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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

FREE SPEECH COALITION, INC., A California
Not-For-Profit Trade Association,
On Its Own Behalf and On Behalf of Its Members,

Plaintiff,

vs.

MARK SHURTLEFF in his official capacity as Utah
Attorney General of the State of Utah; THAD
LEVAR, in his official capacity as the Director of the
Division of Consumer Protection in the Utah
Department of Commerce, UNSPAM INC., a
Delaware corporation

Defendants.

Case No. 2:05-cv-00949

**PLAINTIFF FREE SPEECH
COALITION, INC.'S
MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANTS
MARK SHURTLEFF AND KEVIN
V. OLSEN'S MOTION IN RE:
LIMITED STANDING CLAIMS
OF PLAINTIFF**

I. INTRODUCTION

Plaintiff Free Speech Coalition, Inc. (“FSC”) files this Memorandum of Law in opposition to the Motion in Re: Limited Standing Claims of Plaintiff filed on or about July 7, 2006 by Defendants Mark Shurtleff and Kevin V. Olsen. FSC is separately filing a Memorandum of Law in Opposition to Defendants’ Motion to Dismiss for Lack of Standing, which is incorporated herein and made a part hereof by this reference.

As FSC understands it, this Motion in Re: Limited Standing appears to claim that FSC’s standing is “limited” to challenging Utah Code Ann. §13-39-202(1)(b), but not Utah Code Ann. §13-39-202(1)(a).

For the reasons set forth below, this Motion is without merit and should be denied.

II. ARGUMENT

A. FSC Has Standing to Challenge Both Utah Code Ann. §§13-39-202(1)(a) and (b)

Utah Code Ann. §13-39-202(1) reads as follows:

- (1) A person may not send, cause to be sent, or conspire with a third party to send a communication to a contact point or domain that has been registered for more than 30 calendar days . . . if the communication:
 - (a) has the primary purpose of advertising or promoting a product or service that a minor is prohibited from purchasing; or
 - (b) contains or has the primary purpose of advertising or promoting material that is harmful to minors, as defined in Section 76-10-1201.

Defendants recognize that “plaintiff and its members also send commercial emails providing or advertising sexually oriented material that is ‘harmful to minors’ as that term is defined in Utah Code §76-10-1201.” Motion, p. 2. Utah Code §§76-10-1201 and 1206 make it a felony to distribute or offer to distribute to a minor material that is “harmful to minors.”

For all of the reasons set forth in FSC's accompanying Memorandum of Law in Opposition to Motion to Dismiss for Lack of Standing, FSC has standing to challenge Utah Code §13-39-202(1)(a) and (b) on its own behalf and on behalf of its members.

Defendants seem to be arguing that while FSC might have standing to challenge Utah Code Ann. §13-39-202(1)(b), (as Defendants put it) "involving sending or advertising material that is harmful to minors as defined in the Criminal Code," Motion p.7, it does not have standing to challenge Utah Code Ann. §13-39-202(1)(a), regarding (as Defendants put it) "advertising and promoting of products that a minor is prohibited by law from purchasing, such as tobacco or alcohol." Motion, p. 7.

Yet, "tobacco or alcohol" are hardly the only products covered by Utah Code Ann. §13-39-202(1)(a). So is sexually explicit material without regard to whether it is "harmful to minors." Utah law prohibits the sale to minors of sexually explicit material beyond Utah Code Ann. § 76-10-1201 (expressly cited in the subpart (b) of the CPR Act). Utah Code Ann. § 76-10-1227 prohibits the distribution to minors of "materials with descriptions or depictions of illicit sex, sexual immorality, or nude or partially denuded figures", or even the display at any newsstand or any other establishment frequented by minors any material made up of indecent descriptions or depictions of illicit sex or sexual immorality, etc; West Valley City Municipal Code, § 21-2-103 prohibits that sale of "sex paraphernalia" to minors and Salt Lake City Ordinance, §11.44.060 prohibits the sale to minors of admission tickets to premises exhibiting "nudity, sexual conduct, sexual excitement or sad-masochistic abuse which is harmful to minors" or to display at any newsstand, bookstore, etc., where minors are or may be invited, any material containing the matter just quoted.

By prohibiting the sale of such material to minors, these laws (putting aside for the

moment their constitutionality), prohibit minors from purchasing such goods and services for purposes of Utah Code Ann. §13-39-202(1)(a). The only reasonable interpretation of part (a) is that it deals with the *transaction* in which goods and services are bought and sold. For someone to sell certain goods or services to a minor, the minor must purchase such goods and services. Surely the State of Utah is not here arguing that while the sale to minors of such sexually explicit goods and services is prohibited, their purchase by minors is somehow allowed. If the State of Utah is seriously urging this Court to enter a Declaratory Judgment which provides that Utah Code Ann. §13-39-202(1)(a) does not apply to any email communications on the basis of sexual content, then FSC will have prevailed on that aspect of this action and can focus on the unconstitutionality of Utah Code Ann. §13-39-202(1)(b).

Meanwhile in the real world Defendants clearly believe that the CPR Act is applicable to the goods and services of Plaintiff's members. On November 7, 2005, Defendants mailed a letter to a long list of companies that it considered subject to the Act, including many of FSC's members. (Exhibit A) The letter clearly takes the position that the distribution of this material is prohibited to minors. The letter includes the following language:

“The Division has taken the position that the Child Protection Registry covers those that may send or provide content for sending commercial email that advertises:

1. an alcoholic beverage or product;
2. any form of tobacco;
3. pornographic materials; and
4. and product or service that is illegal in Utah (whether purchased by a minor or an adult) such as illegal drugs, prostitution, and gambling.”

Exhibit A.

Defendant's letter clearly sets forth the primary industries that sell products the State considers to be regulated for sale only to adults. Explicit sexual material, including the materials advertised and distributed by Plaintiff and its members, are included.

Consequently, since FSC has standing to challenge part (b) of the CPR Act, it has standing to challenge part (a), which encompasses a wider scope of goods and services which minors are prohibited from purchasing.

And it likewise follows that the Amici Curiae in support of FSC are entitled to support the challenge to both parts (a) and (b) of the CPR Act.

III. CONCLUSION

For each of these reasons, Defendants' Motion In Re: Limited Standing Claims of plaintiff should be denied. To any extent that the allegations of the Second Amended Complaint may be insufficient, FSC respectfully requests leave to amend.

DATED this 31st day of July, 2006.

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Memorandum on Behalf of Plaintiff was served by electronically filing the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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Respectfully submitted this 31st day of July 2006.

_____/s/ Jerome H. Mooney ____
Jerome H. Mooney