited legal protection, whereas the former is essentially an interest in the usability of land and, although it involves an element of personal tastes and sensibilities, it receives much greater legal protection." [*Ibid.*]

i. Even limited legal protection (laws, precedent) will suffice to stop Defendants from abridging Plaintiff's right to freedom from discomfort and annoyance while using email accounts.

j. "All of the cases relate to an interference of the enjoyment of the property while on the premises. See, e.g., Harford Penn-Cann Service, Inc. v. Zymblosky, 549 A.2d 208 (Pa.Super. 1988) (dust from truck stop sufficient to constitute nuisance where health problems to employees resulted); Karpiak v. Russo, 676 A.2d 270 (Pa.Super. 1996) (dust from a business not a nuisance where no health problems or effect on daily activities resulted); Township of Bedminster v. Vargo Dragway, Inc., 253 A.2d 659 (Pa. 1969) (excessive noise from a racetrack in a residential area found to be a nuisance in fact)." [*Ibid.*]

k. Defendants "noise" was an emotional (health) problem which regularly interrupted Plaintiff O'Brien's daily activity and exacerbated his disability.

l. "Perception while physically present should not be confused with physical invasion. For instance, the noise and light from a trucking business can be perceived while physically present on neighboring property and may constitute a nuisance though no physical invasion occurs. See *Firth v. Scherzberg*, 77 A.2d 443 (Pa. 1951) (noise and headlights from a trucking business operated at night considered a nuisance where it deprived neighbors of sleep)." [*Ibid.*]

m. Defendants email sends from proprietary servers to server(s) at Angelfire.com on which PL's email accounts were hosted was, nevertheless, trespass and/or nuisance.

n. "Originally, all types of trespass, including trespass to land, were punishable under the criminal law because the trespasser's conduct was regarded as a breach of the peace. When the criminal and civil aspects of trespass were separated, the civil action for trespass was colored by its past, and the idea that the peace of the community was put in danger by the trespasser's conduct influenced the courts' ideas of the character of the tort. Therefore, relief was granted to the plaintiff where he was not actually damaged, partly, at least, as a means of discouraging disruptive influences in the community. If then, there is an act on the part of the defendant interfering with the plaintiff's possession, which does or is likely to result in arousing conflict between them, that act will characterize the tort as a trespass, assuming of course that the other elements of the tort are made out. (7 Speiser et al., *American Law of Torts* (1990) *Trespass*, sec. 23:1, p. 592 (Speiser)]" [*Supra.*, p.248]

o. A great number of communities were disrupted when Defendants spam arrived at email accounts/clients and caused discomfort and distress. (Admittedly, spam did provide opportunity for certain qualified consumers in need of a credit card.) Even should the Court doubt actual damage to PL's person or business from Defendants conduct, relief in form of damages paid by Defendants is required in order to discourage future disruptive influence in PL's community.

p. "As a number of very early cases show, any unlawful interference, however slight, with the enjoyment by another of his personal property, is a trespass." (Speiser, sec. 23:23, p. 667)

q. No reasonable person will deny fact spam interferes with the enjoyment of email.

r. "A trespass to chattels is actionable *per se* without any proof of actual damage. Any unauthorized touching or moving of a chattel is actionable at the suit of the possessor of it, even though no harm ensues...Hence, the successful plaintiff will always be entitled to nominal damages at least[.]" (Salmond on Tort (21st ed. 1996) Trespass to Goods, sec. 6.2, p. 95, fns. omitted)

s. If nominal damages then punitive damages:

t. "As indicated, some confusion in the cases and treatises disappears when the nature of the remedy is considered. We accept that 'The plaintiff, in order to recover more than nominal damages, must prove the value of the property taken, or that he has sustained some special damage.' (1 Waterman, Trespass (1875) Remedy for Wrongful Taking of Property, sec. 596, p. 617; see *Lay v. Bayless* (1867) 44 Tenn. 246, 247; *Warner v. Capps* (1881) 37 Ark. 32.)" [*Intel v. Hamidi*, p.249]

u. What value can be placed on peace-of-mind or the absence of emotional distress? If time-consuming editing (read/save/delete) was only nominally expensive, exacerbation of PL's Veterans Administration certified disability (and disabilities suffered by countless others impacted by same email attack) was very expensive.

v. "A plaintiff can sustain an action for trespass to chattels, as opposed to an action for conversion, without showing a substantial interference with its right to possession of that chattel. *Thrifty-Tel, Inc.*, 46 Cal. App. 4th at 1567 (quoting *Zaallow v. Kroenert*, 29 Cal. 2d 541, 176 P.2d 1 (Cal. 1946)). Harm to the personal property or diminution of its quality, condition, or value as a result of defendants' use can also be the predicate for liability.

w. Multiple unsolicited and unwanted communications from Defendants to the effect Plaintiff needed (or could use) Defendants credit card, designed only for low-income persons, was a diminution of the quality of PL's email accounts and possibly libelous. Accounts, occasionally monitored for quality by the hosting service, revealed to Angelfire.com Plaintiff's low income status (from which he was trying desperately to extricate himself), evidenced by Defendants profiling (see major credit card issuer Capital One Financial Corp.'s profiling - at http://www.capitalone.com/about/index.shtml?linkid=WWW_X_X_X

_GBLHM_H1_02_T_A7). Plaintiff has often had friends, associates and superiors peer over his shoulder while he accessed/read email. How many dubious smiles did defendants solicitations with "no credit check required" on subject line bring? How many promotions have been lost (or reputations tarnished) when employers viewed employees negatively described spam?

x. Host injury is also consumer injury:

(1) "In the present case, any value CompuServe realizes from its computer equipment is wholly derived from the extent to which that equipment can serve its subscriber base. Michael Mangino, a software developer for CompuServe who monitors its mail processing computer equipment states by affidavit that handling the enormous volume of mass mailings that CompuServe receives places a tremendous burden on its equipment. (Mangino Supp. Dec. at 2). Defendants' more recent practice of evading CompuServe's filters by disguising the origin of their messages commandeers even more computer resources because CompuServe computers are forced to store undeliverable e-mail messages and labor in vain to return the messages to an address that does not exist. (Mangino Supp. Dec. at ~{66~}7-8). To the extent that defendants' multitudinous electronic mailings demand the disk space and drain the processing power of plaintiff's computer equipment, those resources are not available to serve CompuServe subscribers. Therefore, the value of that equipment to CompuServe is diminished even though it is not physically damaged by defendants' conduct." [CompuServe v. Cyber Promotions, Inc., 962 F. Supp. 1015 (S.D. Ohio 1997); In the United States District Court for the Southern District of Ohio Eastern Division; Case No. C2-96-1070; JUDGE GRAHAM; February 3, 1997; MEMORANDUM OPINION AND ORDER

(2) "Next, Plaintiff asserts that it has suffered injury aside from the physical impact of defendants' messages on its equipment. Restatement sec. 18(d) also indicates that recovery may be had for a trespass that causes harm to something in which the possessor has a legally protected interest. Plaintiff asserts that defendants' messages are largely unwanted by its subscribers, who pay incrementally to access their e-mail, read it, and discard it. Also, the receipt of a bundle of unsolicited messages at once can require the subscriber to sift through, at his expense, all of the messages in order to find the ones he wanted or expected to receive. These inconveniences decrease the

utility of CompuServe's e-mail service and are the foremost subject in recent complaints from CompuServe subscribers. Patrick Hole, a customer service manager for plaintiff, states by affidavit that in November 1996 CompuServe received approximately 9,970 e-mail complaints from subscribers about junk e-mail, a figure up from approximately two hundred complaints the previous year. (Hole 2d Supp. Dec.). Approximately fifty such complaints per day specifically reference defendants. (Hole Supp. Dec.). Defendants contend that CompuServe subscribers are provided with a simple procedure to remove themselves from the mailing list. However, the removal procedure must be performed by the e-mail recipient at his expense, and some CompuServe subscribers complain that the procedure is inadequate and ineffectual. (See, e.g., Hole Supp. Dec.)." [*Ibid.*]

(3) "Many subscribers have terminated their accounts specifically because of the unwanted receipt of bulk e-mail messages. (Hole Supp. Dec., Hole 2d Supp. Dec.). Defendants' intrusions into CompuServe's computer systems, insofar as they harm plaintiff's business reputation and goodwill with its customers, are actionable under Restatement sec. 18(d)." [*Ibid.*]

(4) "The reason that the tort of trespass to chattels requires some actual damage as a prima facie element, whereas damage is assumed where there is a trespass to real property, can be explained as follows:

(5) The interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel. In order that an actor who interferes with another's chattel may be liable, his conduct must affect some other and more important interest of the possessor. Therefore, one who intentionally intermeddles with another's chattel is subject to liability only if his intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest of the possessor is affected as stated in Clause (c). Sufficient legal protection of the possessor's interest in the mere inviolability of his chattel is afforded by his privilege to use reasonable force to protect his possession against even harmless interference." [*Ibid.*]

(6) "Plaintiff CompuServe has attempted to exercise this privilege to protect its computer systems. However, defendant's affirmative efforts to evade plaintiff's security measures have circumvented any protection those self-help measures might have provided. In this case CompuServe has alleged and supported by affidavit that it has suffered several types of injury as a result of defendants' conduct. The foregoing discussion simply underscores that the damage sustained by plaintiff is sufficient to sustain an action for trespass to chattels. However, this Court also notes that the implementation of technological means of self-help, to the extent that reasonable measures are effective, is particularly appropriate in this type of situation and should be exhausted before legal action is proper." [*Ibid.*]

3. Defendants Spam Not Protected Free Speech:

a. "E-mails criticizing former employer is protected speech, court rules Tuesday, July 1, 2003 Posted: 1:05 PM EDT (1705 GMT)

SAN FRANCISCO, California (AP) -- In a free-speech case watched closely by civil libertarians, California's high court ruled that a barrage of e-mails sent by a fired Intel worker disparaging his former employer did not constitute trespassing.

In a 4-3 decision Monday, the California Supreme Court overturned a lower-court injunction barring Kourosh Kenneth Hamidi from sending e-mail to his former colleagues. Santa Clara-based Intel had sought the injunction, arguing that Hamidi was trespassing on its computer servers just as though he were intruding on private property.

The majority's reasoning does not give a legal nod to those sending spam, or unsolicited e-mail, en masse, she noted.

Werdegar also said Intel's servers were not harmed by the computer messages and the thousands of recipients were able to request that the e-mails stop, which Hamidi honored. Had that not been the case, Hamidi may have been trespassing, she said.

He (Hamidi) no more invaded Intel's property than does a protester holding a sign or shouting through a bullhorn outside corporate headquarters, posting a letter through the mail, or telephoning to complain of a corporate practice. -- Justice Kathryn Werdegar

She added that Intel's chief concern was the content of his e-mails, which are protected speech. Commercial speech, such as spam, does not have the same First Amendment protection." [<http://www.cnn.com> (homepage): July 1, 2003: Intel v Hamidi]

b. Why Intel did not stop Hamidi's spam with standard filtering is yet a mystery. Did Intel try to entrap Hamidi or give him enough rope to hang himself? Plaintiff would have permanently stopped questionable free speecher cold in a matter of a few minutes using inexpensive email filtering software.

c. Intel sought only an injunction to stop Hamidi's frequent, uncomplimentary email and did not join Intel employees to case. Although Intel's cause of action for trespass was not accepted by the California Supreme Court, employees, arguably, had cause of action for trespass and breach of California codes.

d. Even though Hamidi did, apparently (never proven), grant Intel employees (individually) "right" to stop emails many who were not enjoying unsolicited, corporately offensive messages did not want to acknowledge that fact and/or communicate with a discharged, disgruntled former employee. Absence of estoppel request is not approval of continuing email barrage.

e. Hamidi's email may, in fact, not have caused appreciable damage to Intel's servers having virtually unlimited memory. However, emails did very probably cause damage to employees' persons (mental disturbance, loss of productivity, etc.). Emails, not only as electronic matter but also as cognitive matter (affect), can be likened to noise or dust. When a large number of irrelevant, disturbing emails impact a person's mind it is like experiencing excessive noise or a cloud of unhealthy dust.

f. Quote reiterated (recited) for emphasis and absolute clarity, "All of the cases relate to an interference of the enjoyment of the property while on the premises. See, e.g., Harford Penn-Cann Service, Inc. v. Zymblosky, 549 A.2d 208 (Pa.Super. 1988) (dust from truck stop sufficient to constitute nuisance where health problems to employees resulted); Karpiak v. Russo, 676 A.2d 270 (Pa.Super. 1996) (dust from a business not a nuisance where no health problems or effect on daily activities resulted); Township of Bedminster v. Vargo Dragway, Inc., 253 A.2d 659 (Pa. 1969) (excessive noise from a racetrack in a residential area found to be a nuisance in fact." [*Stewart R. Golen v.*

The Union Corporation, in the Court of Common Pleas of Philadelphia County, Civil No. 1992-305, September 1995:
<http://www.dpg-law.com/opinions/pa-super/9809/6170-golden.html#821D>]

g. Commercial spam frequently sent (PL receives on average three(3) unauthorized email messages soliciting credit card purchase daily) by Defendants is not free speech protected by the First Amendment of the U.S. Constitution and, when sent copiously, can be likened to excessive noise or dust causing, or having significant potential to cause, health and/or mental injury.

h. In this case, Defendants emails caused mental distress and exacerbated Plaintiff's disability by increasing migraine headaches. Emails were also financially injurious because they required PL's time at business station for read/save/delete and, perhaps most importantly, caused inadvertent deletion of meaningful messages by mistake!

i. Therefore, Plaintiff O'Brien has valid cause of action under trespass to chattels.

F. Unlawful Telephone Use:

1. Clear Breach of 47 C.F.R. 64.1200:

a. "No person or entity shall initiate any telephone solicitation to a residential telephone subscriber:

(1) Before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), and

(2) Unless such person or entity has instituted procedures for maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

Written policy. Persons or entities making telephone solicitations must have a written policy, available upon demand, for maintaining a do-not-call list.

(3) Recording, disclosure of do-not-call requests. If a person or entity making a telephone solicitation (or on whose behalf a solicitation is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name and telephone number on the do-not-call list at the time the request is made. If

such requests are recorded or maintained by a party other than the person or entity on whose behalf the solicitation is made, the person or entity on whose behalf the solicitation is made will be liable for any failures to honor the do-not-call request. In order to protect the consumer's privacy, persons or entities must obtain a consumer's prior express consent to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a solicitation is made or an affiliated entity.

(4) Identification of telephone solicitor. A person or entity making a telephone solicitation must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. If a person or entity makes a solicitation using an artificial or prerecorded voice message transmitted by an auto-dialer, the person or entity must provide a telephone number other than that of the auto-dialer or prerecorded message player which placed the call. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges." [47 C.F.R. 64.1200]

2. Some of Defendants email solicitations arrived in Plaintiff's email accounts before 8:00am and after 9:00pm.

3. Defendants did not notice in certain of their email solicitations a written policy, available upon demand, for maintaining a do-not-call list.

4. Defendants did not provide Plaintiff with the legal name of the individual "caller" making the email transmission on behalf of RB, Visa/MC and/or member banks.

5. Defendants did not provide Plaintiff with a telephone number for Visa, MC, member bank(s), and/or RB inter email solicitations.

6. Defendants breached sec.227:

a. "Restrictions on use of telephone equipment

(a) Definitions

As used in this section -

(1) The term "automatic telephone dialing system" means equipment which has the capacity -

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(3) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(4) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States -

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice -

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously." [Telephone Consumer Protection Act of 1991, sec. 227]

7. Defendants used a computer to send unsolicited advertisements to a remotely hosted email client which in turn sent the ads to PL's accounts in same server. Email clients at Angelfire.com are substantially similar to virtual facsimile machines which are, in fact, facsimile machines.

8. Defendants email solicitations targeting PL and many other consumers, inter and extra *www.angelfire.com*, simultaneously engaged two(2) or more telephone lines at Angelfire.com.

9. "Included in sec.227 of the TCPA is a definition for the term 'telephone facsimile machine.' In relevant part it defines the term as 'equipment which has the capacity...to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.' 47 U.S.C. sec. 227(a)(2)(B).

Appellant argues that his personal computer, which received the 6 unsolicited e-mail advertisements, fits this definition. He explains that his personal computer was attached to a separate telephone line and to a computer printer. Thus, he maintains he received Bright-Teeth's unsolicited messages on equipment which has the capacity to transcribe text or images (or both) from an electronic signal over a regular telephone line onto paper. Appellant asserts that the attached printer gives the computer the capacity to print the e-mail messages onto paper, as

demonstrated by the copies he attached to his complaint." [Aronson v. Bright-Teeth Now, LLC, Case No. 1179 WDA 2002 in the Superior Court of Pennsylvania, decided May 8, 2003]

10. When the Court did not agree with the appellant it did so by implying that a fax machine was only hardware that sends/receives messages to another hardware fax machine that automatically prints out messages on paper. The Court overlooked the fact that there are widely used virtual fax machines (computer programs) that are very similar to sophisticated email clients. These fax clients, like email clients, display messages on pc monitor that may be readily printed on paper or otherwise mediated. Plaintiff O'Brien frequently used a virtual fax system (a) at *www.atelo.com* and (b) inter personal computer systems.

11. Use of virtual fax machines by millions of internet/pc users obviates the Aronson court's restrictive definition. Issue is ripe for overturn.

VIII. TRADE AND COMMERCE

1. Throughout the period covered by this Complaint, Visa and MasterCard have operated credit card networks throughout the United States. They provide card network products and services in, and those products and services affect, a substantial amount of interstate commerce. In 2002, transaction volume on the Visa and MasterCard networks exceeded \$2.2 trillion.

IX. RELEVANT MARKET

1. General purpose credit cards are payment devices that a consumer can use to make purchases from unrelated merchants without accessing or reserving the consumer's funds at the time of the purchase. There are two principal types of general purpose credit cards:

a) credit cards such as Visa and MasterCard Classic and Gold cards, the American Express Optima card, and the Discover card that usually permit the cardholder to either (i) pay all charges within a set period after a monthly bill is rendered, or (ii) pay only a portion of the charges within that time and pay the remainder in monthly installments, including interest; and

b) charge cards such as the American Express Green Card that require the cardholder to pay all charges within a set period after a monthly bill is rendered.

2. General purpose credit cards do not include cards that can be used at only one merchant (e.g., department store cards) or cards that immediately access funds on deposit in a checking or savings account (e.g., debit cards).

3. General purpose credit cards provide a consumer with a combination of convenience, widespread acceptance, security, and deferred payment options that is not effectively replicated by any other form of payment. For a significant number of consumers and types of transactions, other forms of payment are not a close substitute for general purpose credit cards.

4. Competition to provide general purpose cards occurs at two levels. First, Visa and MasterCard compete with American Express, Discover/Novus, Diners Club, and Japan Credit Bureau in an upstream market, herein referred to as the *network market*.

5. Second, individual Visa and MasterCard member banks, including all Defendants, compete with each other and with American Express, Discover/Novus, Diners Club, and JCB member banks in two downstream *issuer* markets.

a) the market for issuing general purpose credit cards to consumers ("card-issuing market"); and

b) the market for providing the services that enable merchants to accept general purpose credit cards for the purchase of goods or services ("card-acceptance market").

6. Visa and MasterCard associations compete only in the upstream network market. Their member banks, with the exception of Citibank, which owns Diners Club, and BankAmerica Corp., which owns Visa, compete only in the downstream markets.

D. Product Market:

1. Certain functions essential to the acceptance and use of general purpose credit cards are most efficiently performed by general purpose credit card networks, often because the functions require broad coordination across international regions and subnetworks.

2. For example, among these functions, all general purpose credit card networks:

a) invent, develop, and implement systems and technologies, including systems to authorize and settle card transactions and reduce fraud;

b) develop, market, advertise, and promote their brand names among consumers and merchants;

c) invent, develop, implement, standardize, market, and advertise types of card products;

d) develop and implement rules and standards to govern their networks;

e) set fees and assessments for use of the network's products and services, including the interchange fee that accounts for the largest part of the price that merchants pay for the right to accept general purpose credit cards;

f) and extend credit card acceptance to merchant segments that have not accepted cards in the past.

3. The products and services provided by general purpose credit card networks form a relevant product market ("the network market"). Banks and other entities that issue credit cards and provide credit card acceptance services to merchants rely on general purpose credit card networks to provide a core set of these products and services for which there is no cost-effective alternative.

4. Card issuers and banks that provide credit card acceptance services to merchants thus cannot substitute other products and services for the products and services provided by general purpose credit card networks in an amount sufficient to deter Defendants' exercise of market power in the network market.

5. In addition, consumers do not substitute other forms of payment, and merchants do not stop accepting general purpose credit cards, in amounts sufficient to deter Defendants' exercise of market power in the network market.

6. The products and services provided by general purpose credit card networks are critical inputs to the entities that issue cards to consumers and provide credit card acceptance services to merchants.

7. Card issuers compete for cardholders with respect to interest rates, annual cardholder fees, payment terms and conditions, card enhancements, and customer service.

8. Entities that provide credit card acceptance services to merchants compete with respect to their fees and the quality of service they provide. This competition among Visa and MasterCard member banks in the card-issuing market and the card-acceptance market is not a substitute for, and does not replace, competition at the *network* level.

9. Competition at downstream levels thus cannot protect consumers from the anticompetitive effects of the exercise of market power by general purpose credit card networks. Competition among card *issuers* does, however, ensure that if network competition is vigorous, the benefits of that competition will be passed on to consumers.

E. Geographic Market:

1. The United States is the relevant geographic market for each relevant product market alleged herein.

2. Almost all of the general purpose credit cards issued by banks based in the United States are issued to domestic cardholders, and these consumers use their credit cards predominantly at merchant locations in the United States.

3. Most general purpose credit card transactions with merchants located in the United States are made using cards issued in the United States, and most merchants would not consider networks operating outside the United States to be a substitute for networks operating in the United States.

4. The Defendants consider the United States to be a separate geographic market, as demonstrated in part by their establishment of separate Boards of Directors for, and separate rules governing the operation of, credit card networks in the United States. For example, the Visa rules permitting member banks to issue Visa and MasterCard, but no other network's cards, apply only in the United States.

F. Market Power:

1. Visa/MC has market power in the general purpose card network services market and the general purpose card markets. The general purpose card market includes the general purpose credit card sub-market.

2. "In determining that defendants exclusionary rules' have 'anticompetitive effects [that] outweigh [their] pro-competitive effects', and hence violate Section 1 of the Sherman Act, the district court in *United States v. Visa/Mastercard* applied a 'full-fledged rule of reason analysis,' considering 'all of the circumstances of [the] case.' (quoting *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977)). In this analysis, courts first consider a defendant's market power. See, e.g., *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 600 (7th Cir. 1996); *Double D Spotting Serv., Inc. v. Supervalu, Inc.*, 136 F.3d 554, 558 (8th Cir. 1998). The district court found that the defendants Visa and Mastercard, jointly and separately, possessed market power in a relevant market consisting of general purpose card network services. Relevant market includes the sub-market of general purpose credit cards." [*United States of America v. Visa U.S.A., Inc., Mastercard International, Inc. and Visa International Corp.*, United States Court of Appeals for the Second Circuit, No. 02-6074, Brief for the United States]

3. "The definition of the relevant market is a factual inquiry reversible only for clear error. *International Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242, 251 (1959); *Todd v. Exxon Corp.*, 275 F.3d 191, 199 (2d Cir. 2001) ('market definition is a deeply fact-intensive inquiry'); *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261 (2d Cir. 1989)." [*Ibid.*]

4. "The district court in *U.S. v. Visa/Mastercard* properly defined markets 'composed of products that have reasonable interchangeability for the purposes for which they are produced--price, use, and qualities considered.' *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956) (cited by Op. 335 (SPA171)). It found two relevant product markets: 'the general purpose card network services market and the general purpose card market.' The record fully supports the district court's findings, which were based on the testimony of the economic experts for the government and for the defendants, current and former officers of the associations, and industry participants, as well as on defendants' own documents." [*Ibid.*]

5. "General purpose card networks provide the infrastructure and mechanisms through which general purpose card transactions are conducted, including the authorization, settlement, and clearance of transactions. Merchant acceptance of a card brand is also defined and controlled at the system level and the merchant discount rate is established, directly or indirectly, by the networks. These

basic or core functions are indispensably done at the network level. Networks play 'a major role in determining the overall quality of the brand, encompassing system-level investments in brand advertising, the creation of new products and features and cost-saving increases in the efficiency of the electronic backbone of the networks.' Visa and MasterCard provide network services, and American Express and Discover are the only other significant competitors providing network services for general purpose cards." [*Ibid.*]

6. "The relationship between issuing banks and their networks is not that of distributor and manufacturer. 'A card issuer, instead, actually determines the main characteristics of the card which it puts on the market.' Id. (quoting B.Katz (VUSA/VINT) Tr. 3137:13-3138:4 (T2684-85) (discussing P-0727 at 28 (E3159-60))). Nor do the networks merely sell services the banks use to produce general purpose cards, because the networks are mainly responsible for creating and promoting the brands and new products. Rather, the banks and networks combine to produce general purpose cards jointly. The exclusionary rules deny American Express and Discover access to the 'special skills, expertise and relationships with consumers,' banks bring to this enterprise." [*Ibid.*]

7. Therefore, Defendants co-equally liable for violations alleged in this Complaint.

8. General Purpose Cards Constitute A Relevant Product Market

"In determining the relevant markets, the district court employed the hypothetical monopolist, price-sensitivity test endorsed by the First Circuit and others. The 'inquiry is whether a 'hypothetical cartel' would be 'substantially constrain[ed]' from increasing prices by the ability of customers to switch to other producers.' Todd, 275 F.3d at 202 (quoting AD/SAT v. Associated Press, 181 F.3d 216, 228 (2d Cir. 1999) (per curiam)). The district court correctly articulated this legal standard, and expressly adopted the analysis of plaintiff's expert economist utilizing this standard; see M.Katz Dir. 128-31 (T3133-36). Professor Katz's analysis indicated that a hypothetical monopolist over general purpose cards would find a 5% price increase profitable unless that price increase would reduce general purpose card charge volume by more than 16%; M.Katz Dir. 130-31 (T3072-73). Although a price increase for general purpose cards likely would cause some substitution to other forms of payment, the court found it 'highly unlikely that

there would be enough cardholder switching away from credit and charge cards to make any such price increase unprofitable for a hypothetical monopolist of general purpose card products.'" [*Ibid.*]

9. "MasterCard argued that the district court's focus on switching in response to price changes is inappropriate because there is no meaningful price for general purpose cards. MC 67-70. But, for the large portion of consumers carrying a credit balance, the price of using general purpose cards is relatively straightforward: it is the interest they are charged, which the government's expert calculated to average 12.3% of the purchase price of goods.(31) M.Katz Dir. 120 (T3066)." [*Ibid.*]

10. "MasterCard also argued the district court was wrong to focus on switching in response to price changes because innovation, rather than changes in price, has historically caused increased usage of general purpose cards relative to other forms of payment. MC 63-65. Consumers have increased their usage of general purpose cards over time in response to changes in factors other than price. It does not follow, however, that other forms of payment that consumers would formerly have used are in the relevant market for general purpose cards. See *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 248 n.1 (8th Cir. 1988) ('evidence of the substantial displacement of sugar by HFCS is irrelevant because this displacement focuses on static, rather than dynamic' factors); *United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, 1259-60 (N.D. Ill. 1989) ('substitutability over time' is not relevant for market definition), *aff'd*, 898 F.2d 1278 (7th Cir. 1990). Consumers have increased their usage of personal computers over time in response to both price and non-price factors, but that does not mean that pencils and paper and other substitute technologies are in the relevant market for PCs." [*Ibid.*]

11. "MasterCard further suggested that '[b]ecause this case is about innovation,' Appellate Court should abandon the hypothetical monopolist price-sensitivity test found in its precedents in favor of a test asking whether a hypothetical monopolist would continue to innovate. MC 20, 68-69. But even MasterCard's own expert employed a price-sensitivity test (see Pindyck Dir. 7.1 (T6125)), and MasterCard offers no case support for its suggestion that the sole test in this case should be whether a hypothetical monopolist would continue to innovate. There was no reason for the court to adopt market definition methods designed for the sort of 'innovation market' to which MasterCard refers (MC 68-69), because the government did not allege such a market.

Innovation is an issue in this case but, contrary to MasterCard's assertion, many of the anticompetitive effects alleged by the government and found by the court did not relate to innovation." [*Ibid.*]

12. "Despite its objections to price sensitivity analyses, MasterCard argued that the survey-based price sensitivity analysis performed by its expert (Prof. Pindyck) provides a basis to reject the district court's findings. MC 70-71. The district court found, however--based on the testimony of the government's and Visa's experts--that 'it is essentially impossible to make a definitive calculation of consumer price sensitivity or elasticity of demand via survey.' Moreover, to the extent one can draw any conclusion from MasterCard's survey, it is that credit and charge cards constitute a relevant market. M.Katz Dir. ~{66~} 116-22 (T3064-68). Professor Pindyck's analysis considered a 2% change in the overall cost of a purchase made using a card, which MasterCard asserts (MC 71) is in the range of actual rebate offers. That means, however, that MasterCard is positing an effective price increase of far more than 100% of the cost to the consumer of using the card. That price increase is vastly higher than any a court ever has used to define a relevant market. Yet even with such a huge price increase, MasterCard represents that only 50% of consumers would switch, which indicates that a hypothetical monopolist would find it profitable to raise prices substantially, M.Katz Dir. 121 (T3067), and therefore, that general purpose cards constitute the relevant market." [*Ibid.*]

13. "Appellants contend (VUSA 27 & n.7; MC 60-62) that the district court erred in excluding cash, checks, and debit cards from the relevant market of general purpose cards. The district court, however, properly excluded those items from the market and rejected defendants' proffered 'all-payments' market. In light of the court's abundant citations for its multiple findings on market definition, appellants do not come close to meeting their burden of demonstrating clear error." [*Ibid.*]

14. "Cash And Checks: To be sure, cash and checks often are functional substitutes for general purpose cards. But functional interchangeability is not enough; the test for market definition is whether users find products to be 'reasonably interchangeable.' See U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 995-96 (11th Cir. 1993) (generic anchors not in same product market as Danforth-brand anchors, even though they are 'functionally interchangeable' and often 'virtually identical'); Archer-Daniels-Midland, 866 F.2d at 246 (sugar not in relevant

market for high-fructose corn syrup (HFCS) despite being functionally interchangeable in every application in which HFCS was used). Functional interchangeability is only one aspect of reasonable interchangeability. See *Buehler AG v. Ocrim S.p.A*, 836 F. Supp. 1305, 1325 (N.D. Tex. 1993); *United States v. Chas. Pfizer & Co.*, 246 F. Supp. 464, 468 n.3 (E.D.N.Y. 1971)." [*Ibid.*]

15. "The district court properly found that consumers, merchants, and defendants themselves do not consider cash and checks to be reasonably interchangeable with general purpose cards. Consumers cannot use cash to make purchases over the Internet (or by phone, and 'generally do not want to carry large sums of cash to make large purchases.' *Schmalensee Tr.* 5969:23-5971:4 (T5987-89); *Schmidt (VUSA) Dep.* 70:12-19 (A790). In addition, holders of general purpose cards without monthly balances benefit by deferring payment for a short time, and those that carry outstanding balances 'benefit from the . . . card's credit function, which allows for the choice to purchase now and pay later.' Checks have much lower merchant acceptance than either cash or general purpose cards, which discourages their use. *Id.* Merchants' attitudes derive from and therefore reflect consumers' attitudes. Most merchants believe they would 'lose significant sales' if they stopped accepting general purpose cards; thus, even merchants with thin profit margins 'feel compelled to accept general purpose cards.'" [*Ibid.*]

16. "Debit Cards: There is strong evidence that consumers 'do not consider debit cards to be substitutes for general purpose cards.' 'Although debit cards are similar to credit and charge cards in that they may be used at unrelated merchants, the fact that upon use they promptly access money directly from a cardholder's checking or deposit account strongly differentiates them from credit and charge cards.' Debit cards do not defer payment or provide credit. In addition, online debit cards (which require special terminals at the merchant and use of a PIN) do not have the widespread acceptance of general purpose cards. (see also *Schmalensee Tr.* 5972:7-25 (T5990)). And Visa and MasterCard's own research demonstrates that consumers do not view offline debit cards as substitutes for general purpose cards, even though offline debit has widespread merchant acceptance and requires only the purchaser's signature. Consumers use offline debit cards as a substitute for cash and checks, not for credit or charge cards." [*Ibid.*]

17. "Visa and MasterCard argue (VUSA 50; MC 36-37) that it was improper for the court to consider the exclusionary rules' effects on American Express's and Discover's debit

card programs in light of the fact that debit cards were neither included in the general purpose card market nor found to be a separate relevant market. The district court's findings of anticompetitive effects concerning debit, however, relate to the effect debit card transaction volume has on competition in the general purpose card network services market due to economies of processing both types of cards over the same network and because future cards will provide access to both credit and debit accounts. The district court's appreciation of debit's contribution to effective competition in general purpose card network services does not suggest that debit is reasonably interchangeable with credit and thus in the relevant market for general purpose cards." [*Ibid.*]

18. "In similar circumstances, the court of appeals in Microsoft affirmed the district court's finding that Microsoft unlawfully maintained its PC operating systems monopoly by quashing the 'middleware threat.' United States v. Microsoft Corp., 253 F.3d 34, 53-54 (D.C. Cir.) (en banc) (per curiam), cert. denied, 122 S. Ct. 350 (2001). Sustaining the claim of monopoly maintenance required neither the delineation of a middleware market nor the inclusion of middleware in the operating systems market." [*Ibid.*]

19. "Thus, 'because card consumers have very little sensitivity to price increases in the card market and because neither consumers nor the defendants view debit, cash and checks as reasonably interchangeable with credit cards, general purpose cards constitute a product market.'" [*Ibid.*]

G. Monopoly Power:

1. Defendants combination has monopoly power in market(s) for general purpose card network services and general purpose credit cards.

a. Antitrust injury and anticompetitive effects alleged in this Complaint occurred primarily in the market for general purpose credit cards.

b. In 1997, Visa accounted for approximately 50% of the dollar volume of transactions using consumer credit cards in the United States and approximately 53% of the number of consumer credit cards issued.

c. In 1997, MasterCard accounted for approximately 25% of the dollar volume and approximately 33% of the number of cards issued.

d. Together, Visa and MasterCard account for approximately 75% of consumer credit card dollar volume and approximately 86% of the number of credit cards issued.

e. In the United States, approximately 3.4 million merchant outlets accept both Visa and MasterCard. Practically every merchant that accepts Visa also accepts MasterCard and vice versa. This common merchant base is significantly larger than the base of any other competitor.

f. In 1997, American Express accounted for approximately 18% of dollar volume and 5% of consumer credit cards issued in the United States. Cards on the American Express network were accepted at approximately 2.5 million merchant outlets in the United States.

g. In 1997, Discover/Novus accounted for approximately 6% of dollar volume and 8.5% of cards issued in the United States. Cards on the Novus network were accepted at approximately 3.1 million merchant outlets in the United States.

h. Year 2002 data reveals Visa is the world's leading credit card brand. Visa-branded cards generate more than US\$2.3 trillion in annual volume and are accepted at more than 29 million physical locations around the world, including more than 800,000 ATMs. The Visa organization plays a pivotal role in developing innovative payment products and technologies to benefit its 21,000 member financial institutions and their cardholders. Visa is a leader in Internet based payments and is pioneering the creation of u-commerce, or universal commerce - the ability to conduct commerce anywhere, anytime, and any way. For more information, visit www.corporate.visa.com.

i. There are two other consumer credit card networks that compete in the United States: Diners Club/Carte Blanche, which is owned by Citigroup Inc., the bank that has issued the largest number of Visa and MasterCard cards, and JCB, a network based in Japan that issues credit cards in the United States primarily to Japanese expatriates.

j. Networks competitive with Visa/Mastercard have competitively insignificant market shares and limited merchant acceptance in the United States.

2. Competition among Visa and Mastercard issuers is not a substitute for network competition.

a. Card issuers compete on interest rates, fees, enhancements, and customer service. This competition, however, cannot cure the harm to consumers arising from a lack of competition among card networks, nor does it prevent the Visa and MasterCard member banks from collectively exercising power in credit card issuer/processor market(s) to the detriment of consumers.

b. In furtherance of the combination and conspiracy alleged herein, Defendants have adopted rules and policies that disadvantage or exclude rival credit card networks, such as American Express and Discover/Novus, including rules or policies prohibiting member banks from issuing cards on the American Express or Discover/Novus networks.

c. Combination and conspiracy has had anticompetitive effects, including:

(1) Consumers have had fewer choices in the characteristics and variety of card products made available to them;

(2) Visa and MasterCard member banks have been prevented from competing with one another with respect to the variety of card brands that they may offer to consumers;

(3) Card networks not owned by banks have been foreclosed from access to an important channel of distribution; and

(4) Consumers have been denied the benefits of free and open competition among general purpose card networks in the promotion, development, and implementation of new general purpose card products and services.

3. Unless enjoined by this Court, these anticompetitive effects are likely to continue and are not reasonably necessary to accomplish any pro-competitive objective.

H. Barriers To Market Entry:

1. The prospect of entry by new credit card networks does not prevent Visa and MasterCard from exercising market power in the network market.

2. Entry is extremely difficult because establishing a new general purpose credit card network requires large investments to develop both cardholder and merchant bases. Coordinated development of both cardholder and merchant

bases is critical because the utility of a particular card product to cardholders and merchants depends not only on the cost and features of the card, but also on the ubiquity of its acceptance and use.

3. Since Visa and MasterCard were established in the mid-1960s, only one network has successfully entered the relevant market. In 1985, Sears created a new network, then called Discover and now known as Novus, by building on the infrastructure and the cardholder and merchant bases of the Sears single-retailer card system. At the time, Sears was one of the largest retailers and card issuers in the United States.

4. In the early 1980s, Citicorp, the largest issuer of Visa and MasterCard cards, and at the time a large provider of credit card acceptance services to merchants, unsuccessfully attempted to enter the network market.

5. Other companies that considered entering the network market concluded that the high cost of building a merchant and cardholder base made entry too difficult. For example, in the late 1980s, AT&T considered forming a new general purpose credit card network. After analyzing the Discover and Citicorp experiences, however, it decided not to enter the network market. AT&T instead entered only at the card-issuing level by becoming a member of Visa and MasterCard.

6. Visa and MasterCard have adopted and maintained anticompetitive rules and policies described above that further increase an entrant's cost of developing cardholder and merchant bases.

7. By virtue of their dominant market shares and the difficulty of entry into the highly-concentrated network market, Visa and MasterCard together have the power to injure competition in that market. As described below, they have exercised that power to the detriment of consumers by reducing competitive investments in the innovation, development, and marketing of improved network products and services, and by restraining the competitiveness of smaller networks via unfair business practices.

I. Control of Visa and Mastercard:

1. Both Visa and MasterCard are organized as membership corporations that ostensibly operate on a not-for-profit basis. Their activities are financed through fees and assessments levied on their members. Both card networks permit a variety of financial institutions to become

members, including commercial banks, thrifts, credit unions, and entities that are engaged primarily in the credit card business, commonly known as "non-bank banks" or "monoline banks."

2. Under Visa's and MasterCard's corporate structures and policy, a financial institution holding membership in either organization has the right to issue cards bearing the organization's trademark and to offer card acceptance services for the organization's cards. Most member banks, including Defendants and all other larger bank members, also become owners of the network and receive a bundle of rights similar to those of a shareholder in a corporation. This fact makes unreasonable any claim by Defendants for Visa's non-profit status and exemption(s) from certain statute prohibitions based on exempt status.

3. Network ownership rights include the right to vote for a board of directors, participate in the governance of the association, and share in the association's assets upon dissolution. Voting and dissolution rights are apportioned according to the dollar volume of transactions that the bank has transmitted through the network. Member banks also agree to abide by the network's bylaws, rules, regulations, and policies.

A. Visa and MasterCard Began As Entirely Separate Systems

(1) Prior to 1970, Visa and MasterCard were controlled by different groups of banks.

(2) In 1970, one of Visa's member banks, Worthen Bank of Arkansas, sought to become a card-issuing member of both networks. MasterCard did not object, but Visa responded by adopting Bylaw 2.16, a bylaw that prohibited member banks from issuing any other network's cards.

(3) Worthen then sued Visa, alleging that Bylaw 2.16 violated sec. 1 of the Sherman Act. The district court determined that the bylaw was a per se violation of sec. 1 and granted summary judgment for Worthen. The Eighth Circuit, however, reversed and remanded for trial under the rule of reason.

(4) While the case was awaiting trial, Visa asked the Department of Justice to express its views, pursuant to a Department procedure called a 'Business Review', on the legality of a more restrictive bylaw that would have prohibited Visa members from both issuing cards and

providing card acceptance services for 'any other [credit card] program presently existing or which may develop.'

(5) The Department responded that it would not object to a bylaw that restricted Visa members to issuing Visa cards exclusively 'to the extent it is necessary to insure continued intersystem competition.' But the Department expressed concern that Visa's proposed prohibition on banks providing card acceptance services to merchants for both networks 'might well handicap efforts to create new bank credit card systems and may also diminish competition among the banks in various markets.'

J. Industry Background:

1. "Within Visa USA's intersystem share, aggregated to include MasterCard issuers as well, the district court noted the evidence showed in 1991 the ten largest issuers of Visa and MasterCard accounted for approximately 48% of the total Visa/MasterCard charge volume. The top-ten issuers were Citicorp, First Chicago, AT&T, Chase Manhattan, MBNA America, Bank of America, Nationsbank, Chemical Bank, Banc One, and Wells Fargo Bank. The largest issuer, Citicorp, accounted for approximately \$42.5 billion in charge volume in 1991 - representing approximately 15.8% of the Visa/MasterCard market and 11.4% of the entire general purpose charge card market.' [*Ibid.*, 967]

2. Same court noted in same case leading processors of Visa U.S.A, Inc. transactions in 1999 were (a) Texas Independent Bankshares, (b) U.S. Bancorp, (c) Bank One (2 directors), (d) Bank of America (2 directors), (e) Suntrust Bankcard, (f) First Union, (g) Associates National Bank, (h) Wachovia Corp,, (i) First National Bank of Nebraska, and (j) Wells Fargo & Company. [*Ibid.*]

3. Visa and MasterCard are joint commercial ventures (corporations) and not "banking associations", as they are commonly thought to be. 15 U.S.C., sec. 19 prohibits any person from serving as a director or officer in any two competitive corporations other than banks, banking associations, and trust companies. A statement from (<http://www.aba.com>) illuminates "banking association" for purposes of analysis herein, "The American Bankers Association has been the premier voice of the American banking industry for 125 years, with assets of member banks representing approximately 90 percent of the industry total. ABA's mission is twofold: to provide high-quality banking education and training products and services, and to serve as the voice of the banking industry."

4. In the spirit of congressional legislation, only associations that provide banking education, bank related training or related services and/or values can be considered exempt from 15 U.S.C., sec. 19 prohibitions. Neither Visa nor MasterCard may be legally characterized as a banking association, bank or trust company.

5. Defendants control both the Visa and Mastercard "associations" by simultaneously placing directors (bank employees) on the board of one company and same persons on important committees of the other company. Although not literally "interlocking directorates" the intent and protective spirit of sec. 19 militates, nevertheless, against interchange of one company's directors/officers at competitor's controlling level(s). Large member banks' control of Visa/Mastercard may be characterized as sophisticated, consistent, effective and patently illegal.

6. Each member bank named as defendant in this case issues both Visa and MasterCard products. Control of two credit card companies by banks that have significant interests in both is known in the industry as "duality". Duality has substantially lessened competition between Visa and MasterCard because controlling member banks have been, and continue to be, significantly unwilling to fund and implement competitive initiatives that would cause consumers to switch their business from one "association" to the other.

7. In addition, both Visa and MasterCard, on behalf of and in collaboration with the banks that govern them, have adopted rules and policies that restrict the ability of all member banks to do business with American Express, Discover/Novus, or any other credit card company that Visa's owner and directors deem to be undesirably "competitive."

8. Importantly, Visa and MasterCard do not apply restrictive rules to one another. Member banks may do business with the two largest, marginally competitive credit card companies but not with other credit card companies ["networks"].

9. Defendants exclusionary rules and policies eliminate certain forms of competition among Visa and MasterCard member banks and have effectively precluded American Express and Discover/Novus from competing to enlist banks in the U.S. in their credit card programs.

10. Through common control of both Visa and MasterCard, the largest banks have stifled competition between their two

networks and have thwarted competition from Discover/Novus, American Express and smaller competitor networks.

11. Comprehensive reductions in competition among general purpose credit card networks have hindered and delayed the development and implementation of improved network products and services, and have lessened consumer choice.

12. If allowed to continue, anticompetitive structure and practices of Visa and Mastercard will threaten competition in the development and marketing of new general purpose card products including cards that integrate credit, debit, and stored value functions.

13. Defendants participation in alleged anticompetitive corporate ownership, management and business practices caused antitrust injury to many persons in credit card markets. PL experienced quantifiable and provable consumer and business injury from Defendants' anticompetitive behavior and brings this action alleging supplementary facts as follows:

(a) On October 7, 1998, the United States sued Visa USA Inc., Visa International Corp., and MasterCard International Inc., alleging two violations of Section 1 of the Sherman Act (15 U.S.C. sec. 1).

(b) Count I of the Complaint in case cited above challenged the governance practices of Visa and MasterCard, under which member banks with representatives on the Board of Directors and/or governing committees of each association are permitted to issue substantial numbers of cards on the other association's network. The government alleged that because of this "dual governance" the conflicted directors "have a reduced incentive to invest in or implement competitive initiatives that would affect their other card product, and as a result the Visa and MasterCard associations have failed to compete with each other by constraining innovation and investments in new and improved products."

(c) Count II focused on Visa's Bylaw 2.10(e) and MasterCard's Competitive Programs Policy (CPP). These rules permit member banks to issue credit and charge cards on both the Visa and MasterCard networks, but prohibit them from issuing cards on the only two other major general purpose credit card networks, which are not controlled by banks: American Express (Amex) and Discover. Plaintiff contended that the exclusionary rules restrained competition among

credit card networks and credit card issuers, and thereby harmed consumers.

(d) The district court held a 34-day bench trial, during which it heard live testimony from 37 witnesses, and admitted depositions of 122 other witnesses and 1418 exhibits. Following the close of evidence, the parties submitted 741 pages of proposed findings of fact and conclusions of law; and another 241 pages responding to each others' proposed findings and conclusions.

(e) The district court issued 157 pages of findings of fact and conclusions of law, with detailed citations to the record--especially to defendants' documents and the testimony of their current and former executives. The court analyzed the government's claims under the rule of reason, beginning by defining two product markets: (1) general purpose credit cards, and (2) general purpose card network services. The court found that defendants have market power in the card network services market--the market in which the associations operate. Although the court found that the government had not sustained its burden with respect to Count I, it held that the exclusionary rules challenged in Count II "weaken[ed] competition and harm[ed] consumers" and that the defendants had failed to establish any pro-competitive justification.

(f) The court's opinion addressed relief and proposed a decree, but invited further comment on the remedy. The parties and amici subsequently provided the court 42 pages of comments on the final judgment, another 72 pages responding to each others' comments, followed by reply comments by Visa USA. On November 29, 2001, the district court issued a further opinion on remedy and modified its final judgment. [183 F. Supp. 2d 613 (S.D.N.Y. 2001)]. The Final Judgment orders Visa USA and MasterCard to repeal their exclusionary rules; enjoins all three defendants from "enacting, maintaining, or enforcing any by-law, rule, policy or practice that prohibits its issuers from issuing general purpose or debit cards in the United States on any other general purpose card network"; and, for a period ending two years after exhaustion of appeals, permits member banks that enter into agreements to issue American Express or Discover cards to terminate any existing "dedication" agreements with Visa or MasterCard.

(g) Visa USA and MasterCard jointly moved to modify the Final Judgment under Rule 59(e), Fed. R. Civ. P., alleging denial of due process. They also moved separately for the district court to stay its judgment pending appeal. On

February 19, 2002, the district court denied as "wholly without merit" defendants' motion to modify the final judgment, granted their requests for a stay, and entered the Final Judgment. Appeal by defendants, Visa U.S.A., Inc. and Mastercard International, Inc., to the United States Court of Appeals for the Second Circuit followed. Appeal was numbered 02-6074 (L) and was consolidated with appeals numbered 02-6076 and 02-6078.

K. Industry Facts:

1. General purpose card networks provide the infrastructure and mechanisms through which general purpose card transactions are conducted, including the authorization, settlement, and clearance of transactions. Networks play a major role in determining the overall quality of the brand, encompassing system-level investments in brand advertising, the creation of new products and features and cost-saving increases in the efficiency of the electronic backbone of the networks.

2. Issuers evaluate card applications and issue (sell) cards to consumers; set terms for those cards (e.g., annual fees, interest rates charged for carrying a balance), and own/manage the consumer's account. Although networks provide product platforms (e.g., parameters for platinum cards), issuers add features that appeal to their customers. Acquirers sign up merchants to accept one or more brands of cards.

3. In a typical general purpose card transaction, when a customer presents her card to a merchant as payment for goods or services, the merchant electronically presents the card transaction data to an acquirer for verification and processing. The acquirer presents the transaction data to the association (e.g., Visa or MasterCard) which in turn contacts the issuer (e.g. Capital One Bank) to check the cardholder's credit line. The issuer then indicates to the association that it authorizes or denies the transaction; the association relays the message to the merchant's acquirer, who then relays the message to the credit card terminal at the merchant's point of sale.

4. After verification, the acquirer pays the merchant the amount of the charge, less the acquirer's processing fee--known as the "merchant discount"--usually expressed as a percentage of the value of the transaction. Thus, the higher the merchant discount, the less the merchant actually receives in payment. The average merchant discount in a Visa/MasterCard transaction is approximately 2%.

5. To illustrate, when a customer uses her Visa card to purchase \$100. worth of clothing from a merchant the merchant ends up with about \$98. in cash from the acquirer. For the merchant, the transaction is now complete.

6. After paying the merchant, the acquirer turns to the issuer of the card for reimbursement. The issuer pays the acquirer the full value of the transaction (in this example, \$100.), less the "interchange fee." Assuming an interchange fee of 1.4% (which is the average interchange fee in a Visa/MasterCard transaction, the issuer pays the acquirer \$98.60, leaving the acquirer with net revenue of \$0.60 on the transaction. The issuer, which bears the risk of nonpayment, bills the cardholder for the full value of the transaction (\$100.). The cardholder then has a number of days to pay the statement in full without accruing finance charges; interest is charged on unpaid balances at the customer/issuer agreed upon interest rate.

7. Visa and MasterCard are structured as open, joint venture associations with members that issue cards, acquire merchants, or both. Neither Visa nor MasterCard had stock or stockholders. Visa and MasterCard are operated as not-for-profit associations and are supported primarily by service and transaction fees paid by their members. Members agree to abide by each association's bylaws and operating regulations. Members also sit on the associations' boards and committees that make strategic business decisions, and they reap the financial rewards of the associations' marketplace success. Visa USA has approximately 14,000 members in the United States, including approximately 6,000 issuers. MasterCard has approximately 20,000 global members. Issuers are traditional banks, "monoline" banks, or insurance companies or large retail corporations acting through banks, which are known collectively and generically as "member banks".

8. Count I of the Complaint alleged that dual governance, in itself, was anticompetitive, but the district court held that the government failed to prove the allegation. Conversely, the government did prove that certain rules (restraints on trade and competition) proceeding from Visa/Mastercard dual governance were anti-competitive and, therefore, illegal. The district court found that dual issuance, impacting Visa/Mastercard competition, had been pro-competitive but that Defendants exclusionary rules, impacting member bank issuance, lacked pro-competitive justification.

9. "American Express, Discover, and Diners Club operate as 'closed loop' vertically integrated systems. They promote their brands and operate their networks to process transactions and (unlike the associations) also issue cards and enlist merchants to accept those cards. Thus, American Express, Discover, and Diners Club compete as networks against Visa and MasterCard, and also compete as issuers against the thousands of Visa/MasterCard members."

10. "Visa and MasterCard set the interchange rate paid by acquirers to issuers. And although the acquirer sets the merchant discount, the association-set interchange fee is the dominant component of the merchant discount. In fact, some contracts between merchants and their acquirers provide for direct pass-through of interchange rates. As the district court noted, neither "American Express nor Discover needs to set interchange fees because they are both the issuer and acquirer on all transactions and keep the full amount of the merchant discount fee". [*SCFC ILC, INC. v. VISA USA, INC.*, 36 F.3d 958 (10th Cir. 1994)]

11. In 1999, American Express's average merchant discount was approximately 2.73%, compared to Visa and MasterCard's rates of approximately 2%, and Discover's rate of approximately 1.5%. Because a higher merchant discount leaves less revenue for merchants, these figures mean that merchants retain more money when a customer pays with Discover rather than with Visa/MasterCard. Nonetheless, Discover is accepted at fewer than 90% of the locations that accept Visa/MasterCard.

12. The explanation is that merchants are reluctant to accept a specific brand of card (with its associated set-up and ongoing administrative costs) unless they are confident that sufficient numbers of customers will want to use that card; on the other hand, consumers do not want to carry a specific brand of card unless they are confident that they can use that card at the merchants at which they plan to--or might eventually want to--shop. This "chicken-and-egg" problem has allowed Visa and MasterCard, whose dominant positions ensure that most merchants feel it necessary to accept them, to raise interchange fees repeatedly in recent years. The associations and their member banks acknowledge that raising interchange rates increases issuer profits.

L. Competition Issues:

1. Consumers should be able to benefit from innovative products that financial networks develop in response to pressures (demands) spawned by healthy competition.

2. U.S. financial institutions in relevant markets should be free to choose with whom they do business and be free of compulsion by dominant "associations".

3. Consumers should have access to the best products the marketplace can offer.

4. Together, Defendants have limited consumer choice, and limited product innovation and access to new products. Defendants anticompetitive practices have and will continue to injure PL and many other consumers and businesses by restraining development of next generation payment products, whether they be new credit cards, debit cards, smart cards or yet unforeseen innovations.

5. "The exclusionary rules significantly impair competition in the network and issuer markets. As agreements among competing issuers not to deal with networks they do not control, the rules are facially anticompetitive because they 'prevent American Express and Discover from offering network services to the consumers of those services.' Op. 379 (SPA215). There can be no doubt that American Express and Discover seek to partner with banks, and, but for the exclusionary rules, some banks would agree to partner with them. The challenged rules protect the member/issuers from competition from other member banks choosing to enter into such relationships, and they protect the bank-controlled networks from competition. The law is clear that horizontal competitors may not collectively dictate the contours of competition. See, e.g., *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986)." [*United States v. Visa USA, Inc., Mastercard Inc., Visa International, Inc.*, United States Court of Appeals for the Second Circuit, Case 02 - 6074 (L), Brief for the United States - Summary of Argument - sec. 3]

6. How exactly do Defendants lock out competition?

a. Virtually every financial institution in the United States is a member of Visa or MasterCard and usually both. It is significant, therefore, that both organizations have similar prohibitions that bar member banks from issuing American Express Cards. Visa bylaw 2.10(e) explicitly prohibits U.S. member banks from issuing American Express or Discover cards, which Visa views as competitive threats. A violation of this bylaw results in expulsion from the Visa network. MasterCard, through a similar policy, imposes the same penalty on a member that issues American Express Cards.

b. As a result of Visa and MasterCard concerted action, all U.S. financial institutions that are members of either

network cannot offer their customers a bank-issued American Express credit card unless the bank is willing to abandon existing Visa and MasterCard credit card businesses. A U.S. bank that does business with American Express would also be forced to abandon future participation in Visa or MasterCard programs such as debit cards, smart cards and subsequent innovations.

X. STATE LAW CAUSE

A. Unlawful Email:

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

2. (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.

3. 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." [California Business & Professions Codes, sec. 17538.4]

4. Defendants sent PL email messages that offered extension of credit (credit cards) that did not, in the first text in the body of the message, display a toll free telephone number and/or valid sender operated return email address and/or valid regular mailing address.

B. Unlawful Access and Disruption of Email Services:

1. "(c) Except as provided in subdivision (h), any person who commits any of the following acts is guilty of a public offense:

(1) Knowingly accesses and without permission alters, damages, deletes, destroys, or otherwise uses any data, computer, computer system, or computer network in order to either (A) devise or execute any scheme or artifice to defraud, deceive, or extort, or (B) wrongfully control or obtain money, property, or data.

(2) Knowingly accesses and without permission takes, copies, or makes use of any data from a computer, computer system, or computer network, or takes or copies any supporting documentation, whether existing or residing internal or external to a computer, computer system, or computer network.

(3) Knowingly and without permission uses or causes to be used computer services.

(4) Knowingly accesses and without permission adds, alters, damages, deletes, or destroys any data, computer software, or computer programs which reside or exist internal or external to a computer, computer system, or computer network.

(5) Knowingly and without permission disrupts or causes the disruption of computer services or denies or causes the denial of computer services to an authorized user of a computer, computer system, or computer network.

(6) Knowingly and without permission provides or assists in providing a means of accessing a computer, computer system, or computer network in violation of this section.

(7) Knowingly and without permission accesses or causes to be accessed any computer, computer system, or computer network.

(8) Knowingly introduces any computer contaminant into any computer, computer system, or computer network.

(9) Knowingly and without permission uses the Internet domain name of another individual, corporation, or entity in connection with the sending of one or more electronic mail messages, and thereby damages or causes damage to a computer, computer system, or computer network." [California Penal Codes, sec 502: Computer Crimes]

2. Defendants knowingly and without permission used or caused to be used computer services legally granted to Plaintiff O'Brien.

3. Defendants knowingly accessed and without permission added unsolicited solicitations (spam) to computer programs (email client) residing on server(s) external to their server(s) and internal (PL's proprietary space) to server(s) owned by Angelfire.com.

4. Defendants knowingly and without permission disrupted or caused the disruption of email services used by Plaintiff O'Brien.

5. Defendants knowingly and without permission provided third parties with Plaintiff's email addresses as a means of accessing PL's email accounts without permission.

6. Defendants knowingly and without permission accessed or caused to be accessed Plaintiff's proprietary space on server(s) operated by Angelfire.com.

7. Defendants knowingly introduced contaminants in form of low-class targeted, disturbing and costly electronic entities into PL's email accounts.

8. Defendants knowingly and without permission used unintelligible (misleading) internet domain names in connection with the sending of email messages, and thereby caused recipient's confusion and injury (time/productivity loss) of the type California laws were enacted to prevent.

9. Courts have begun to recognize that the unauthorized mailing of unsolicited bulk e-mail may constitute a trespass to chattels under state law. See *Compuserve, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997) (finding that bulk e-mailing by the defendants caused "the value of [Compuserve's equipment to be) diminished even though it is not physically damaged by defendant's conduct," *id.* at 1022). The facts of *Compuserve* are nearly identical to the facts of the case at bar.

10. Defendants sent Plaintiff email that did not display a toll-free telephone number or valid sender operated return e-mail address so that the recipient of the unsolicited documents could call or e-mail to notify the sender not to e-mail any further unsolicited documents.

11. Defendants knowingly accessed Plaintiff's email accounts and, without permission, added messages to those stored in accounts via the internet.

12. Defendants knowingly and without permission accessed Plaintiff's email client via the internet.

13. Defendants knowingly introduced a contaminant into Plaintiff's email client via the internet.

14. "17538.41. (a) (1) Except as provided in subdivision (b), (c), or (d), no person or entity conducting business in this state shall transmit or cause to be transmitted a text message advertisement to a cellular telephone or pager equipped with short message capability or any similar capability allowing the transmission of text messages.

A text message advertisement is a message, the principal purpose of which is to promote the sale of goods or services to the recipient, consisting of advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit.

(2) This section shall apply when a text message advertisement is transmitted to a telephone number assigned for cellular telephone or pager service to a California resident.

(b) This section shall not apply to text messages transmitted at the direction of a person or entity offering cellular telephone or pager service if the subscriber is offered an option to not receive those text messages.

(c) This section shall not apply to text messages transmitted by a business that has an existing relationship with the subscriber if the subscriber is offered an option not to receive text messages from that business.

(d) This section shall not apply to text messages transmitted by an affiliate of a business that has an existing relationship with the subscriber, but only if the subscriber has provided consent to the business with which he or she has that relationship to receive text messages from affiliates of that business. 'Affiliate' means any company that controls, is controlled by, or is under common control with, another company.

(e) Subdivision (a) shall not impose an obligation on a person or entity offering cellular or pager service to control the transmission of a text message unless the message is transmitted at the direction of that person or entity." [California Business & Professions Codes, sec. 17538.41]

13. Because PL's cellular telephone accessed email stored at www.angelfire.com/biz2/savicom on a regular, programmed basis, Defendants effectively transmitted unsolicited (not

previously authorized) email messages (offering extension of credit) to Plaintiff via cell phone in violation of sec. 17538.41.

XI. DAMAGES

A. Compensatory Damages:

1. Plaintiff O'Brien was injured by Defendants violations of federal and state laws in years 1999 thru 2003 such that personal, compensatory damages in amounts (1) \$5,500. for loss of professional time/productivity, (2) \$100,000. (\$500. times 200 unwanted email messages), and (3) \$1,000,000. for long-term infliction of mental distress exacerbating VA certified disability are well justified and appropriate.

2. Telephone Consumer Protection Act of 1991 (47 U.S.C., sec. 227):

a. "At the hearing, the Government presented evidence that unsolicited fax advertising shifts costs to the recipients who are forced to contribute ink, paper, wear on their fax machines, as well as personnel time. There was also evidence to show that a fax advertisement interferes with the recipients' use of their machines by preempting the fax line for the time it takes to send a message." [*Missouri ex rel. Nixon v. American Blast Fax, Inc.*, Case No. 02-2705/2707; United States Court of Appeals for the Eighth Circuit (2003), Decision filed March 21, 2003, p.2]

b. "The hearing held in the district court in 2001 also produced evidence that the harms of unsolicited fax advertising are real and have not been eliminated by technological changes. There was evidence that unsolicited fax advertisements can shift to the recipient more than one hundred dollars per year in direct costs, that it takes thirty seconds for a one page fax to be received, that most machines can still only receive one fax at a time, that currently eighty percent of all faxes are printed on paper, and that unsolicited fax advertising interferes with company switchboard operations and burdens the computer networks of those recipients who route incoming faxes into their electronic mail systems. The record evidence from that hearing indicates that the costs and amount of interference resulting from unrestrained fax advertising continue to be significant. See *Destination Ventures*, 46 F.3d at 57 ("[U]nsolicited fax advertisements shift significant advertising costs to consumers.").

c. "We conclude that the Government has demonstrated a substantial interest in restricting unsolicited fax advertisements in order to prevent the cost shifting and interference such unwanted advertising places on the recipient." [*Ibid.*, p.7]

d. "We conclude that 47 U.S.C. sec. 227(b)(1)(C) satisfies the constitutional test for regulation of commercial speech and thus withstands First Amendment scrutiny. There is a substantial governmental interest in protecting the public from the cost shifting and interference caused by unwanted fax advertisements, and the means chosen by Congress to address these harms directly and materially advances the governmental interest. The statute is also narrowly tailored to create a reasonable fit with its objective. Accordingly, we reverse the judgment dismissing the claims asserted under sec. 227(b)(1)(C) and remand the case to the district court for further proceedings consistent with this opinion." [*Ibid.*, p.15]

e. "Viewing the facts in the light most favorable to Destination, we conclude that Destination's own figures do not rebut the admitted facts that unsolicited fax advertisements shift significant advertising costs to consumers. The possibility of future technological advances allowing simultaneous transmission and eliminating the need for paper does not alter this conclusion. We look at the problem as it existed when Congress enacted the statute, rather than speculate upon what solutions may turn up in the future. Therefore, we hold that the ban on unsolicited fax advertisements meets the Central Hudson and Fox test for restrictions on commercial speech." [Destination Ventures, Ltd. v. FCC, Case No. 94-35295 in the United States Court of Appeals for the Ninth Circuit, re 46 F.3d 54 (9th Cir. 1995); Decision filed February 1, 1995]

f. "Future technological advances" have come. Defendants spam, like unsolicited fax messages, injured Plaintiff O'Brien and millions of others because spam consumed email account memory, hosting server memory, and user time (money). PL spent about fifteen(15) minutes daily deleting spam. Approximate cost \$50. per week: \$2600. per year: \$10,400. over time of cause of action (1999 - 2003).

3. California Business and Professions Codes, sec. 17538.4 and California Penal Codes, sec. 502:

a. In February, 2003 Debra Bowen, a Democratic state senator from Marina del Rey in Los Angeles, has introduced a

bill to allow recipients to sue for \$500 (?12) for each unwanted message.

"Spam isn't just annoying," she said. "It burns people's time and money by forcing them to wade through millions of messages that cost spammers virtually nothing to package and fire off."

b. Defendants sent Plaintiff more than 200 unsolicited email solicitations and/or advertisements in years 1999 through 2003. Approximate cost to Plaintiff O'Brien, \$5,500.

4. Mental Distress Law:

a. Case law reveals a diversity of circumstances in which recovery for emotional distress may be had. Precedent loosely linked in the sense that in each case it could be said that a particular form of mental suffering naturally ensued from the acts constituting the invasion of another kind of protected interest. 'The commonest example . . . is probably where the plaintiff suffers personal injuries in addition to mental distress as a result of negligent or intentional misconduct by the defendant.' (Crisci v. Security Ins. Co., 66 Cal.2d 433.) Pain and suffering is the natural concomitant of a personal injury. (Capelouto v. Kaiser Foundation Hospitals, 7 Cal.3d 889 [infant's pain and suffering incident to contagious illness]). '[I]n the case of many torts, such as assault, battery, false imprisonment, and defamation, mental suffering will frequently constitute the principal element of damages.' (State Rubbish, etc. Assn. v. Siliznoff, 38 Cal.2d at 338; see also Deevy v. Tassi, 21 Cal.2d 109 [assault and battery].) Molien v. Kaiser Foundation Hospitals, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (Cal. 1980), found sufficient assurance of the validity of a claim of emotional distress in the nature of the cause of action for negligent misdiagnosis, predicated as it was upon a false imputation of syphilis, which by statute constitutes slander per se, an intentional tort. (Id., at pp. 930-31.)

b. Titles placed on Defendants email solicitations sent to PL indicated a syphilitic credit status ("bad credit - bankruptcy ok"), and were read by numerous persons influential in PL's life and business.

c. In torts involving extreme and outrageous intentional invasions of mental and emotional tranquility, the outrageous conduct affords the necessary assurance of the validity of the claim. (Id. at 927.) Recovery also has been sanctioned for emotional distress which could be said

naturally to ensue from an act which invaded an interest protected by an established tort. (See, *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668 [humiliation from wrongful ejection from train]; *State Rubbish*, supra, 38 Cal.2d 330 [intentional infliction of emotional distress]; *Crisci*, supra, 66 Cal.2d 425 [physical injuries and psychosis resulting from fall through opening]; see also *Acadia, California, Ltd. v. Herbert* (1960) 54 Cal.2d 328, 337 [mental suffering occasioned for fear for safety of family caused by trespass]; *Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 271 [discomfort and annoyance caused by nuisance]; *Herzog v. Grosso* (1953) 41 Cal.2d 219, 225 [annoyance ensuing from trespass]).

d. Not all mental anguish is compensable: '[E]motional distress is but 'part of the human condition.' *Fuentes v. Perez* (1977) 66 Cal.App.3d 163, 169. Loss by anyone of property or money, and certainly loss of expected wages, will normally produce mental anguish.

e. Plaintiff's claim for aggravated damages based on infliction of mental distress is rationalized by Defendants "...extreme and outrageous intentional invasions of mental and emotional tranquility, the outrageous conduct affords the necessary assurance of the validity of the claim."

f. Defendants trespass to chattel also rationalizes recovery for mental distress because Defendants "...invaded an interest protected by an established tort."

B. Exemplary Damages:

1. Specifications

a. Federal antitrust statutes specify penalties and/or remedies for proven breach(s) of Title 15, United States Codes, sections 1, 2, and 19. Many state antitrust statutes specify compensatory, exemplary and other forms of remedy for personal (person and business) injuries sustained via breach of California Bus. and Prof. Codes and Penal Codes. Federal authorities and California specify penalties and/or remedies which are appropriate for facts/circumstances alleged in this action.

2. Federal Penalties/Remedies:

a) Sec. 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall

make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." [15 U.S.C., sec. 1]

b) Sec. 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." [15 U.S.C., sec. 2]

3. Declaration of Penalties/Remedies:

a) For convictions on Sections 1 and 2: Defendants must pay one-million dollars (trebled) to Plaintiff for each trespass to chattel and violation of federal and/or state laws cited regarding email transmissions.

b) Two-hundred(200) separate email law violations by Defendants, who clearly intended to increase Visa/MC market share (monopoly) and aggrandize related banking business with unlawful internet usage, must now be penalized with fines totaling \$200,000,000. Trebled that's \$600,000,000. in punitive damages.

c) For convictions on Sections 19: Defendants must be penalized appropriately by the Court.

4. State Specifications Re California Law

a) Section 16750: "Any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefore in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him or her actual damages pursuant to Section 16761, and preliminary or permanent injunctive relief when and under the same conditions and principles as injunctive relief is granted by courts generally under the laws of this

state and the rules governing these proceedings, and shall be awarded a reasonable attorneys' fee together with the costs of the suit.

b) "This action may be brought by any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant." (emphasis added) [Cal. Codes: Business and Professions: Sec. 16750 (a)]

c) "Section 16755: Any violation of this chapter is a conspiracy against trade, and any person who engages in any such conspiracy or takes part therein, or aids or advises in its commission, or who as principal, manager, director, agent, servant or employee, or in any other capacity, knowingly carries out any of the stipulations, purposes, prices, rates, or furnishes any information to assist in carrying out such purposes, or orders there under or in pursuance thereof, is punishable, as follows:"

d) "(1) If the violator is a corporation, by a fine of not more than one million dollars (\$1,000,000) or the applicable amount under paragraph (3), whichever is greater."

e) "(2) If the violator is an individual, by imprisonment in a state prison for one, two, or three years, by imprisonment for not more than one year in a county jail, by a fine of not more than the greater of two hundred fifty thousand dollars (\$250,000), a fine or the applicable amount under paragraph (3), or by both a fine and imprisonment."

f) "(3) If any person derives pecuniary gain from a violation of this chapter, or the violation results in pecuniary loss to a person other than the violator, the violator may be fined not more than an amount equal to the amount of the gross gain multiplied by two or an amount equal to the amount of the gross loss multiplied by two, whichever is applicable."

g) California Business and Professions Codes, Sec. 17538.4 and California Penal Codes, sec. 502:

"(d)(1) Any person who violates any of the provisions of paragraph (1), (2), (4), or (5) of subdivision (c) is punishable by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment in the state prison for 16 months, or two or three years, or by both that fine and imprisonment, or by a fine not exceeding five thousand

dollars (\$5,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.

(2) Any person who violates paragraph (3) of subdivision (c) is punishable as follows:

(A) For the first violation that does not result in injury, and where the value of the computer services used does not exceed four hundred dollars (\$400), by a fine not exceeding five thousand dollars (\$5,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.

(B) For any violation that results in a victim expenditure in an amount greater than five thousand dollars (\$5,000) or in an injury, or if the value of the computer services used exceeds four hundred dollars (\$400), or for any second or subsequent violation, by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment in the state prison for 16 months, or two or three years, or by both that fine and imprisonment, or by a fine not exceeding five thousand dollars (\$5,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.

(3) Any person who violates paragraph (6) or (7) of subdivision (c) is punishable as follows:

(A) For a first violation that does not result in injury, an infraction punishable by a fine not exceeding one thousand dollars (\$1,000).

(B) For any violation that results in a victim expenditure in an amount not greater than five thousand dollars (\$5,000), or for a second or subsequent violation, by a fine not exceeding five thousand dollars (\$5,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.

(C) For any violation that results in a victim expenditure in an amount greater than five thousand dollars (\$5,000), by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment in the state prison for 16 months, or two or three years, or by both that fine and imprisonment, or by a fine not exceeding five thousand dollars (\$5,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.

(4) Any person who violates paragraph (8) of subdivision (c) is punishable as follows:

(A) For a first violation that does not result in injury, a misdemeanor punishable by a fine not exceeding five thousand dollars (\$5,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.

(B) For any violation that results in injury, or for a second or subsequent violation, by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

(5) Any person who violates paragraph (9) of subdivision (c) is punishable as follows:

(A) For a first violation that does not result in injury, an infraction punishable by a fine not one thousand dollars.

(B) For any violation that results in injury, or for a second or subsequent violation, by a fine not exceeding five thousand dollars (\$5,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.

(e)(1) In addition to any other civil remedy available, the owner or lessee of the computer, computer system, computer network, computer program, or data who suffers damage or loss by reason of a violation of any of the provisions of subdivision (c) may bring a civil action against the violator for compensatory damages and injunctive relief or other equitable relief. Compensatory damages shall include any expenditure reasonably and necessarily incurred by the owner or lessee to verify that a computer system, computer network, computer program, or data was or was not altered, damaged, or deleted by the access. For the purposes of actions authorized by this subdivision, the conduct of an un-emancipated minor shall be imputed to the parent or legal guardian having control or custody of the minor, pursuant to the provisions of Section 1714.1 of the Civil Code.

(2) In any action brought pursuant to this subdivision the court may award reasonable attorney's fees." [California Penal Codes, sec 502: Computer Crimes]

5. Conclusions: Facially it appears that appropriate federal penalty/remedy is \$2,000,000. per violation of Sec. 1 and 2. State penalty/remedy for Defendants proven breach of Sections 16700 et seq. and Section 17200 et seq. are:

a) For convictions on Section 16700, et seq. and Section 17200 et seq.: Defendants must pay one-million dollars

(trebled) each, or the gain (pecuniary) that defendants derived from breaches of antitrust laws, if the gain is proven greater than \$3.0 million.

b) For convictions on Sections 16700, et seq. and Section 17200 et seq.: Defendants, individually and/or collectively, must pay one-million dollars (trebled) each, or the gain (pecuniary) that defendants derived from breaches of antitrust laws, if the gain is proven greater than \$3.0 million.

c) For convictions on Sections 17538.4, 17538.41 and/or 502 Defendants, individually and/or collectively, must pay a fine not exceeding ten thousand dollars \$10,000 per violation, or be imprisoned in the state prison for 16 months, or two or three years, or by both that fine and imprisonment, or by a fine not exceeding five thousand dollars \$5,000 per violation, or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.

XII. CONCLUSION

1. Visa International Corp. and Mastercard Corp. injured Plaintiff O'Brien measurably when they restrained trade and increased monopoly in the general purpose credit card market via members/agents conduct that breached federal and/or state laws concerned with unsolicited email.

2. Defendants actions complained of herein breached United States Codes, Title 15, sec. 1 by monopolistically restraining trade and commerce.

3. Defendants actions complained of herein breached 15 U.S.C. sec. 2 by increasing Visa/MC's monopoly in the general purpose credit card market by unlawful means.

4. Defendants actions complained of herein breached 15 U.S.C., sec. 19 by formation/employ of interlocking directorates.

5. Defendants breached American and/or English Common Law (trespass to chattels) and/or the Restatement (Second) of Torts when they sent unsolicited email messages to the Plaintiff.

6. Defendants breached the Telephone Consumer Protection Act of 1991 when they sent unsolicited email messages to the Plaintiff.

7. Defendants breached California Business & Professions Codes, sec. 17538.4 when they sent unsolicited email messages to the Plaintiff.

8. Defendants breached California Business & Professions Codes, sec. 17538.41 when they transmitted or caused to be transmitted text message advertisements to Plaintiff's cellular telephone.

9. Defendants breached California Penal Codes, sec. 502 when they sent unsolicited, unlawfully constructed email messages to Plaintiff.

10. Spam is restraint of trade and commerce and, when spammer is a monopolist, restraint of trade and commerce in effort to increase monopoly violates the Sherman Act and the Cartright Act. Therefore, Defendants caused antitrust injury to Plaintiff when they breached 15 U.S.C., sec.1 and 2 by sending spam to Plaintiff Edward O'Brien injuring his person and financial condition.

11. Defendants intentionally intermeddled with Plaintiff's "moveable" personal property (person and email accounts), via remote-fixed and/or remote-mobile telephone access to Plaintiff's email accounts hosted at <http://www.angelfire.com> under <http://www.angelfire.com/biz2/savicom>. Therefore, Defendants caused significant injury to Plaintiff when they breached the Restatement (Second) of Torts, sec. 17, 217(b) and 47 U.S.C., sec. 227.

12. Defendants trespassed on, unlawfully accessed and infiltrated Plaintiff's email accounts and placed spam therein. Spam often did not display, in first text of message(s), either a toll-free telephone number, a mailing address or valid sender return e-mail address so that the recipient of the unsolicited documents could call or e-mail to notify the sender not to e-mail any further unsolicited documents. Defendants caused significant injury to Plaintiff when they breached California Business and Professions Codes, sec. 17538.4.

12. Defendants knowingly and without permission accessed Angelfire's email client via internet. Therefore, Defendants caused significant injury to Plaintiff's hosting service when they breached California Penal Codes, sec. 502.

13. Defendants knowingly accessed Plaintiff's email accounts and, without permission, added messages to those stored in memory. Therefore, Defendants caused significant injury to Plaintiff when they breached California Penal Codes, sec. 502.

14. Defendants, via bulk email sendings, knowingly introduced "contaminant", in form of unlawfully constructed, unflattering email, into Plaintiff's email accounts via internet. Therefore, Defendants caused significant injury to Plaintiff when they breached California Penal Codes, sec. 502.

15. Defendants are liable for payment of damages specified herein.

XIII. PRAYER

Plaintiff Edward Michael O'Brien claims and prays for

1. Court's order compelling Defendants immediate payment(s) to Plaintiff of compensatory damages in the amount of \$3,316,500;

2. award by the Court of punitive (exemplary) damages in the amount of \$X , equal to twice the *pecuniary gain* Defendants, collectively and/or severally, derived from *per se* illegal conduct over the time period encompassed by cause(s) of action in this case, or \$600,000,000, whichever is deemed by the Court more appropriate under the facts/circumstances of this case;

3. award to Plaintiff of attorneys' fees and other costs of suit;

4. such other and further damage award and/or relief as the Court deems just and appropriate.

Written this day, July 11, 2003

by _____

Edward Michael O'Brien

pro se

Victoria Court

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