



Table II-1
 ATTITUDE TOWARD RECEIVING UNSOLICITED
 CALLS - AMONG ALL PERSONS WITH TELEPHONE SERVICE

Type of call:	Attitude Toward Receiving --				
	Very Annoying	Somewhat Annoying	A little annoying	Don't mind these calls	Like these calls
Obscene, threatening calls	84.8%	2.7	2.7	1.3	.3
Crank calls that are not obscene or threatening	68.6%	12.3	7.0	3.5	.4
Calls where people claim they are conducting a survey and then try to sell you something	62.0%	14.3	11.5	6.2	.1
Calls that dial numbers at random and deliver a recorded sales message	60.9%	11.5	6.0	5.1	.1
Calls made by sales people to sell you products or services	53.9%	17.7	15.3	9.1	.1
Calls from bill collectors	39.8%	7.4	8.6	12.4	.2
Calls encouraging you to attend religious services	34.1%	13.6	16.8	22.0	1.1
Calls soliciting money for charitable purposes	27.7%	19.4	18.3	27.1	.2
Wrong number calls	23.7%	14.5	21.2	38.4	.1
Calls asking for your vote or support of a political candidate.	16.8%	13.2	16.3	43.4	1.7
Calls made by interviewers on authentic public opinion surveys	13.3%	8.2	15.6	50.2	3.7

(Base: Households with telephone service) (948)

SIGNED this the 10 day of April, 2002.

A handwritten signature in cursive script, appearing to read "Merrill A. ...".
JUDGE PRESIDING



STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

CASE NO.: 00-SC-86-4271

ROBERT BIGGERSTAFF,)
)
 Plaintiff,)
)
 vs.)
)
 WEBSITE UNIVERSITY.COM, INC. and)
 TERRY HATFIELD individually)
)
 Defendants.)

ORDER

Filed in Charleston County
 Small Claims Court
 MAR 20 2001
 EB

This matter came before the Court on March 5, 2001, on Plaintiff's Motion to Strike. Plaintiff brought suit under the Telephone Consumer Protection Act ("TCPA), 47 U.S.C. § 227(b) alleging that he received an unsolicited advertisement via facsimile, in violation of that statute. Defendants answered, raising a number of affirmative defenses. Plaintiff is now seeking to strike from Defendants' pleadings, certain affirmative defenses as insufficient, pursuant to Rule 12(f), SCRCiv.P, specifically paragraphs 22, 23 and 26 of the Answer. Plaintiff's motion is GRANTED in part and DENIED in part.

Defendants have averred that the TCPA "violates the United States Constitution and/or the Constitution of the State of South Carolina." Answer at 22. In the absence of a controlling decision holding otherwise, we believe Defendants are entitled to a full hearing on the merits of such constitutional defenses. Plaintiff's motion is therefore denied with respect to paragraph 22 of the Answer.

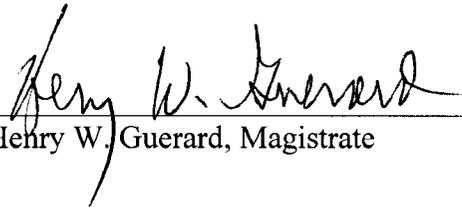
Defendants also aver that "Plaintiff maintained a prior business relationship with defendants..." Answer at 23. Even if true, this does not constitute a valid defense to Plaintiff's cause of action. Congress saw fit to include an "established business relationship" as a defense to a cause of action arising out of **telemarketing calls**, by including that exception in the definition of "telephone solicitation" in the TCPA. See 47 U.S.C. § 227(a)(3). The unsolicited fax provisions, however, provides for a defense **only** if the fax advertisement was sent with "prior express invitation or permission." Cf. 47 U.S.C. § 227(a)(4). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that

Congress acts intentionally and purposely in the disparate inclusion or exclusion." Rodriguez v. United States, 480 U.S. 522, 525 (1987). By the plain language of the statute, there is no "established business relationship" defense to a cause of action for unsolicited faxes under the TCPA. Paragraph 23 of the Answer is stricken.

Finally, Defendants seek to reserve other unnamed affirmative defenses. Answer at 26. Affirmative defenses must be pled in the Answer. Rule 8(c), SCRCiv.P. There is no provision for reserving them until some future date, and accordingly paragraph 26 is stricken. If Defendants discover additional defenses, they must seek leave of the Court to amend their Answer.

IT IS SO ORDERED.

This the 20 day of March, 2001.


Henry W. Guerard, Magistrate

FILED

NOV 21 2002

KIRI TORRE
Chief Executive Officer/ Clerk
Superior Court of Santa Clara County
Deputy
WANDA WALDERA

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
CIVIL DIVISION, DOWNTOWN SUPERIOR COURT**

ANNA WYLDER,)	
)	Case No. CV810946
Plaintiff,)	
)	
vs.)	MEMORANDUM
)	OF DECISION
DIALAMERICA MARKETING, Inc.,)	AND ORDER
)	
Defendant.)	

The small claims appeal/trial de novo was heard before the Honorable Kevin E. McKenney on October 18, 2002, at 1:30 p.m. in Department 16. The matter having been submitted, the Court orders as follows:

The appeal is denied.

PRODECURE

The *Pro Hac Vice* application of William E. Raney, Esq., was denied because it did not comply with California Rule of Court §983(a) because there was no declaration from Ms. Gannon, there was no proof of service on the California State Bar. Additionally, the service on plaintiff did not comply with Code of Civil Procedure §1013(a) because it was not timely served.

Testimony was heard from plaintiff, Mr. Raney, and Mr. Robert Michael Jannicelli, Assistant Director of Quality Assurance for defendant. Mr. Raney was not permitted to give any legal opinions regarding interpretation of the law since that is the exclusive province of the court. [*Summers v A. L. Gilbert Co.* (1999) 69 Cal. App,4th 1155.]

FACTS

Plaintiff received 4 documented telemarketing phone calls from defendant. They were on January 28, 2002, for 47 seconds, February 1, 2002, for 2 minutes 15 seconds, February 2, 2002, for 1 minute 48 seconds, and February 5, 2002, for 1 minute 10 seconds. [Appellant Exhibit B]

The calls were solicitations for *Victoria* magazine. Plaintiff was already a subscriber.

Plaintiff testified that in response to the phone solicitations, she said “do not call again” on 1/28/02, “not interested” and “do not call” on 2/1/02, refused and said “not interested” on 2/2/02, and “do not call” and hung up on 2/05/02.

Mr. Jannicelli testified that defendant required a solicited person to specifically ask to be added to the “do-not-call” list in order to stop any further phone solicitations. Further, Defendant’s written “Do not call policy” [Appellant’s Exhibit D] states that “a “do not call” is a customer...who informs us orally...that he or she does not want further telemarketing solicitation from DialAmerica Marketing and/or a DialAmerica Marketing Client. ... ALL REQUESTS WILL BE HONORED.”

FINDINGS

1. Plaintiff was credible.

2. There was an “established business relationship” with the customer. (47USCS §227(a)(3)(B))
3. This relationship was severed on 1/28/02 when plaintiff said “do not call again.”
4. Defendant’s interpretation of the Telephone Consumer Protection Act is intolerably restrictive. Requiring a consumer to specifically ask to be added to the “do not call” list in order to stop these calls is inconsistent with the stated philosophy of the Act, which is “to protect residential telephone subscribers’ privacy rights.” Expressions of “not interested” and “do not call” are simple clear statements that as a matter of law should have been enough to stop repeated phone calls.
5. The phone calls of 2/1/02, 2/2/02, and 2/5/02 were placed in violation of 47 USC §227 and 47 CFR 64.1200(e)(2)(iii).
6. 47 CFR 64.1200(e)(2)(iii) states in pertinent part: “If a person or entity making a telephone solicitation ... 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.” This section does not require a subscriber to follow the procedures described by Mr. Jannicelli. A “request ... not to receive calls...” should suffice. Plaintiff’s entreaty “do not call” should have resulted in placement on the do-not-call list.
7. 47 USC §227(b)(3)(B) authorizes an award of \$500 damages for each of these three calls which violated 47 USC §227 and 47 CFR 64.1200(e)(2)(iii).
8. The evidence in this hearing and defendant’s efforts to justify continual calls in spite of plaintiff’s protestations “do not call again,” “not interested,” and “do not call,” require the court to conclude that defendant willfully and knowingly violated

this subsection and the regulations prescribed under this subsection and therefore award plaintiff an additional \$1,000 pursuant to 47 USC §227(b)(3).

ORDER

THEREFORE, IT ORDERED THAT plaintiff have judgment for \$2,500 against defendant plus costs of \$43.

DATED: November 20, 2001



KEVIN E. MCKENNEY
JUDGE OF THE SUPERIOR COURT

the organization.

CONCLUSIONS OF LAW

1. Standard of Review for Summary Judgment.

The rationale behind summary judgments as permitted under Rule 74.04(c)(3) of the Missouri Rules of Civil Procedure is to facilitate the expeditious determination of a controversy when there is no genuine issue as to any material fact. Rockwell International, Inc. v. West Port Office Equipment Company, 606 S.W.2d 477, 479 (Mo.App. 1980). The Missouri Supreme Court reaffirmed the standard under which a summary judgment should be entered in favor of the moving party in a lawsuit, in ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp., 854 S.W.2d 371, (Mo. banc 1993). Further, a non-moving party cannot rely on pleadings of ultimate facts when confronted with a Motion for Summary Judgment. Snowden v. Northwest Missouri State University, 624 S.W.2d 161, 169 (Mo.App. 1981). In such a case, summary judgment, if appropriate, will be entered against the non-moving party. Rule 74.04(c)(3); Charity v. City of Haiti Heights, 563 S.W.2d 72, 75 (Mo. banc 1978).

2. Elements of the Telephone Consumer Protection Act.

The statute prohibits the sending of any material constituting an “unsolicited advertisement” by facsimile. 47 U.S.C. § 227(b)(2). An “unsolicited advertisement” is defined by the statute as “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.” 47 U.S.C. § 227(a)(4). As a result, the only way such faxes can be sent is if 1) the faxes do not contain “any material advertising the commercial availability or quality of any property, goods, or services” or 2) if the faxes are sent with the “prior express invitation or permission” of the recipient.

The parties have stipulated that the fax at issue in this case contains material advertising the

commercial availability or quality of any property, goods, or services. Thus the only way to escape the broad proscription the TCPA imposes in this case is if the sender obtained “prior express invitation or permission” to send the solicitation. 47 U.S.C. § 227(b)(1)(C). Thus this case is reduced to a single question - did Defendant obtain “prior express invitation or permission” to send this fax to Plaintiff? This Court holds it did not.

3. Construction of “prior express invitation or permission”

The only connection whatsoever Defendant has with Plaintiff is that Plaintiff is a travel member of IATAN and Defendant is a supplier member of that organization. Defendant argues that by providing its facsimile number to IATAN knowing that IATAN shares contact information with other members, Plaintiff has expressly consented to receipt of advertising faxes from other members of IATAN. Plaintiff argues that such conduct does not rise to the level of “express” consent.

This is a question of ordinary statutory interpretation, and in this case the statute’s plain language is crystal clear. The TCPA requires express permission, not implied permission. The two terms are mutually exclusive. Black’s Law Dictionary defines “express” as:

Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C.A.Minn., 34 F.2d 270, 274. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with “implied.”

Black’s Law Dictionary (Revised 6th ed.) (emphasis added). Webster’s dictionary provides a similar definition. This is the proper definition to use within the context of the TCPA.

4. Statutory Construction of “willful or knowing” within the TCPA

The TCPA provides for mandatory liquidated statutory damages of \$500 per violation. If the Court finds that the defendant willfully or knowingly violated the prescribed regulations, it may in its

discretion, increase the amount of the award to an amount equal to not more than 3 (three) times the amount available under 47 U.S.C. § 227(3) (Private Right of Action) . The court declines to exercise any of its discretion in regard to assessing any discretionary damages.

5. Damages

The TCPA provides for a mandatory minimum liquidated statutory damages of \$500 per violation. The discretion to award trebled damages of \$1,500 upon a showing of willful or knowing violations is in the discretion of the Court.

CONCLUSION

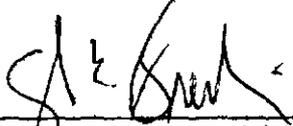
IT IS THEREFOR ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment is GRANTED; and

IT IS FURTHER ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is DENIED; and

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs BRENTWOOD TRAVEL, INC. and Stephanie Turner have and recover from Defendant LANCER, LTD., the sum of \$500.00 plus the court assess court costs against the defendant

SO ORDERED.

This, the 15th day of August, 2001



Judge John Frerking, Division 45.

STATE OF MISSOURI)
COUNTY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

DAVID L. HARJOE,

Plaintiff,

v.

COLONIAL LIFE & ACCIDENT
INSURANCE COMPANY,

Defendant

Cause No.: 02 CC - 001983

Div. No: 45

FILED

AUG 29 2002

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

ORDER AND JUDGMENT

This matter came before the Court on August 29, 2002 on Plaintiff's Motion to for Summary Judgment and Defendant's cross Motion for Summary Judgment. This is an action originally brought by Plaintiff in the Associate Circuit Division, against Colonial Life & Accident Insurance Company ("Colonial"), alleging transmission of an unsolicited advertisement via facsimile in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. Judgment was rendered against Defendant on May 2, 2002 by Division 35, and Defendant sought a trial de novo in this Court.

The parties have stipulated to a set of facts which establish the relevant elements of the cause of action. At all times relevant, Plaintiff had telephone facsimile service at the facsimile telephone number of (314) 878-7277. On March 28, 2000 Defendant sent a facsimile transmission to and received by Plaintiff at (314) 878-7277, and Defendant did not obtain prior express invitation or permission to send the fax to Plaintiff. Defendant knew it was sending the fax, and was fully aware of the content of the fax. The fax at issue was not sent as a result of any accident or mistaken act.

The Missouri Supreme Court reaffirmed the standard under which a summary judgment

should be entered in favor of the moving party in a lawsuit, in ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp., 854 S.W.2d 371, (Mo. banc 1993). In so defining, the Court stated:

If the non-movant cannot contradict a showing of the movant, judgment is properly entered against the non-movant because the movant has already established a right to judgment as a matter of law.

ITT, 854 S.W.2d at 381 (emphasis added). Further, a defendant cannot rely on pleadings of ultimate facts when confronted with a Motion for Summary Judgment. Snowden v. Northwest Missouri State University, 624 S.W.2d 161, 169 (Mo.App. 1981). In such a case, summary judgment, if appropriate, will be entered against the non-moving party. Rule 74.04(c)(3); Charity v. City of Haiti Heights, 563 S.W.2d 72, 75 (Mo. banc 1978).

Elements of the Telephone Consumer Protection Act.

The elements of an unsolicited fax advertisement claim under the TCPA are that a person 1) uses a telephone facsimile machine, computer, or other device 2) to send an unsolicited advertisement. The stipulated facts establish nearly all the elements of Plaintiff's claim, with the only question remaining being whether the fax at issue contains "material advertising the commercial availability of any property goods, or services." 47 U.S.C. § 227(a)(4). Defendant describes the fax as merely "announcing employment opportunities" while Plaintiff argues that the fax advertises Defendant's company and the services it offers, such as its website. Plaintiff also argues that the fax is a qualitative statement about Defendant's services. The only question is whether or not the facsimile contains an "unsolicited advertisement" subject to the statute.

Definition of "unsolicited advertisement"

The statutory definition of "unsolicited advertisement" at 47 U.S.C. § 227(a)(4) is:

(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.

Whether the fax at issue meets this definition is ultimately one of statutory construction. With any question of construction, the nature of the statute plays a role in that construction. While criminal statutes invoke the rule of lenity, remedial statutes “should be liberally construed and interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers.” Scarborough v. Atlantic Coast Line R. Co., 178 F.2d 253, 258 (4th Cir. 1950). Exemptions from provisions of remedial statutes “are to be construed narrowly to limit exemption eligibility.” Hogar v. Suarez-Medina, 36 F3d 177, 182 (1st Cir 1994). See, e.g., the very first paragraph of the Missouri Revised Statutes, which requires “all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.” RSMo. § 1.010.

Defendant argues that nothing is being offered “for sale” by the faxes. But there is no requirement that to be covered by the statute, that the goods or services advertised actually must be for sale to the recipient. They only have to be “advertised.” Indeed, we commonly see advertisements for “free” goods and services, often given away at no charge to secure customer goodwill or brand recognition, as a loss leader to generate sales of other goods or services, or just to obtain contact information for potential new customers. Webster’s dictionary defines “advertise” as “to make something known to : notify” and this is the proper construction of that term as used in the TCPA. Defendant’s interpretation that the goods or services must be for sale to the recipient is overly strict - especially considering the remedial nature of the statute. To fall within the ambit of the TCPA, an unsolicited fax need only notify or announce to a recipient, the commercial availability of any property, goods, or services, or make qualitative statements about them. Defendant is clearly engaged in a commercial insurance business, and the fax in question does notify the recipient about

the existence of Defendant's insurance wares and their commercial availability.

Defendant's web site is a service.

The Court also agrees with Plaintiff that Defendant's Internet website, listed on the fax, is also a service within the TCPA. If Defendant's argument were correct that the referral of the reader of a fax to Defendant's web site is not an advertisement under the TCPA, any fax advertiser could escape the TCPA by putting all the sales pitches on a web site, and broadcast millions of faxes with merely a logo and a web site address. This type of subterfuge would permit easy evasion of the law. A foundational rule of statutory construction, construing a statute broadly for the public benefit, is "to suppress subtle inventions and evasions for continuance of the mischief." Cummins v. Kansas City Public Service Co., 334 Mo. 672, 698-99 (Mo. banc 1933). In this case, the mischief is unsolicited faxes promoting the goods and services of commercial enterprises like Defendant.

CONCLUSION

Plaintiff's Motion is GRANTED. Defendant's Motion is denied. Plaintiff shall have and recover from Defendant Colonial Life & Accident Insurance Company, judgment in the amount of \$ 750 plus court costs.

It is SO ORDERED, this the 29 day of Aug 2002

Sidney H. Chaffin 17,155
Judge Sidney Chaffin Division 45

~~ALLEGED~~ A TRUE COPY

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE SMALL CLAIMS COURT
CASE NO.: 99-SC-86-2785

ROBERT BIGGERSTAFF,)
Plaintiff,)
vs.)
COMPUTER PRODUCTS, INC.)
Defendant.)

ORDER

Filed in Charleston County
Small Claims Court

NOV 29 1999



The above captioned matter came before this Court for trial on September 29, 1999. Plaintiff appeared pro se. Defendant was represented by Henry S. McClain, president of the Defendant corporation. Plaintiff filed suit under the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, December 20, 1991, which amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 et seq., by adding a new section, 47 U.S.C. § 227 (the "TCPA") to that Title. The Complaint seeks statutory damages of \$500 for each facsimile, and trebled damages for "willful or knowing" violations as provided for by the TCPA. After considering all of the evidence and arguments, this Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The material facts of this case are essentially undisputed. On both April 20 and May 14, 1999, Defendant admits sending via facsimile ("fax"), a single-page advertisement promoting its computer products and services to Plaintiff's fax machine.

In October of 1997, Plaintiff had joined the Charleston Chamber of Commerce as an individual. In filling out his application for membership in the Chamber, Plaintiff had provided information including his mailing address, phone number, and fax number. Subsequently, this information was published as part of the Chamber's membership roster, in the section titled "Individual Memberships" along with similar information on other individual members. There is no evidence that Defendant ever had any direct contact with Plaintiff or that Plaintiff expressly consented to the receipt of unsolicited faxes from Defendant.

Defendant originally filed an Answer consisting of a general denial on June 21, 1999. On September 7, 1999, Defendant filed an amended Answer admitting that it sent the unsolicited faxes to Plaintiff, but denying that they were sent "willfully or knowingly."

CONCLUSIONS OF LAW

1. Prior Express Invitation or Permission.

Defendant raised a defense that by his act of joining the Chamber of Commerce whereby his fax number was published in the membership list, Plaintiff consented to the receipt of unsolicited advertisements at that number from other members of the Chamber of Commerce. Plaintiff argues that even if his actions could be construed as implied consent to receive fax advertisements, the TCPA requires prior express consent as the only exception to the prohibitions on sending unsolicited fax advertisements. 47 U.S.C. § 227(a)(4). The statute provides at § 227(b)(1):

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

* * *

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

The TCPA defines "unsolicited advertisement" by:

(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. [emphasis added]

In general, the TCPA restricts 1) unsolicited fax advertisements, 2) telemarketing solicitations by an artificial or prerecorded voice, and 3) telemarketing solicitations by live agents. It is worth noting that the restrictions on unsolicited fax advertisements are the most rigid of the three. Congress singled out unsolicited fax advertisements for complete prohibition. This is wholly reasonable, given that Congress found unsolicited fax advertisements shift the cost of advertising to the unwilling recipient. See H.R. Rep. No. 317, 102nd Cong., 1st Sess. 1991 at 25. It is analogous to a long distance telemarketing call made with the charges reversed or junk mail sent with postage due. As a result, the only time one may send an advertisement via fax is when the one receiving the fax has expressly invited you, or permitted you, to send the fax. The example would be a request for information wherein the person providing the information asks if he may send the information by fax and the intended recipient says yes.

The term "prior express invitation or consent" is not defined in the statute. Black's Law Dictionary defines "express" as:

Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C.A.Minn., 34 F.2d 270, 274. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with "implied."

Black's Law Dictionary (Revised 6th ed.) This is the proper definition to use within the context of the TCPA and is confirmed by the FCC's opinion:

Although the term "express permission or invitation" is not defined in statutory language or legislative history, there is no indication that Congress intended that calls be excepted from telephone solicitation restrictions unless the residential subscriber has (a) clearly stated that the telemarketer may call, and (b) clearly expressed an understanding that the telemarketer's subsequent call will be made for the purpose of encouraging the purchase or rental of, or investment in, property, goods or services.¹

In the Matter of the Telephone Consumer Protection Act of 1991, Memorandum Opinion and Order, ¶ 11, 10 FCC Rcd 12391 (1995). The same order states that "We [the FCC] do not believe that the intent of the TCPA is to equate mere distribution or publication of a telephone facsimile number with prior express permission or invitation to receive such advertisements." Id. at ¶ 37.

We find that Plaintiff's actions in joining the Chamber of Commerce do not constitute "prior express invitation or consent" as required by the statute. Even if consent could be inferred or implied from Plaintiff's actions, the statute plainly requires prior express consent. Defendant failed to introduce evidence sufficient to meet his burden of establishing prior consent to send faxes to Plaintiff. Therefore this Court grants Plaintiff's motion for directed verdict on the issue of liability, and awards the statutory damages of \$500 for each fax, totaling \$1,000.

2. Willful or Knowing Violations

Plaintiff also alleges that Defendant's actions are "knowing and/or willful" within the meaning of the 1934 Communications Act and prays for treble damages as provided for by the TCPA at 47 U.S.C. § 227(b)(3). Plaintiff provided a clarifying opinion letter from the FCC, issued July 27, 1999, which cites the established FCC's construction of the terms "willful" and "knowing." "Knowing," is set out as a clear "knew or should have known" standard citing Audio Enterprises, Inc., Notice of Apparent Liability for Forfeiture, 3 FCC Rcd 7233, 7237, ¶ 29 (1988). "Willful" is defined so that it "does not require that the actor knew he was acting wrongfully; it requires only that the actor knew he was doing the acts in question" citing Liability of Midwest Radio-Television Inc., Memorandum Opinion and Order, 45 F.C.C. 1137, 1140-41, at ¶¶ 8-11 (1963), and reflects the statutory definition of "willful" at 47 U.S.C. § 312(f).

As the administrative agency charged with administering the TCPA, the FCC's interpretation is

¹ While the FCC is addressing the "express permission or invitation" clause in the TCPA as applied to live operator telemarketing calls, the same construction applies equally to that phrase with respect to telephone facsimiles.

entitled to great deference from a court. Smith v. Robinson, 468 U.S. 992, 1027 (1984). In addition, “[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” Chevron USA v. Natural Resources Defense Council, 467 U.S. 837, 844, n 11 (1984).

To avoid a finding of willfulness, it is important to distinguish the nature of the conduct (which must be unintentional), and not the violation of the regulation to which the conduct led. The FCC has used the example of “bumping a switch” as an example of a non-willful act that could give rise to a violation that would not be construed as willful. In re Valley Page, 12 FCC Rcd. 3087 at ¶ 6, 1997 WL 106481 (F.C.C.).² In addition, the FCC has consistently found willfulness where “laxity” has led to preventable violations. Midwest Radio-Television, supra, at 1141.

Testimony was undisputed that the fax advertisement sent to Plaintiff was not merely an accident or mistake. If anything, laxity in Defendant’s duty to comply with its obligations under the statute seems to be a major factor in the violations. Applying the FCC constructions it is clear that Defendant should have known that its actions could constitute a violation of the statute, and that the Defendant knew it was sending facsimile advertisements. Any business that engages in a regulated activity (in this case sending advertisements via fax) must fully acquaint itself with the laws and regulations governing that activity - or risk the consequences for that laxity.

3. Trebled Damages

Having found that Defendant’s acts were willful and knowing, the amount of exemplary damages is entirely within the discretion of this Court up to three times the amount of actual damages. Defendant engaged in illegal conduct, and reaped again from this conduct in the form of reduced advertising costs - and possibly even additional sales. We are mindful that there may be some manner of violative conduct more egregious than what this defendant did and the full effect of the TCPA’s trebled damages should be reserved for those most egregious violations. This Defendant’s conduct deserves a measured response, and this Court finds the appropriate amount of exemplary damages in this case to be 50 dollars per fax.

4. Sanctions and Costs

² “[W]illfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question such as using a radio transmitter, as opposed to being accidental (for example, brushing against a power switch turning on a radio transmitter).”

Plaintiff argues that because of Defendant's original Answer was a general denial denying all the allegations of the Complaint, Plaintiff was compelled to develop evidence to prove that the faxes he received were actually sent by Defendant. Plaintiff notified Defendant in writing, by a letter dated July 7, 1999, that Plaintiff would seek costs for obtaining evidence to prove facts improperly denied by Defendant's Answer. This evidence consisted of telephone records subpoenaed from BellSouth demonstrating that at the dates and time alleged in the Complaint, telephone calls were placed from Defendant's fax line to Plaintiff's fax number. Because these records are only available for a limited time, Plaintiff was compelled to act quickly to obtain these records to preserve them for trial.

In this case, Defendant should have been able to consult its own records and quickly determine if indeed the faxes were sent. In fact, it apparently did so, and filed an amended Answer admitting sending the faxes, but not until well after Plaintiff had already incurred substantial costs in obtaining the telephone records. Even with its *pro se* status, Defendant has an obligation under Rule 11 to make a good faith inquiry into the allegations of the Complaint, and admit those allegations that are true. Plaintiff clearly alerted Defendant to this obligation, and the possibility that Plaintiff's costs in developing evidence to prove the faxes were sent could be taxed against Defendant. Plaintiff is awarded those costs of \$373.50.

It is hereby ORDERED, ADJUDGED AND DECREED, that Plaintiff shall have judgment against Defendant for \$1,473.50, plus \$70 court costs.

AND IT IS SO ORDERED.



Henry W. Guerard, Magistrate

November 18, 1999, Charleston South Carolina.



STATE OF MISSOURI)
)
 COUNTY OF ST. LOUIS)

FILED

NOV 12 2002

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

DANIEL GILMER
 CIRCUIT CLERK, ST. LOUIS COUNTY

I DREAM SOLUTIONS, INC.,

Plaintiff,

v.

JOHN M. ELLSWORTH CO., INC.,

Defendant.

Cause No. **02AC-014959 K CV**

Division 39 - Tuesday

ORDER

This matter came before the Court on September 24, 2002, on Defendant's Motion to Dismiss by way of a special appearance, for lack of personal jurisdiction. The Court has heard the arguments of both parties. For the reasons set forth below, Defendant's Motion is DENIED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff brought suit against Defendant under the private right of action provided in 47 U.S.C. § 227(b), the Telephone Consumer Protection Act, ("TCPA"). Plaintiff alleges that Defendant sent one¹ facsimile containing an unsolicited advertisement to Plaintiff's fax machine in Missouri, and that this fax violates the TCPA and subjects Defendant to the personal jurisdiction of the Missouri Courts. The Second Affidavit of Mr. Ellsworth admits that Defendant sent the fax in

¹ Plaintiff alleges only one fax was sent to his fax machine, and the Court assumes this is true for the purposes of this motion. However, were the Court inclined to find a single fax transmission sent into this state was insufficient to satisfy personal jurisdiction, Plaintiff would be entitled as a matter of law to discovery to determine the extent of Defendant's other contacts with Missouri. Shouse v. RFB Construction Co., Inc., 10 S.W.3d 189, 194 (Mo. App. W.D. 1999) ("Of course, the parties have the right to conduct discovery to demonstrate whether [defendant] has such substantial business or contacts.")

question into Missouri, ostensibly intended to be received by a different entity.

I. Standard for asserting personal jurisdiction

When a defendant asserts lack of personal jurisdiction in a motion to dismiss, a plaintiff bears only the minimal burden of establishing a prima facie case that (1) the suit arose out of the activities enumerated in the Missouri long-arm statute, Section 506.500; and (2) the defendant has sufficient contacts with Missouri to satisfy due process requirements. Schilling v. Human Support Svcs., 978 S.W.2d 368, 370-71 (Mo. App. E.D. 1998). “The basic due process test is whether the defendant has ‘purposefully availed itself of the privilege of conducting activities within the forum state.’” Farris v. Boyke, 936 S.W.2d 197 (Mo. App. S.D. 1996) citing Elaine K. v Augusta Hotel Assocs. Ltd. Partnership, 850 S.W.2d 376, 378 (Mo. App. E.D. 1993).

Section 506.500, RSMo 1994, states:

1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:

- (1) The transaction of any business within this state;
- (2) The making of any contract within this state;
- (3) The commission of a tortious act within this state;
- (4) The ownership, use, or possession of any real estate situated in this state;
- (5) The contracting to insure any person, property or risk located within this state at the time of contracting;
- (6) Engaging in an act of sexual intercourse within this state with the mother of a child on or near the probable period of conception of that child.

Jurisdiction is proper under due process where “the defendant has ‘purposely directed’ his activities at residents of the forum, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984), and the

litigation results from alleged injuries that ‘arise out of or relate to’ those activities, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984).” Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-473 (1985).

Missouri’s long arm statute is intended to reach “to the fullest extent permissible under the due process clause of the Fourteenth Amendment.” State ex rel. Deere & Co. v. Pinnell, 454 S.W.2d 889 (Mo. banc 1970). Missouri courts have been explicit that the exercise of long arm jurisdiction “is not susceptible to mechanical application; rather the facts of each case must be weighed to determine whether requisite affiliating circumstances are present.” State ex rel. Sperandio v. Clymer, 581 S.W.2d 377, 382 (Mo. banc 1979).

The issue of whether faxes or telemarketing calls made into Missouri will subject the sender to the personal jurisdiction of Missouri courts under the TCPA is not new to St. Louis courts. See R.F. Schraut Heating & Cooling, Inc. v. Maio Success Systems, Inc., No. 01AC11568 (Div. 39, Mo. Cir. Ct. Aug. 14, 2001); Brentwood Travel, Inc. v. Lancer, Ltd., No. 01CC-000042 (Div. 45, Mo. Cir. Ct. Feb. 21, 2001) (unsolicited faxes); Margulis v. VoicePower Telecom., Inc., No. 00AC-013017 (Div. 39, Mo. Cir. Ct. March 22, 2001) (telemarketing calls). Defendant has presented nothing to challenge the analysis presented in those cases.

II. Transacting Business in Missouri

“‘Transaction of any business’ as used in the Missouri Long Arm Statute, must be construed broadly and may consist of a single transaction **if that is the transaction sued upon.**” Mead v. Conn, 845 S.W.2d 109 112 (Mo. App. 1993) citing State ex rel Metal Serv. Ctr. v. Gaertner, 677 S.W.2d 325, 327 (Mo. banc 1984) (emphasis added); Laser Vision Centers, Inc. v. Laser Vision Centers International, 930 S.W.2d 29, 32 (Mo. App. 1996). “A single business proposal to a Missouri corporation has been found sufficient to constitute the transaction of business.”

Chromalloy American Corp. v. Elyria Foundry Co., 955 S.W.2d 1, 4-5 (Mo. banc 2000); “Minimum contacts necessary to support jurisdiction are met by a single act done or a single transaction consummated within the forum state, on a claim relating to that act or transaction.” State ex rel. Metal Serv. Center of Georgia, Inc. v. Gaertner, 677 S.W.2d 325, 327 (Mo. banc 1984); State ex rel. Caine v. Richardson, 600 S.W.2d 82 (Mo.App.1980), citing McGee v. International Life Insurance Co., 355 U.S. 220 (1957).

A. Advertising products to Missouri consumers is “transaction of business”

Defendant engaged in an advertising action soliciting a Missouri customer. Missouri courts have made clear that this activity alone is sufficient to constitute “transaction of business” under the Missouri long arm statute. State ex rel. Nixon v. Beer Nuts, Ltd., 29 S.W.3d 828 (E.D. Mo. 2000):

In the case at bar, the trial court found that [out of state seller] Beer Nuts had regularly solicited customers in and from Missouri and this activity constitutes the transaction of business within the State.

Id. at 835. The Beer Nuts decision is directly on point, and is dispositive of the issue that soliciting the consumers in this state constitutes “transacting business in Missouri.”

Similarly, in Welkener v. Kirkwood Drug Store Co., 734 S.W.2d 233 (Mo. App. E.D. 1987) and out-of-state corporation was held subject to personal jurisdiction in Missouri because it “solicited purchases by sending out thousands of brochures and catalogs of its products throughout the United States, including Missouri.” Id. at 239-40. “[A] foreign manufacturer's regular solicitation of orders is sufficient to sustain jurisdiction.” Id. at 240, citing Marshall Const. Co. v. M. Berger Co., 533 F.Supp. 793 (W.D.Ark.1982). A “foreign corporation which manufactures product for use in Missouri is subject to jurisdiction” Id., citing State ex rel. Apco Oil Corporation v. Turpin, 490 S.W.2d 400 (Mo.App.1973). Promotional activity directed at Missouri in order to sell items of merchandise was sufficient to subject the non-resident corporation to jurisdiction. State

ex inf. Danforth v. Reader's Digest, 527 S.W.2d 355 (Mo. banc 1975). Also instructive is State ex rel. Caine v. Richardson, 600 S.W.2d 82 (Mo. App. E.D. 1980), nothing that when an out of state seller is sending marketing materials into Missouri, asserting long arm jurisdiction is proper “so long as the marketing is intentional and distribution into the forum state is an anticipated and foreseeable event as part of the manufacturer's business.” Defendant was not ignorant of where he targeted his advertising. By calling numbers in the 314 area code, it is “anticipated and foreseeable” that the calls were reaching customers in Missouri.

The recent case of Johnson Heater Corp., v. Deppe, No.: ED80011 (Mo. App. E.D., Sep 3, 2002) is not to the contrary. Johnson Heater involved an out of state purchaser who entered a contract with a Missouri company in another state. While the direction of contact was into Missouri, it was an out of state purchaser buying Missouri products - not an out of state advertiser seeking out customers in Missouri and availing himself of the privilege of soliciting Missouri consumers. On the contract claim at issue in Johnson Heater it is black letter law that “contract is made where acceptance occurs” which in Johnson Heater that was in Wisconsin. As a matter of law that fails to satisfy Section 506.500(2). The instant case involves tortious conduct arising out of the call itself, and not a contract claim. Johnson Heater is thus inapposite.

B. “Direction” of contact

In long arm jurisdiction contexts, courts recognize an important distinction between nonresident sellers and nonresident buyers recognized in Minnesota law. Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F.2d 365, 368 (8th Cir. 1969):

One reason for this distinction, articulated by the Minnesota Supreme Court, was that a nonresident seller subjects itself to the obligation of amenability to suit in return for the right to compete for sales in the Minnesota market. Such reciprocity does not apply to the nonresident buyer.

Id. This is a major difference between the case at bar, and the cases relied upon by Defendant. This

is a case of a nonresident seller, who subjected himself to the amenability to suit here in Missouri in return for the right to compete for customers in this state.

Defendant **sought out a Missouri customer**. He dialed a Missouri fax number. The fact that the out of state party initiated the contact into Missouri is very important. Schilling v. Human Support Services, 978 S.W.2d 368, 371 (E.D. Mo. 1998) (“Defendant’s **initiation** of a contact with a Missouri business is an important factor in weighing the various due process factors.”) (emphasis added) This is clearly “purposeful availing” of the benefits of Missouri.

C. Cases relied on by Defendant are inapposite

Defendant raises several cases in its brief and at argument. TSE Supply Company v. Cumberland Natural Gas Company, 648 S.W.2d 169 (Mo. App. E.D. 1983) and Institutional Food Marketing Associates v. Golden State Strawberries, 747 Fed.2d 448 (8th Cir. 1984), however, these cases are distinguishable from the case at bar. In TSE Supply, a seller in Missouri brought an action against an out-of-state buyer to recover payment for steel pipe. The plaintiff was an in-state seller who solicited the out-of-state buyer. This situation was previously noted in Scullin Steel Co. v. National Ry. Utilization Corp., 676 F.2d 309 (8th Cir. 1982) that "solicitation by a nonresident purchaser for delivery outside the forum state is a more minimal contact than that of a (nonresident) seller soliciting the right to ship goods into the forum state." Id. at 314. That fact situation is opposite from the case at bar.

Institutional Food Marketing Associates, Ltd., v. Golden State Strawberries, Inc., 747 F.2d 448 (8th Cir. 1984) is similarly distinguishable. A corporation with principal place of business in Missouri brought suit seeking declaration that it did not have a contract with the California defendant and that defendant intentionally and tortiously interfered with a contract. The court refused to exercise personal jurisdiction on the contract claim noting that “all negotiations leading

to the sale of strawberries took place in California.” Id. at 456. The contract was not made in Missouri, which was a necessary element under that plaintiff’s cause of action.

Enterprise Rent-a-Car, Co. v. Stowell, 131 F.Supp. 2d 1151 (E.D. Mo. 2001) was a trademark infringement action against an out-of-state defendant who maintained a “passive” website that was not directed to Missouri, and which had engaged in no commerce in Missouri. That defendant had done nothing more than put a website on the Internet and had not “purposefully availed” himself of doing business specifically in Missouri. The court at 1158-59, cited Cybersell, Inc. V. Cybersell, Inc., 130 F.3d at 414, 420 (9th Cir. 1997), that to find jurisdiction was proper in Missouri simply because someone had a passive website never directed specifically at Missouri, “would automatically result in personal jurisdiction wherever the plaintiff’s principal place of business is located. That would not comport with traditional notions of what qualifies as purposeful activity invoking the benefits and protections of the forum state.” Defendant in the instant case purposefully directed his solicitation directly into Missouri, so Enterprise is factually very different.

III. Commission of a Tortious Act

Plaintiff also advances that Defendant has committed a tortious act within this state. Statutes establishing personal liability to the aggrieved party, such as the TCPA, create statutory torts. See, e.g., Yellow Freight Sys., Inc. v. Mayor's Comm’n on Human Rights of the City of Springfield, 791 S.W.2d 382, 384 (Mo. banc 1990) (Violations of a law “may establish an element of tortious conduct in a common law or statutory tort action cognizable in the circuit court.”); See also Labine v. Vincent, 401 U.S. 532, 535 (1971) (With statute providing for cause of action, the state “created a statutory tort ... so that a large class of persons injured by the tort could recover damages in compensation for their injury.”) Unsolicited faxes are essentially a trespass and conversion. It is analogous to similar “long distance” offenses against persons such as telephone harassment or mail

bombing, which traditionally find jurisdiction over the defendant where the injuries to the victims occur. For example, in Falang v. Hickey, 40 Ohio St.3d 106 (1988) the Ohio Supreme court held that mailing a letter from South Carolina to Ohio subjected sender to personal jurisdiction in Ohio for a tort action arising out of libelous statements made in the letter.

A. Shooting across the border

Although Defendant may have been in another state when he put into motion the events that lead to the harm, his acts ultimately caused the harm in Missouri. This situation is not unlike the well known law school example of a man who fires a gun from across the border in Kansas, and hits a person in Missouri. The shooter will be subject to suit in Missouri for the damage from the gunshot, but not for a breach of contract action unrelated to the gunshot. In this case Defendant “shot” from Wisconsin to Missouri, and caused an injury. Plaintiff is not suing for breach of contract or other cause of action only tenuously related to that contact.... **it is suing for that contact itself.** The provision in Missouri Long Arm statute of “commission of a tortious act” is given broad meaning by Missouri courts, and not restricted to causes of action based solely in tort law:

Provision of this section [Missouri Long Arm Statute] pertaining to “commission of a tortious act within this state” did not mean that cause of action had to sound in tort and this section applied to any cause of action arising from the doing of such acts, and it was not necessary to characterize the Carmack Amendment claim of plaintiff as a cause of action in tort for this section to apply.

Fulton v. Chicago, Rock Island & P. R. Co., 481 F.2d 326 (8th Cir, 1973) cert. denied 414 U.S. 1040 (1973). Under Missouri law, “[c]ommission of tortious act within the state which will subject defendant to long-arm jurisdiction includes extraterritorial acts of negligence which produce actionable consequences in Missouri.” State ex rel. William Ranni Associates, Inc. v. Hartenbach (Sup. 1987) 742 S.W.2d 134.

Congress explicitly provided for “actionable consequences” for violations of the TCPA.

Sending unsolicited facsimile advertisement solicitations is prohibited by federal law. Defendant's non-consensual illegal solicitation is "an extraterritorial act producing actionable consequences in Missouri" satisfying the Missouri long arm statute.

IV. Fair Play and substantial justice

After a determination that a defendant has established sufficient contacts under the long arm statute, a court will consider additional "traditional notions of fair play and substantial justice." factors before deciding jurisdiction over a non-resident defendant. This includes: "1) the burden on the defendant; 2) the interest of the forum state; 3) the plaintiff's interest in obtaining relief; 4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and 5) the shared interest of the several states in furthering fundamental substantive social policies." Beer Nuts, at 835-36. "In reviewing minimum contacts to satisfy the due process requirements, a court focuses on the relationship among the defendant, the forum, and the litigation." Id., at 835. Defendant's own purposeful initiation of a contact with a Missouri business is an important factor in weighing the fair play analysis. Elaine K. v Augusta Hotel Assocs. Ltd. Partnership, 850 S.W.2d 376, 379 (Mo.App. E.D.1993).

In the context of this "fair play" analysis, the Supreme Court has noted that "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." McGee, 355 U.S. at 223. This is certainly true in this case. Defendant's burden is minimal, and **he is the initiator of the contact with Missouri**. If he didn't want to be hailed into Missouri's courts, he could have not called Missouri telephone numbers, and harmed a victim in Missouri.

The state has an interest in protecting its citizens from harm, from whatever source those harms spring. The Plaintiff and society's interest, indeed, the entire TCPA would be strangled if

consumers can not bring suit where they sustained their injury. The TCPA was intended to make it “as easy as possible for consumers to bring such [TCPA] actions.” 137 CONG.REC. S16,205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings). Failing to find personal jurisdiction where the consumer sustains their damage, coupled with the relative small damage awards, would mean that practically no TCPA cases could be prosecuted. Creative defendants could safely avoid responsibility by secreting their operations far away from the locations to which they are sending their waves of illegal faxes and calls. It would relegate the TCPA to a dead hand statute. Therefore the Plaintiff’s, and the state’s, interest in this forum is substantial. It substantially furthers the TCPA’s statutory scheme, thus furthering the “interstate judicial system’s interest” in enforcing the uniform federal law.

In addition, one aspect of the “fair play” analysis is possibly unfairness of subjecting a nonresident to a foreign state’s law. In this case however, that element is nonexistent, since the TCPA is a federal law, and applies equally everywhere. Defendant can not complain about being subjected to the TCPA by a Missouri court, since the TCPA applies in Wisconsin as well as Missouri.

Finally, Defendant’s affidavit suggests that the fax was intended to go to a different party, which previously had Plaintiff’s fax number. Even if true, this does not constitute a defense under the TCPA. This is a strict liability statute, and intent is not an element of the cause of action, nor is a mistake of this nature a defense. The Court notes that unsolicited fax advertising is in the nature of a trespass, and common law recognizes that trespass occurs even if the trespasser is under mistaken belief that his use of the property was permitted. See, e.g., Restatement (Second) of Torts § 164, Intrusion Under Mistake; Serota v. M. & M. Utilities, Inc., 285 N.Y.S.2d 121, 124 (1967) (defendant’s “mistaken belief that his visit was authorized” was irrelevant to trespass claim).

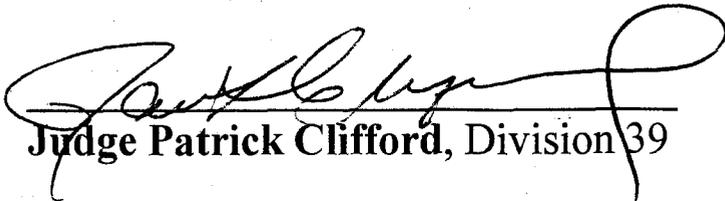
CONCLUSION

The Supreme Court succinctly summarized this issue by noting that jurisdiction lies where “the defendant has ‘purposely directed’ his activities at residents of the forum, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984), and the litigation results from alleged injuries that ‘arise out of or relate to’ those activities, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984).” Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-473 (1985).

Defendant is an out of state vendor that has purposefully directed his advertising and his service into Missouri. This was not “random” ... it was intentionally directed at Missouri. Soliciting customers in Missouri is all that is required to establish personal jurisdiction. State ex rel. Nixon v. Beer Nuts, Ltd., 29 S.W.3d 828 (E.D. Mo. 2000).

This defendant has nothing to complain of... he targeted his marketing scheme at Missouri, causing an actionable harm to a Missouri resident, and he is responsible for his own actions. Plaintiff has demonstrated that Defendant has “transacted business” in this state by his advertising contact, and the cause of action has arisen out of that specific contact. Independently, Plaintiff has demonstrated that Defendant engaged in a tortious act with actionable consequences in this state. Plaintiff has thus made a prima facie case for personal jurisdiction. Defendant’s Motion is DENIED. IT IS SO ORDERED.

This the 12 day of ~~NOVEMBER~~ 2002.


Judge Patrick Clifford, Division 39

CAROL KONDOS, *et al.*,

Plaintiffs,

v.

LINCOLN PROPERTY CO., *et al.*,

Defendants.

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IN THE DISTRICT COURT

DALLAS COUNTY, TEXAS

160TH JUDICIAL DISTRICT

CLASS CERTIFICATION ORDER

Before the Court is Plaintiffs' motion for class certification. The issue has been extensively briefed, and counsel for all parties appeared for hearing on June 1, 2001. Based on the argument of counsel and the record before the Court, the Court finds that certain of the claims and putative classes should be certified, for the reasons discussed below. The class and claims that the Court finds should be certified are: the TCPA claims of the holders of telephone numbers that were confirmed to have received faxes from ABF on behalf of LPC. This Order constitutes the Court's findings of fact and conclusions of law in connection with class certification.

I. FACTUAL BACKGROUND

Defendant American Blast Fax, Inc. ("ABF") was in the business of sending mass facsimile ("fax") advertisements on behalf of its customers to a large number of fax machines. ABF maintained a computer database of fax numbers that could be geographically grouped. Customers would identify the geographic areas they desired to target with their advertisements and enter into a contract with ABF at a price determined

by the quantity of fax numbers in that area. ABF would then transmit mass fax advertisements to the specified numbers. The telephone numbers were identified on a mass basis by automated equipment and the transmissions were sent on a mass basis by automated equipment. ABF did not engage in any recipient-specific process to determine who would receive its advertisements, but rather treated numbers in its database on a collective basis as a group.

Some receiving fax equipment has the ability to confirm for the sender that the facsimile has been successfully received; ABF's practice was to maintain records of those numbers for which transmission was confirmed. Absence of a confirmation does not necessarily indicate that the transmission was not received, as the receiving equipment may not be able or may not be configured to reply with confirmation, or some vagary of telephones may have permitted the transmission to go through but not the confirmation. The presence of a confirmation, however, is highly suggestive that the transmission was successful.

Defendant Lincoln Property Co. ("LPC") is proprietor of numerous apartment complexes in the Dallas area and elsewhere; LPC operates through a sophisticated structure, which does not presently appear to be material to the class certification issues before the Court. The Court will refer to LPC and its affiliates simply as "LPC." In order to market its apartments to prospective tenants, LPC entered into a series of contracts with ABF for mass fax advertising. For some of those contracts, receipt logs exist; for some they do not exist. There is no indication that the missing logs were intentionally

destroyed or misplaced, or that LPC had anything whatsoever to do with the retention or destruction of any logs.

LPC is a significant commercial presence in the Dallas area. Its apartments house thousands of people, and have in the past housed thousands more. It is a large employer with numerous present and former employees and has commercial relations with numerous suppliers in the Dallas area, who likewise have numerous employees. It markets its apartments extensively in the Dallas area and has had contact with numerous prospective tenants. Some of those prospective tenants filled out written forms indicating their interest in leasing an apartment from LPC, and some of those prospective tenants included fax numbers on those forms so LPC to provide them with information by fax.

II. LEGAL BACKGROUND

In 1991, Congress passed the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. The TCPA makes it unlawful for any person to "use any telephone facsimile machine, computer, or any other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). An unsolicited advertisement is "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." 47 U.S.C. § 227(a)(4). The TCPA provides a private right of action against a sender of an unsolicited advertisement, *id.* § 227(b)(3), with damages of \$500 or actual damages, whichever is greater, for each violation, *id.* § 227(c)(5), which

are subject to trebling by the Court if the violations were willful or knowing. *Id.* § 227(b)(3).

The Court has put off deciding the so-called “EBR” issue as long as it practically could do so, but it can do so no longer. The Federal Communications Commission (“FCC”) has reviewed the provisions of the TCPA above and suggested that when there is an established business relationship (“EBR”) between the sender and the recipient, such a relation can give rise to an inference that permission to send a fax is implied from the relationship. *In re Rules and Regulation Implementing the TCPA*, Docket No. 92-90 (F.C.C. October 16, 1992), at ¶ 54 n.87. The Court gives great deference to the construction of a statute creating a regulatory scheme by the agency charged with administering such regulation, *e.g.*, *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); however, “no deference is due to agency interpretations at odds with the plain language of the statute itself.” *Public Employee Retirement System v. Betts*, 492 U.S. 158, 171 (1989). Here, the FCC’s interpretation of the EBR defense would act to amend the TCPA’s definition of unsolicited advertisement from a fax sent without the recipient’s “prior express invitation or permission,” to a fax sent without the recipient’s prior express or implied invitation or permission. That interpretation conflicts with the plain language of the statute

Moreover, Congress did expressly provide an established business relationship exclusion in the provisions of the TCPA dealing with telephone solicitations, *see* 47 U.S.C. § 227(a)(3). “Where Congress includes particular language in one section of a

statute and but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (citations omitted). With respect to faxes, then, in contrast to telephone solicitations, Congress intended to limit the effect of prior invitation only to *express* invitations; the FCC’s interpretation would effectively delete that limitation from the statute. The Court cannot support an interpretation that reverses the effect of the words chosen by Congress. Accordingly, the Court holds that there is no “EBR” or “implied permission” exception to the definition of unsolicited advertisement for faxes.

III. CLASS CERTIFICATION REQUIREMENTS

A. Prerequisites

Rule 42 of the Texas Rules of Civil Procedure governs the requirements for class certification. Rule 42(a) provides for four prerequisites for class certification: numerosity, commonality, typicality, and representativeness. The putative class here numbers in the thousands and is, therefore, sufficiently numerous. The questions of law and fact, as set forth in more detail below, are common among the class members. The claims of the putative class representatives are typical of those of the class. The representative parties will fairly and adequately protect the interests of the class.

B. Specific Type of Class Action

The Court notes preliminarily that it finds only Rule 42(b)(4) certification is appropriate. Under the facts of this case, the prosecution of individual actions would not

create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for the party opposing the class; indeed, there is very little chance that independent actions would be prosecuted at all if this class is not certified. Accordingly, certification under Rule 42(b)(1)(A) is not proper. Similarly, adjudication by individuals would not as a practical matter impair or impede the ability of other members to protect their interests; unlike typical limited fund classes, there is not a limited pot of money available to satisfy class members that is being depleted inequitably absent a class action. As mentioned, absent a class action there appears to be no individual litigation by putative class members, and certainly not to a degree that threatens LPC's ability to respond to \$500 claims. Accordingly, certification under Rule 42(b)(1)(B) is not proper. Thirdly, although the defendants have acted on grounds generally applicable to the class, this action is primarily for monetary damages and attorneys' fees and does not appear to be appropriate for final injunctive relief with respect to the class as a whole; indeed, it appears that ABF may have been driven out of business, one presumes by claims such as these, and there is no need for prospective injunctive relief. Accordingly, certification under Rule 42(b)(2) is not proper.

The Court now turns to Rule 42(b)(4). That provision requires the court to consider whether common issues predominate and whether a class action is superior to other methods of resolving the dispute. Common issues here include: the manner in which the faxes were sent; whether intrastate transmissions are within the scope of the TCPA; whether a principal is liable under the TCPA for the acts of an independent

contractor; which party bears the burden of showing the absence of prior express permission; and statutory damages. LPC argued that the EBR issues were individualized and extensive, considering its relationships with large numbers of past and present employees, vendors, tenants and prospective tenants; determining whether such prior established businesses relationships were sufficient to give rise to an inference of implied permission would surely be an extensive individualized undertaking. However, as the Court has indicated, the statute does not encompass implied permission. Accordingly, the nature of LPC's prior dealings with all those individuals is irrelevant to the causes of action before the Court and does not cause individualized issues to predominate over common issues. Although the question of express permission is individualized, it should be relatively easy to ascertain whether any class member did give prior express permission to LPC or ABF; moreover, the record suggests that the number of such persons is relatively small. Accordingly, the Court finds that common questions predominate over individual questions.

Rule 42(b)(4) also directs the court to consider whether the class action vehicle is superior, and in that context, to consider: (a) the interest of members in controlling separate actions, (b) pending litigation, (c) desirability of the forum; and (d) management. Here, there is no indication that anyone other than class counsel has any desire to control the prosecution of this action; absent a class action it appears unlikely that any individual claims would be asserted. There is not any other pending litigation regarding the subject matter of this lawsuit. Although this forum is not especially better than any other forum,

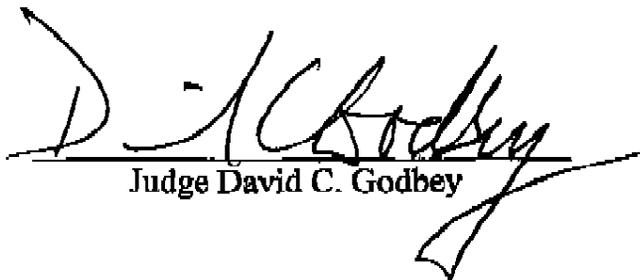
it does seem desirable for all this litigation to be in a single forum rather than scattered about various courtrooms throughout Dallas County and North Texas.

Finally, the Court considers management of the case and how it would proceed if certified. It seems likely that most issues would be resolved by summary judgment. The underlying facts regarding how the faxes were sent are not in dispute and are common to all potential class members; individualized proof need not be presented by plaintiffs. Damages are set by statute and need not be individually proved. Although the existence of express permission is an individualized question, applying the statute as written to consider only express prior permission limits the scope of that inquiry considerably and it can probably be resolved by summary judgment. Likewise, LPC has indicated it will proceed with a motion for summary judgment on some of its legal defenses, and it is certainly possible that motion may resolve plaintiffs' claims against LPC on a wholesale basis. In short, the case appears manageable if certified and a trial, if necessary at all, would not involve any extensive individualized proof. The court finds, based on consideration of all of these factors, that common issues predominate and that the class action vehicle is superior, and therefore certifies as a class action the TCPA claims brought on behalf of confirmed recipients of LPC faxes.

With regard to the proposed sub-classes involving individuals for whom receipt confirmation does not exist and all the claims of negligence, the Court further finds that the individualized questions raised by those persons and claims predominate over

common questions and tip the balance against class certification. Plaintiffs' request for certification of those sub-classes and claims is therefore denied.

SIGNED this 12th day of July, 2001.



Judge David C. Godbey

STATE OF SOUTH CAROLINA)
) IN THE SMALL CLAIMS COURT
) CASE NO.: 98-SC-86-5519
COUNTY OF CHARLESTON)

ROBERT BIGGERSTAFF,)
Plaintiff,)

vs.)

LOW COUNTRY DRUG SCREENING)
INC.)
Defendant.)

ATTEST A TRUE COPY

ORDER

Filed in Charleston County
Small Claims Court

NOV 29 1999 *mare*

The above captioned matter came before this Court for trial on February 28, 1999. Plaintiff appeared pro se. Defendant was represented by Sean Keefer, Esq. of the Mason Law Firm. After considering all of the evidence and arguments, this Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The material facts of this case are essentially undisputed. During November 1998, Defendant sent, via electronic facsimile ("fax") machine, a large number of single-page advertisements promoting its commercial drug testing services. An employee of Defendant used the fax numbers printed in the Charleston Metro Chamber of Commerce 1998 Membership Directory and Buyer's Guide (the "Guide") as the source for the fax numbers to send the advertisements to. On November 6, 1998, one of these fax advertisements was sent to Plaintiff's fax machine. The parties have stipulated that Defendant in fact sent the unsolicited advertisement in question to Plaintiff's fax machine. Uncontroverted testimony of Defendant's own witness established that sending out its advertisements via fax was significantly less expensive for Defendant than sending the same advertisements by other marketing means such as direct mail. Defendant kept no records of whether or not new customers or sales were obtained from these fax advertisements.

In October of 1997, Plaintiff had joined the Charleston Chamber of Commerce as an individual. In filling out his application for membership in the Chamber, Plaintiff had provided information

including his mailing address, phone number, and fax number. Subsequently, this information was published in the Guide as part of the Chamber's membership roster, along with similar information on the other Chamber members, both individuals and businesses. Most members are businesses and are listed in the membership roster under various business categories, while Plaintiff was listed, along with several other individuals, under the section titled "Individual Memberships." Guide p. 115. There is no evidence that Defendant ever had any direct contact with Plaintiff or that Plaintiff expressly consented to the receipt of unsolicited faxes from Defendant.

Based on these facts, Plaintiff filed suit under the federal Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, December 20, 1991, which amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 et seq., by adding a new section, 47 U.S.C. § 227 (the "TCPA") to that Title.

Defendant's original Answer, filed December 18, 1998, raised as a defense to the TCPA claim that this State has not enabled suits under the TCPA by passing specific legislation to open this state's courts to private actions under the TCPA. Defendant also claimed that Plaintiff failed to comply with provisions of S.C. Code Ann. § 15-75-51 and is therefore barred from recovery. After this Court granted Defendant's motion for leave to file an amended Answer at a hearing on February 11, 1999, Defendant raised an additional defense that by his acts in joining the Chamber of Commerce whereby his facsimile number was published in the membership list, Plaintiff "consented, either expressly or in the alternative, impliedly, to the receipt of material at the address, phone and fax numbers published in the Guide." Amended Answer ¶ 36.

CONCLUSIONS OF LAW

I. Applicability of S.C. Code Ann. §§ 15-75-50 and 51

As a preliminary matter, S.C. Code Ann. §§ 15-75-50 and -51 have no application to this case. Code § 15-75-50 is similar to the TCPA insofar as it provides a civil remedy under state law with statutory damages of \$200 for sending an unsolicited advertisement via fax. Section 15-75-51 provides that, before taking action against the sender of an unsolicited fax advertisement under § 15-75-50, the complaining party must notify the sender to stop:

SECTION 15-75-51. Notice not to transmit unsolicited material required prior to imposition of penalty.

The penalty provided by Section 15-75-50, including injunctive relief, may not be imposed unless the person who is alleged to have violated that section does so after being instructed, (1) in writing, (2) by telephone, or (3) by a machine that electronically transmits facsimiles through connection with a telephone network, by the receiver of the unsolicited advertising material not to transmit the material.

Plainly this condition on recovery only applies to recovery under Section 15-75-50. The Complaint relies on the federal law for the relief sought and makes no reference to this code section.

The TCPA, at 47 USC §227[e] states in part, “nothing in this section or the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits - (A) the use of telephone facsimile machines...to send unsolicited advertisements...”.

The clear import of this provision is that states may further restrict the use of facsimile machines to send unsolicited advertisements but they may not lessen or reduce the restrictions imposed by federal law. In that case the Plaintiff need only choose the more restrictive federal law upon which to base his cause of action. In this case Plaintiff sought relief under federal law.

II. The TCPA does not require a state to “opt in”

Defendant argues that the clause in the TCPA “if otherwise permitted by the laws or rules of court of a State” conditions the right to bring suit in a state court on permission having been affirmatively granted by that state. In other words, Defendant argues that the state must “opt in” before the doors of its courts are deemed to be open to TCPA suits. Defendant urges that, because federal courts’ doors are closed to private suits under the TCPA,¹ requiring a state court to enforce the federal law would be an unconstitutional commandeering of the state’s resources.

¹ See Int’l Science & Tech. Inst., Inc. v. Inacom Commun., Inc. 106 F.3d 1146 (4th Cir.1997) (holding that state courts have exclusive jurisdiction over private suits under the TCPA) which was followed by the Fifth, Eleventh, Third, and Second circuits in succession; but see, Kenro, Inc. v. Fax Daily, Inc., 904 F.Supp. 912 (S.D. Ind. 1995) and on rehearing Kenro, Inc. v. Fax Daily, Inc., 962 F.Supp. 1162 (S.D. Ind. 1997) (holding that federal courts have jurisdiction over TCPA claims by virtue of federal-question jurisdiction under 28 U.S.C. § 1331).

It is the Constitution itself, not Congress, that imposes the duty upon an appropriate state court to hear claims arising under a valid federal statute such as the TCPA. For that reason, the TCPA clearly presents no Tenth Amendment “commandeering” problem, regardless of whether jurisdiction is exclusive in the state courts or concurrent with the federal courts. The “if otherwise permitted” language of the TCPA was fully explored by the Fourth Circuit in Int’l Science, 106 F.3d at 1156:

The clause . . . “if otherwise permitted by the laws or rules of court of a State” does not condition the substantive right to be free from unsolicited faxes on state approval.

At least one other court has agreed, as this language was adopted in a similar case in the Second Circuit. Foxhall Realty Law Offices, Inc. v. Telecommun. Premium Svcs., Ltd., 156 F.3d 432, 438 (2nd Cir. 1998). A cause of action under the TCPA is therefore available in this State’s courts to all citizens of this State without any requirement for the State to “opt-in” to the TCPA.

III. Implied versus express consent.

Defendant argues that, by joining the Chamber of Commerce and allowing his facsimile number to appear in the membership list, Plaintiff consented to receipt of unsolicited fax advertisements at that number. Plaintiff argues that even if his actions could be construed as implied consent to receive fax advertisements, the TCPA requires prior express consent as the only exception to the prohibitions on sending unsolicited fax advertisements. 47 U.S.C. § 227(a)(3). Thus our inquiry is reduced to a pure question of statutory construction of the phrase “prior express invitation or permission.”

We begin, as we must, with the plain language of the statute, which provides at § 227(b)(1):

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

* * *

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

The TCPA defines “unsolicited advertisement” by:

(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. [emphasis added]

In general, the TCPA restricts or prohibits three types of solicitations: 1) unsolicited fax advertisements to homes and businesses, 2) telemarketing solicitations by an artificial or prerecorded voice, and 3) telemarketing solicitations by live agents. It is worth noting that the restrictions on

unsolicited fax advertisements are the most rigid of the three. In addition to an exemption for prior express consent, the restrictions on voice telemarketing solicitations generally exempt calls to businesses, provide exemptions for charities, and provide for an established-business-relationship exemption under certain circumstances. 47 U.S.C. § 227(a)(3). These and other additional exemptions are not available to fax advertisements. Compare § 227(a)(3) with § 227(a)(4). The maxim casus omissus pro omisso habendus est instructs us that such an exclusion is intentional. “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” Rodriguez v. United States, 480 U.S. 522, 525 (1987).

By excluding these additional exemptions from the prohibitions of fax advertisements, Congress singled out unsolicited faxes for the most stringent restrictions imposing strict liability. This is wholly reasonable, given that Congress found unsolicited fax advertisements interfered with commerce and cost the recipient both time and money. See H.R. Rep. No. 317, 102nd Cong., 1st Sess. 1991 at 10, 25. It shifts the cost of advertising to the unwilling recipient. Id. at 25. It is analogous to a long distance telemarketing call made with the charges reversed or junk mail sent with postage due. As a result, the statute is explicit that obtaining “prior express invitation or permission” presents the only exception to the TCPA’s blanket prohibition on sending unsolicited fax advertisements.

A. Construction of “Prior Express Permission or Invitation”

On the question of statutory interpretation the South Carolina Supreme Court has said. “Where the terms of the statute are clear, the court must apply those terms according to their literal meaning.” Soil Remediation Co. v. Nu-Way Environmental, Inc., 323 S.C. 454, 457, 476 S.E.2d 149, 151 (1996), citing Paschal v. State of S.C. Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995). “In construing a statute, its words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.” Adkins v. Comcar Industries, Inc., 323 S.C. 409, 411, 475 S.E.2d. 762, 763 (1996). We are also mindful that the TCPA is a remedial statute and “should be liberally construed and interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers.” Scarborough v. Atlantic Coast Line R. Co., 178 F.2d 253, 258

(4th Cir. 1950). Exemptions from provisions of remedial statutes “are to be construed narrowly to limit exemption eligibility.” Hogar v. Suarez-Medina, 36 F3d 117, 182 (1st Cir 1994); accord Olsen v. Lake Country, Inc., 955 F.2d 203, 206 (4th Cir. 1991). See also 3 N. Singer, Sutherland Statutory Construction § 60.01.

The term “prior express invitation or consent” is not defined in the statute. Black’s Law Dictionary defines “express” as:

Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C.A.Minn., 34 F.2d 270, 274. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with “implied.”

Black’s Law Dictionary (Revised 6th ed.) Webster’s dictionary provides a similar definition. This is the proper definition to use within the context of the TCPA and is confirmed by the FCC’s opinion:

Although the term “express permission or invitation” is not defined in statutory language or legislative history, there is no indication that Congress intended that calls be excepted from telephone solicitation restrictions unless the residential subscriber has (a) clearly stated that the telemarketer may call, and (b) clearly expressed an understanding that the telemarketer’s subsequent call will be made for the purpose of encouraging the purchase or rental of, or investment in, property, goods or services.²

In the Matter of the Telephone Consumer Protection Act of 1991, Memorandum Opinion and Order, ¶ 11, 10 FCC Rcd 12391, 78 Rad. Reg. 2d (P&F) 1258 (August 7, 1995) 1995 WL 464817 (F.C.C.). The same FCC order states that “We [the FCC] do not believe that the intent of the TCPA is to equate mere distribution or publication of a telephone facsimile number with prior express permission or invitation to receive such advertisements.” Id.

This court agrees with Black’s and with the FCC, and accordingly holds that for the purposes of the TCPA, “prior express permission or invitation” means that the sender must obtain prior consent from the recipient in direct and explicit terms, set forth in words, and not left to inference or

² while the FCC is addressing the “express permission or invitation” clause in the TCPA as applied to live operator telemarketing calls, the same construction applies equally to that phrase with respect to telephone facsimiles.

implication. This consent must state clearly and unambiguously that the sender may send fax advertisements to the recipient. Accordingly, we find that Plaintiff's actions do not constitute "prior express invitation or consent" as required by the statute. Defendant's alternative claim that Plaintiff's actions gave implied consent is not relevant. Even if consent could be inferred or implied from Plaintiff's actions, the statute plainly requires prior express consent. We therefore find for Plaintiff on the issue of liability. The TCPA at § 227(b)(3)(B) provides that Plaintiff shall recover the greater of actual monetary loss or \$500 in damages for each such violation of the statute or FCC rules. Plaintiff has not claimed any actual damages and is entitled to the statutory minimum damages of \$500 for the violation he has proven.

IV. Willful or Knowing Violations

Plaintiff also alleges that Defendant's actions are "knowing and/or willful" within the meaning of the 1934 Communications Act and prays for treble damages as provided for by the TCPA, which provides, in pertinent part:

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

47 U.S.C. 227(b)(3). "Willfully" and "knowingly" are terms of art within the law. "'Willfully' means something not expressed by 'knowingly,' else both would not be used conjunctively." United States v. Illinois Central R. Co., 303 U.S. 239, 243 (1938).³ The terms therefore have different meanings within the TCPA, and we consider each separately.

A. Knowingly

The FCC has a well established construction of "knowing" as used throughout that agency's administration of the 1934 Communications Act. This standard is set out as a clear "knew or should have known" standard. Intercambio, Inc., 3 FCC Rcd. 7247, 64 Rad. Reg. 2d (P & F) 1663, 1988 WL 486783 (F.C.C.); Audio Enterprises, Inc., 3 FCC Rcd. 7233, 64 Rad. Reg. 2d (P & F) 1681, 1988 WL 486782 (F.C.C.).

As stated previously, the term "knowingly," for purposes of enforcement actions brought under Section 223(b)(4), does not require that a person have a specific intent to violate the statute.

³ But see e.g. Hutchman v. State, 66 P.2d 99, 101-2, 61 Okl. Cr. 117 (1937). ("'Willfully' is equivalent to 'knowingly.'") Citing Words and Phrases volume 8 [First Series], pp. 7474 and 7475: ("These words are used interchangeably and both convey the same meaning.")

Rather, the "knowingly" standard only requires that a person either had reason to know or should have known that it engaged in acts which could constitute a violation of the statute.

Intercambio, ¶ 41.

As the administrative agency charged with administering the TCPA, the FCC's definition is entitled to great deference from a court where that definition is not clearly at odds with the intent of Congress. Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984). "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." Id. At 843 n 11. Other authorities agree with the FCC, having held that "knowingly" "does not have any meaning of bad faith or evil purpose or criminal intent." United States v. Sweet Briar, Inc., 92 F.Supp. 777, 780 (D.S.C. 1950).⁴ Similarly, "knowingly" can not be held to mean knowledge that a particular act was a violation of the law, as this would conflict with the truism that all persons are presumed to know the law.

We note that in addition to private suits brought by individual consumers, the FCC is empowered by the Communications Act to take actions against persons violating the TCPA. 47 U.S.C. § 503. "Federal laws 'should be the same everywhere' and 'their construction should be uniform.'" U.S. Term Limits, Inc. v. Thornton, 514 US 779, 812 (1995) citing Murdock v. City of Memphis, 87 U.S. 590, 632 (1874). Since the FCC would properly impose its well established definition of "knowing" on its own enforcement actions against TCPA violators, it could subvert uniform enforcement of the TCPA if state courts hearing TCPA cases imposed a different definition than the FCC. In other words, conduct that would be "knowing" in an action brought by the FCC might not be "knowing" if the same action was brought by a consumer in a state court. Therefore this Court will give deference to the FCC's construction and hold that "knowing" within the context of the TCPA requires only that a Defendant knew or should have known it was engaged in acts which could constitute a violation of the statute.

Applying this "knew or should have known" standard, it is clear that Defendant should have known that its actions could constitute a violation of the statute. Any business that engages in a regulated activity (in this case sending advertisements via fax) must fully acquaint itself with the laws and regulations governing that activity - or risk the consequences for that laxity. Had the fax sent to Plaintiff been misdirected as a result of an error in

⁴ See generally United States v. Sinskey, 119 F.3d 712 (8th Cir. 1997), for a recent exploration of "knowing" in federal courts.

dialing, a wrong number, or otherwise not due to fault or negligence of Defendant, it would not fall within the "knowing" standard. While it may seem harsh to apply such strict liability with a "knew or should have known" standard, that is nonetheless the standard the FCC would undoubtedly apply, and thus is the appropriate standard for this Court to apply to the TCPA. It has been long established that harshness is no justification for a court to alter its interpretation of the law. "If the true construction has been followed with harsh consequences, it cannot influence the courts in administering the law. The responsibility for the justice or wisdom of legislation rests with the Congress, and it is the province of the courts to enforce, not to make, the laws."

B. Willfully

The FCC's construction of "willful" is set forth in In re Southern California Broadcasting Co., 6 FCC Rcd. 4387, 69 Rad. Reg. 2d (P & F) 953 (1991). In Southern California Broadcasting, the FCC took action against the respondent under 47 U.S.C. § 503(b)(1)(B), which provides for forfeitures for "willful or repeated" violations of the FCC's rules. The FCC cited a line of prior Commission rulings⁵ and said:

The [House] Conference Report . . . specifically notes Congress's intent that the definition is consistent with the Commission's decision in Midwest Radio-Television, Inc. [citation omitted] Thus, consistent with congressional intent, recent Commission interpretations of "willful" do not require licensee intent to engage in a violation.

Southern California Broadcasting, ¶ 5. The "congressional intent" was a Conference Committee report⁶ regarding the amendment to the 1934 Communications Act, which established a statutory definition for the term "willful" at 47 U.S.C. § 312(f)(1):

(1) The term "willful," when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter [Chapter 5 of the Communications Act] or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States.

Prior to adoption of this statutory definition in 1982, the FCC consistently used a similar definition in its own proceedings. See In the Matter of Liability of Midwest Radio-Television, Inc. 45 FCC 1137 (1963). Congress created the statutory definition at § 312(f)(1) for the specific purpose of codifying the FCC's definition used in

⁵ Citing MCI Telecommunications Corp., 3 FCC Rcd 509, 514 n. 22 (1988) (subsequent history omitted); Hale Broadcasting Corporation, 79 FCC 2d 169, 171 (1980).

⁶ H.R.Conf.Rep. No. 97-765, 97th Cong.2d Sess. (1982), reprinted in 1982 U.S.C.C.A.N. 2294.

Midwest Radio-Television, H.R.Conf.Rep. No. 97-765, at 51. (“The definitions . . . are consistent with the Commission’s application of those terms in Midwest Radio-Television Inc., 45 F.C.C. 1137 (1963).”) Congress further stated that this statutory definition would control “for any other relevant section of the [1934 Communications] Act.” Id. at 50. The TCPA, as an amendment to the 1934 Communications Act, is such a relevant section since it uses “willful” as the defined term of art.

The result of the statutory definition and FCC construction of “willful” is to remove any element of intent or mens rea from the term, which is a common construction in the law. Other authorities recognize that “willful” can be used in a sense “which does not imply any malice or wrong.” See 94 C.J.S. 625-26 and cases cited therein. Intent to do a wrongful act is not an essential element of willfulness. Id. at 625 It implies nothing blamable, but simply the act of a free agent. Smith v. Wade, 461 U.S. 30 (1983), n 8, citing 30 American and English Encyclopedia of Law, 529-530 (2d ed. 1905) (footnote omitted).

To avoid a finding of willfulness, it is important to distinguish the nature of the conduct (which must be unintentional), and not the violation of the regulation to which the conduct led. The FCC has used the example of “bumping a switch” as an example of a non-willful act that could give rise to a violation that would not be construed as willful. In re Valley Page, 12 FCC Rcd. 3087 at ¶ 6, 1997 WL 106481 (F.C.C.). (“[W]illfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question such as using a radio transmitter, as opposed to being accidental (for example, brushing against a power switch turning on a radio transmitter).”) In addition, the FCC has consistently found willfulness where “laxity” has led to preventable violations. Midwest Radio-Television, at 1141. In the case of the TCPA and as used by the FCC, “willful” simply means that the act out of which a violation arises was not an accident or mistake, even if the resulting violation was unintended.

As with its established construction of the term “knowing,” the FCC would apply its long-established definition of “willful” to TCPA actions. This court will do likewise and adopt the FCC construction of “willful” codified in the Communications Act at 47 U.S.C. § 312(f)(1). Accordingly, this Court holds that a “willful” violation of the TCPA exists where there is a conscious and deliberate commission or omission of an act which results in a violation, irrespective of any intent to violate any law or regulation.

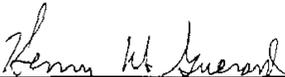
Testimony was undisputed that the fax advertisement sent to Plaintiff was not an accident or mistake. Defendant intended to send the fax to Plaintiff and did exactly what it intended to do. Therefore, this was a willful action which was a violation of the statute and clearly within the “willful” standard proper for the TCPA.

V. Trebled Damages

Having found that Defendant's violation of the statute was willful and knowing, the amount of exemplary damages is entirely within the discretion of this Court. Defendant engaged in illegal conduct, and reaped a gain from this conduct in the form of reduced advertising costs - and possibly even new customers. We are mindful that there may be some manner of violative conduct more egregious than what this defendant did and the full effect of the TCPA's trebled damages should be reserved for those most egregious violators. This Defendant's conduct deserves a measured response, and this Court finds that the appropriate amount of exemplary damages in this case to be Fifty and no/100(\$50.00) dollars.

It is hereby ORDERED, ADJUDGED AND DECREED, that Plaintiff shall have judgment against Defendant for Five Hundred Fifty and no/100(\$550.00) dollars plus Thirty Five and no/100(\$35.00) dollars court costs.

AND IT IS SO ORDERED.


Henry W. Gerard, Magistrate
November 29, 1999, Charleston South Carolina.

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

FILED

JUN 21 2002

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

NATIONAL EDUCATIONAL)
ACCEPTANCE, INC.,)
)
Plaintiff,)
)
v.)
)
SMARTFORCE, INC.,)
)
Defendant.)

Cause No. 01AC-2849
Division 41

JUDGMENT AND ORDER

This matter originally came before the Court on May 1, 2002, on the parties' cross Motions for Summary Judgment. At that time the Court denied Defendant's motion and granted Plaintiff's motion with regard to liability. Liability having been established, Defendant's affirmative defense of mitigation of damages is now before the Court.

This is an action originally brought by Plaintiff against Defendant Smartforce, Inc., ("Smartforce"), alleging transmissions of unsolicited advertisements via facsimile in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. The parties have stipulated to a set of facts which establish the relevant facts. Between the dates of February 22, 2000 to April 4, 2000, inclusive, Defendant sent six (6) facsimile transmissions to Plaintiff at (314) 576-6314. Defendant operates a website at which visitors were able to obtain information about computer courseware products by entering information in a registration form screen on the website. Plaintiff visited that website and provided information about himself, including his fax number. Plaintiff

received no verbal or written notice of Defendant's intended use of the information collected by the website other than the text on the SmartCertify website and its registration form screen. The parties also stipulated that the damages for each fax found to have been sent by Defendant in violation of the provisions of the TCPA is \$500 (Five Hundred dollars).

Defendant argues that Plaintiff had a duty to mitigate his damages by requesting Defendant to refrain from sending faxes to Plaintiff. Plaintiff argues that every person has a right to expect all other persons to comply with the law, and that there is no duty to mitigate damages in this context. In providing its fax number, Plaintiff expected that it would be used only for legally permissible purposes.

An individual cannot ignore an opportunity to stem the continuing increase in damages from an injury and recover the same from a defendant. Cline v. City of St. Joseph, 245 S.W.2d 695 (Mo.App. 1952). He has the responsibility to mitigate the recovery of further damages. Mitigation applies only once an injury is sustained; the issue of mitigation can only be raised in the context of damages. Prior to the assessment of liability, consideration of mitigation is improper. Evinger v. Thompson, 265 S.W.2d 726 (Mo. Banc 1954).

In the context of the TCPA, damages are mandated. Defendant's argument of mitigation is not applicable to a statute such as the TCPA which specifies fixed mandatory damages. The Court must abide by the plain words of the statute and award the mandatory statutory damages. "If the true construction has been followed with harsh consequences, it cannot influence the courts in administering the law. The responsibility for the justice or wisdom of legislation rests with the Congress, and it is

the province of the courts to enforce, not to make, the laws.” United States v. First Nat’l Bank of Detroit, 234 U.S. 245, 260 (1914).

Defendant cannot apply the concept of mitigation of damages to the commission of a series of *independently* wrongful acts. This represents a seemingly new form of mitigation – one that stands for the proposition that a plaintiff must presume that a defendant will commit another unlawful act and must take steps before that act is done. Mitigation does not excuse the consequences of a harm intentionally inflicted merely because the person injured neglected to take precautions to avoid or mitigate the damages. Each fax is independently actionable, and like the serial commission of torts, not the proper subject of the defense of mitigation.

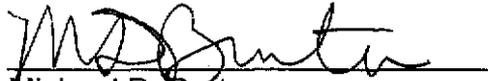
Finally, in the context of unsolicited faxes, there are no ongoing damages to be mitigated. The Court finds, as a matter of law, that the defendant is presumed to know the law. That finding, without more, prevents the Court from concluding that Plaintiff in this matter had any duty to inform the Defendant of the law and the consequences for its violation or be barred from recovery thereunder. Since each transmission is independently wrongful, and since the damages mandated by the TCPA are statutory, the Court finds that mitigation does not apply in the context of unsolicited facsimile advertisements under the TCPA.

CONCLUSION

The statute mandates \$500 in statutory damages for each violation. The facts set forth at the prior hearing established six faxes were sent to Plaintiff in violation of the statute.

WHEREFORE, it is ORDERED, ADJUDGED AND DECREED that Plaintiff have and recover from Defendant Smartforce, Inc. a judgment in the amount of THREE THOUSAND DOLLARS (\$3,000) plus costs.

SO ORDERED:



Michael D. Burton
Judge, Division 41

6/21/02

Entered this 21st day of June, 2002

cc: Attorneys of Record

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
21ST JUDICIAL CIRCUIT, STATE OF MISSOURI

FILED

AUG 13 2002

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

MICRO ENGINEERING, INC., ET AL.,

Plaintiffs,

vs.

~~NACM ST. LOUIS GATEWAY REGION,~~
ST. LOUIS ASSOCIATION OF CREDIT
MANAGEMENT, INC.,

Defendant.

Cause No. 02AC-008238 X CV

Div. 39

ORDER

This matter came before the Court on August 13, 2002 on Defendant's Motion to Dismiss or in the alternative, Motion to Strike. Plaintiffs filed suit under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, alleging they were sent unsolicited advertisements via facsimile by Defendant. Defendant argues that the TCPA provisions restricting unsolicited facsimile advertisements violates First Amendment principles of free speech, citing Missouri v. Am Blast Fax, Inc., 196 F. Supp. 2d 920 (E.D. Mo. 2002) (hereinafter "ABF").¹ Defendant also argues that two of the alleged faxes do not constitute "unsolicited advertisements" as defined by the statute.

As a preliminary matter, this Court is not bound by decisions of federal trial courts. Reynolds v. Diamond Foods & Poultry, Inc., -- S.W.3d --, note 4, No. SC84433 (Mo. Banc, July 23, 2002) (overruling Fox v. McDonnell Douglas Corp., 890 S.W.2d 408, 410 (Mo. App. 1995)). This Court has previously discussed the ABF decision, and found its analysis unpersuasive. Clean Carton Co., Inc. v. Constellation 3D, Inc., (order denying motion to dismiss based on Missouri v. ABF), No.

1. That decision has been appealed to the Eighth Circuit Court of Appeals by both Attorney General Nixon and the U.S. Department of Justice.

01AC-029591 (Div 39) (Mo. Cir. Ct., June 25, 2002);. Nothing has changed in that regard. Rather than merely follow the ABF decision as suggested by Defendant, the weight of persuasive contra authority requires an independent assessment of the constitutional question.

This Court has had the opportunity to address this precise question several times. Clean Carton Co., Inc. v. Constellation 3D, Inc., (order denying motion to dismiss based on Missouri v. ABF), No. 01AC-029591 (Div 39) (Mo. Cir. Ct., June 25, 2002); Rhone v. Olympic Comm., Inc., No.: 01AC-002887 (Div 39) (Mo. Cir. May 14, 2002); Brentwood Travel Serv., Inc. v. Ewing, No 01AC-022171 (Div. 39) (Mo. Cir. Ct., Apr. 30, 2002) Zeid v. The Reding Law Firm, P.C., No. 01AC-013005 (Div. 39) Cir. Ct. Mo., March 19, 2002); Coleman v. ABF, No. 00AC-005196 (Div. 32) (Mo. Cir. Ct. Oct. 12, 2000). Those previous orders set out ample analysis of this question, and nothing has be presented by this defendant to cause the Court to reach a different conclusion this time. “Although it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies.” Clark v. Community for Creative Non-violence, 468 U.S. 288, note 5 (1984) (overnight camping prohibition not a First Amendment violation). Defendant has not met that obligation. Using another person’s fax machine, paper, and toner without their permission is theft and a trespass – not a speech right. There is no speech restriction here that requires First Amendment scrutiny.

Defendant’s argument that the TCPA is an impermissible restriction on free speech can only be based on a perceived right to use another person’s fax machine, paper, and toner, all without permission of the property owner. To make this a speech case, is to insist on a right to use someone else’s paper, ink, and printing press to print your message, all without the permission of the owner of that printing press. “The First Amendment is not a license to trespass, to steal, or to intrude by

electronic means into the precincts of another person's home or office." Dietmann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971); "[I]t is untenable that conduct such as vandalism is protected by the First Amendment merely because those engaged in such conduct intend thereby to express an idea." In re Michael M., 86 Cal.App.4th 718, 729 citing Texas v. Johnson, (1989) 491 U.S. 397, 404; See, also, State v. Mortimer, 641 A.2d 257 (N.J. 1994) (free speech protection was lost when defendants delivered their message through defacement of private property); State v. Nye, 943 P.2d 96, 101 (1997) (no right to put bumper stickers on other people's cars without their permission).

"It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 507 (1949). Sending unsolicited facsimile advertisements without the recipient's permission is simply not a form of conduct protected by the First Amendment, any more than graffiti on someone else's property is protected speech.

Definition of Unsolicited Advertisement

Defendant next argues that two of the faxes at issue do not constitute an "unsolicited advertisement" as defined by the statute. That definition is "any material advertising the commercial availability or quality of any property, goods, or services." 47 U.S.C. § 227(a)(4). Defendant argues that "[a] facsimile which does not attempt to sell any property, goods or services and only advises a party of an opportunity in which they may partake is not an "advertisement" as defined under the TCPA." Def. Mtn. at ¶ 16. This interpretation misreads the statute. The statute does not require that the property, goods or services being mentioned must be "for sale" as Defendant' argues.

While a court can not adopt a construction of a statute that is contrary to its plain language, the TCPA is a remedial consumer protection statute and "should be liberally construed and

interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers.” Scarborough v. Atlantic Coast Line R. Co., 178 F.2d 253, 258 (4th Cir. 1950). Exemptions from provisions of remedial statutes “are to be construed narrowly to limit exemption eligibility.” Hogar v. Suarez-Medina, 36 F3d 177, 182 (1st Cir 1994). See, e.g., the very first paragraph of the Missouri Revised Statutes, which requires “all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.” RSMo.§ 1.010. Defendant’s fax is an advertisement of Defendant’s services that the “true intent and meaning” of the TCPA addresses.

So is this material “advertising?” Webster’s dictionary defines “advertise” as “to make something known to : notify.” This is a pristine example of where the application of the time honored “duck test” is appropriate - “If it walks like a duck, quacks like a duck, and looks like a duck, then it's a duck.” BMC Industries, Inc. v. Barth Industries, Inc., 160 F.3d 1322, 1337 (11th Cir., 1998). These faxes clearly do “announce” the luncheons Defendant offers. It is clear that such professional functions are offered as a service, albeit ostensibly a free service. It is clear also, that the luncheon consists of a meal. Again, ostensibly free, but “property, goods or service” clearly encompasses the concept of a meal. The fax plainly states that NACM provides services to the “credit and financial professional.” Indeed, these types of luncheon seminars are themselves a service. Also prominently advertised on the fax is Defendant’s web site. This web site is a service. Harjoe v. Colonial Life & Accident Ins. Co., No 01AC-11555, slop op. at 3, (Div. 35) (Mo. Cir. Ct., May 2, 2002 currently before Div 45 on Motion for Trial De Novo of defendant).

CONCLUSION

Defendant’s motion to Dismiss and Motion to Strike is DENIED.

IT IS SO ORDERED.

This the 13 day of August, 2002.



Judge Patrick Clifford, Division 39

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

CASE NO.: 99-SC-86-3267

ROBERT BIGGERSTAFF,)
Plaintiff,)

ATTEST  A TRUE COPY

ORDER

vs.)

SBS RESORT PROMOTIONS, INC.)
Defendant.)

The above captioned matter came before this Court for trial on November 15, 1999. Plaintiff appeared pro se. Defendant was represented by Jonathan Harvey, Esq. of Columbia. Plaintiff filed suit under the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, December 20, 1991, which amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 et seq., by adding a new section, 47 U.S.C. § 227 (the "TCPA") to that Title. The Complaint seeks statutory damages for a solicitation call made with a recorded message, and trebled damages for "willful or knowing" violations as provided for by the TCPA. After considering all of the evidence and arguments, this Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The material facts of this case are essentially undisputed. On May 7, 1999, Defendant placed a telephone call to Plaintiff's home, using a recorded message. A transcript of the message was entered into evidence, which showed that the message, inter alia, asked the called party "if 6 days and 5 nights in Florida for only \$97 sounds good to you, press '1' now to hear all the details." Defendant characterized this message as a survey and not a solicitation. It was undisputed that when the called party pressed "1" in response to the message, that the party received further information extolling the features of Defendant's Florida vacation services, and an inducement to purchase those services.

1. Provisions of the Telephone Consumer Protection Act

The statute provides at § 227(b)(1):

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

(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);. . .

The rules promulgated by the Federal Communications Commission ("FCC") found at 47 C.F.R. 64.1200(c) exempt calls made with a prerecorded message for such a call:

- (1) That is not made for a commercial purpose,
- (2) That is made for a commercial purpose but does not include the transmission of any unsolicited advertisement,
- (3) To any person with whom the caller has an established business relationship at the time the call is made, or
- (4) Which [the caller] is a tax-exempt nonprofit organization.

The TCPA defines "unsolicited advertisement" at 47 U.S.C. § 227(a)(4) by:

- (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.

Defendant argues that the recorded message in the call was not an "unsolicited advertisement" as defined by the statute, and thus exempted from the FCC regulations. The question is therefor whether or not the recorded message in the call constituted an "unsolicited advertisement" and is within the ambit of the statute.

2. "Unsolicited Advertisement"

In light of the language used in the recorded message we can not agree with Defendant's characterization of the message as a "survey" or otherwise permitted by the statute and underlying regulations. The recorded message at issue here is clearly an "unsolicited advertisement" as defined by the statute. The message asks if "6 days and 5 nights in Florida for only \$97 sounds good to you...". This clearly describes the commercial availability and quality of a service to be provided by the caller. Therefore this Court grants judgement in favor of the Plaintiff in the amount of \$500 [47 U.S.C. 227(b)(2)(B)].

3. Willful or Knowing Violations

Plaintiff also alleges that Defendant's actions are "knowing and/or willful" within the meaning of the 1934 Communications Act and prays for treble damages as provided for by the TCPA at 47 U.S.C. § 227(b)(3). The FCC has addressed this issue, with a clarifying opinion letter pursuant to 47 C.F.R. §§ 0.91, 0.291, issued July 27, 1999, which cites the FCC's construction of the terms "willful" and "knowing." "Knowing," is set out as a clear "knew or should have known" standard citing Audio Enterprises, Inc., Notice of Apparent Liability for Forfeiture, 3 FCC Rcd 7233, 7237, ¶ 29 (1988). "Willful" is defined so that it "does not require that the actor knew he was acting wrongfully; it requires only that the actor knew he was doing the acts in question" citing Liability of Midwest Radio-Television

Inc., Memorandum Opinion and Order, 45 F.C.C. 1137, 1140-41, at ¶¶ 8-11 (1963), reflecting the definition of "willful" at 47 U.S.C. § 312(f).

The call made to Plaintiff was not merely an accident or mistake. Applying the FCC constructions, it is clear that Defendant should have known that its actions could constitute a violation of the statute, and that the Defendant knew it was making solicitation calls using a recorded message. Any business that engages in a regulated activity (in this case making calls using a recorded message) must fully acquaint itself with the laws and regulations governing that activity - or risk the consequences for that laxity. This Court therefore finds Defendant's violation of the TCPA was both willful and knowing.

4. Trebled Damages

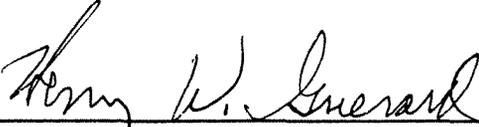
The TCPA provides that for willful or knowing violations, the court may increase the damage award up to three times the amount of regular damages. Defendant carefully crafted the content of the recorded message, not in an attempt at compliance with the law, but in a calculated attempt at evasion of the statute's prohibitions. The full measure of the TCPA's trebled damages are clearly warranted in this case, and this Court hereby trebles the damages to FIFTEEN HUNDRED DOLLARS (\$1,500).

It is hereby ORDERED, ADJUDGED AND DECREED, that Plaintiff shall have judgment against Defendant for \$1,500, plus \$38.20 court costs.

AND IT IS SO ORDERED.

Charleston South Carolina

December 15, 1999


Henry W. Guerard, Magistrate

STATE OF MISSOURI)
COUNTY OF ST. LOUIS)

**IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI**

BRENTWOOD TRAVEL, INC., DAVID HARJOE,
MARILYN MARGULIS, JEFFREY RHONE,
NATIONAL EDUCATIONAL ACCEPTANCE CORP.
and NEAL ZEID,

Plaintiffs,

v.

ANNEX COMPUTERS, INC., and AMERICAN
BLAST FAX, INC.,

Defendants,

v.

AMERICAN BLAST FAX, INC.,

Third-Party Defendant.

Cause No. 00AC-13051

Division 39

FILED

DEC 18 2001

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

ORDER

This matter came before the Court on October 2, 2001, on Plaintiffs' Motion For Summary Judgment. The parties have filed memoranda of law and the Court has heard the arguments of both parties. For the reasons set forth below, Plaintiffs' Motion is GRANTED.

As a preliminary Matter, Defendant/Third-Party Defendant American Blast Fax, Inc. did not appear, and therefore the Court enters Judgment against American Blast Fax, Inc., on Plaintiffs Motion for Summary Judgment.

Plaintiffs brought suit against Defendant under the private right of action provided in 47 U.S.C. § 227(b), the Telephone Consumer Protection Act, ("TCPA"). Plaintiffs allege that

Defendant Annex hired American Blast Fax, Inc. ("ABF") to send Annex's advertising material by fax, and that Plaintiffs' collectively received seventeen (17) facsimiles advertising Annex's services.

FINDINGS OF FACT

The following facts are not in dispute. ABF was retained by Annex for the purpose of sending faxes advertising Annex's services. Annex was fully aware that it did not have prior express invitation or permission to send faxes to any recipients of the faxes. ABF at all times relevant provided the services requested by Annex. Annex knew, or should have known that it was directly, or indirectly through an agent, engaging in the act of sending advertisements by fax. Plaintiff presented affidavits from each Plaintiff attesting to the receipt of the faxes as alleged in the Motion.

Defendant avers in its response to Plaintiffs' motion that it has no knowledge of the specific faxes sent to these Plaintiffs. However Plaintiffs' affidavits and exhibits accompanying their motion are competent summary judgment evidence attesting to the receipt of the faxes as alleged. Annex argues that to require it to make a factual showing to rebut the facts alleged in the motion is tantamount to shifting the burden of proving their case from Plaintiff to Defendant. However, the ample evidence and testimony set forth by the motion is sufficient to require Defendant to make some factual showing to the contrary. ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp., 854 S.W.2d 371, 381 (Mo. banc 1993). Annex did not provide any such evidence or testimony. Therefore, the Court also finds that each Plaintiff received the faxes alleged in the motion and supported by their affidavits.

Annex also denies that ABF acted as its "agent" but the facts as admitted demonstrate that ABF was retained to send unsolicited advertising faxes by and for Annex, and that is precisely what ABF did. Clearly ABF was Annex's agent for the purposes of sending unsolicited faxes, ABF operated within that scope, and the claims of Plaintiffs arise from acts conducted within that scope.

CONCLUSIONS OF LAW

1. Construction of the TCPA

Defendant Annex argues that in order to be liable under the TCPA, a defendant must physically “use” the fax machine itself, as opposed to employing an agent to do so, and that Annex can not be held vicariously liable for the acts of ABF in sending faxes on behalf of Annex. Plaintiffs argue that liability under the TCPA attaches to Annex under the FCC construction of the statute imposing strict, vicarious liability, and the principle of respondeat superior.¹ The relevant part of the statute provides:

It shall be unlawful for any person within the United States— ...

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

47 U.S.C. § 227(b)(1). In essence, Defendant argues for a strict literal interpretation of the term “use” to require physical use. Plaintiffs argue that the TCPA is a remedial consumer protection statute that is due a liberal construction. “[T]he familiar canon of statutory construction [is] that remedial legislation should be construed broadly to effectuate its purposes.” Tcherepnin v. Knight, 389 U.S. 332, 335 (1967). The question of the TCPA’s strict liability is thus reduced to one of statutory construction.

In construing the TCPA, a court is not without ample guidance. The interpretation of any act by the administrative agency overseeing that act is due great deference. Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971); Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S.

¹ This issue is not new to the Court. See, e.g., Coleman v. Real Estate Depot, Inc., No. 00AC-013006 (Div. 39, Mo. Cir. Ct. March 27, 2001). As this issue seem want to recur, this substantive order is in the interest of judicial economy, and should provide guidance to future litigants.

837, 844 (1984). “The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” Id., 467 U.S. at 843, n 11 (additional citations omitted).² This deference is not simply a matter of statutory construction, but is part of the design of the separation of powers. The courts have long recognized that Congress legislates with full knowledge of the canons of construction that the courts apply. McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 496 (1991) (“It is presumable that Congress legislates with knowledge of our basic rules of statutory construction,...”). Among those canons that Congress is presumptively aware, is the deference due an agency’s interpretations of the statute. Rejecting the agency interpretation, absent compelling indications that it is wrong is therefore a rejection of congressional intent. This is one of the principles underlying the Chevron Doctrine:

The principal rationale underlying [*Chevron*] deference is that in this context the agency acts as a congressional proxy; Congress develops the statutory framework and directs the agency to flesh out the operational details.

Atchison, Topeka and Santa Fe Ry. Co. v. Pena, 44 F.3d 437, 441-42 (7th Cir. 1994), aff’d 516 U.S. 152 (1996).

The FCC obviously construes “use” to include both direct use, and indirect use by way of an agent: “We clarify that the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements.” In the Matter of the Telephone Consumer Protection Act of 1991, 10 FCC Rcd 12391 (1995) at ¶ 35. This is wholly reasonable, since if liability could be avoided by using such an intermediary, advertisers

² For a discussion of the policy of deference to agency construction, see Chevron and Canons of Statutory Construction, 58 Geo. Wash. L. Rev. 829 (1990).

could use a series of fly-by-night fax advertising firms to send waves of unsolicited faxes, and be insulated from liability. Such a construction would clearly allow avoidance of the statute, and such a construction is to be avoided. A remedial statute "should be liberally construed and interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers." Scarborough v. Atlantic Coast Line R. Co., 178 F.2d 253, 258 (4th Cir. 1950).

a. Deference to FCC interpretation ensures consistency of the federal scheme

It has long been an accepted principle "that Congress normally intends that its laws shall operate uniformly throughout the nation so that the federal program will remain unimpaired." Reconstruction Finance Corp. v. Beaver County, Pa., 328 U.S. 204, 209 (1946). Delegating authority to implement a statutory scheme to a federal agency is one way that such consistency is achieved. However, the "dual enforcement" of the TCPA creates a potential for dangerous non-uniformity if the FCC's interpretation of its own rules is ignored.

In addition to private suits brought by individual consumers (such as the case at bar), the FCC is empowered by the Communications Act to take actions against persons violating portions of that act, including the TCPA. 47 U.S.C. § 503. The FCC has done so, issuing numerous citations and fines for TCPA violations. See, e.g., In the Matter of 21st Century Fax(es) Ltd., a.k.a. 20th Century Fax(es), Notice of Apparent Liability for Forfeiture, (FCC 00-425) 200 WL 1799579 (Dec. 4, 2000) (forfeiture order for \$1,107,500 fine against 21st Century Fax(es) Ltd. for violations of the TCPA).

Without question, the FCC would properly impose vicarious liability in its own enforcement actions against TCPA violators. It would subvert uniform enforcement of the TCPA if state courts hearing TCPA cases imposed a different interpretation than the FCC. In other words, conduct that

would be violation of the statute in an action brought by the FCC might not be held to be a violation if the same action was brought by a consumer in a state court.

Defendant argues that uniform application of the federal law “should not be a concern since state courts have exclusive jurisdiction over causes of action” under the TCPA. This argument misapprehends the role of state courts in the federal scheme. State courts, when hearing a federal cause of action, must adjudicate those cases in accordance with substantive federal law, even if the federal practice conflicts with state practice.³ “Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. . . . [I]t is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way.” Davis v. Wechsler, 263 U.S. 22, 24 (1923). This includes state practice on liability or burden of proof that are different from federal practice. See Central Vt. R. Co. v. White, 238 U.S. 507, 510-11 (1915)) (When a state court hears federal cases, the burden of proof in contributory negligence is on the defendant, even if state practice is different, since that is the federal rule.)

b. Statutory Construction of “willful or knowing” within the TCPA

The TCPA provides for mandatory liquidated statutory damages of \$500 per violation. The statute further provides for trebled damages to be awarded if the violations were “willful or knowing.” 47 U.S.C. § 227(b)(3). “Willfully” and “knowingly” are terms of art within the law. “‘Willfully’ means something not expressed by ‘knowingly,’ else both would not be used

³ This is the converse of the well settled “Erie doctrine” where a federal court sitting in diversity hearing a state cause of action, must apply substantive state law, even if federal practice would be different. Instances of federal statutes being heard by state courts, such as the TCPA, are often referred to as “reverse-Erie” cases. See Alfred Hill, Substance and Procedure in State FELA Actions - The Converse of the Erie Problem?, 17 Ohio State L.J. 384 (1956).

conjunctively.” United States v. Illinois Central R. Co., 303 U.S. 239, 243 (1938). The terms therefore have different meanings within the TCPA, and each must be considered separately.

i. Knowing

The FCC has a well established construction of “knowing” as used throughout that agency’s administration of the 1934 Communications Act. This standard is set out as a clear “knew or should have known” standard. Intercambio, Inc., 3 FCC Rcd. 7247 (1988); Audio Enterprises, Inc., 3 FCC Rcd. 7233 (1988).

Rather, the “knowingly” standard only requires that a person either had reason to know or should have known that it engaged in acts which could constitute a violation of the statute.

Intercambio, ¶ 41. Other authorities agree with the FCC, having held that “knowingly” “does not have any meaning of bad faith or evil purpose or criminal intent.” United States v. Sweet Briar, Inc., 92 F.Supp. 777, 780 (D.S.C. 1950). Similarly, “knowingly” can not be held to mean knowledge that a particular act was a violation of the law, as this would conflict with the truism that all persons are presumed to know the law.

Applying this “knew or should have known” standard, it is clear that Defendant should have known that its actions could constitute a violation of the statute. While it may seem harsh to apply such strict liability with a “knew or should have known” standard, that is nonetheless the standard that is the appropriate standard for this Court to apply to the TCPA. It has been long established that harshness is no justification for a court to alter its interpretation of the law. “If the true construction has been followed with harsh consequences, it cannot influence the courts in administering the law. The responsibility for the justice or wisdom of legislation rests with the Congress, and it is the province of the courts to enforce, not to make, the laws.” United States v. First Nat’l Bank of Detroit, 234 U.S. 245, 260 (1914).

ii. **Willfully**

The proper construction of “willful” within the context of the 1934 Communication’s act is set forth at 47 U.S.C. § 312(f), and reiterated in In re Southern California Broadcasting Co., 6 FCC Rcd. 4387 (1991). An amendment to the 1934 Communications Act, established a statutory definition for the term “willful” at 47 U.S.C. § 312(f)(1):

(1) The term “willful,” when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter [Chapter 5 of the Communications Act] or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States.

Congress further stated that this statutory definition would control “for any other relevant section of the [1934 Communications] Act.” H.R. Conf. Rep. No. 765, 97th Cong., 2nd Sess. 1982, 1982 U.S.C.C.A.N. 2261, at ¶ 50. The TCPA, as an amendment to the 1934 Communications Act, is such a relevant section since it uses “willful” as the defined term of art.

The result of the statutory definition and FCC construction of “willful” is to remove any element of intent or mens rea from the term, which is a common construction in the law. Other authorities recognize that “willful” can be used in a sense “which does not imply any malice or wrong.” See 94 C.J.S. 625-26 and cases cited therein. Intent to do a wrongful act is not an essential element of willfulness. Id. at 625 It implies nothing blamable, but simply the act of a free agent. Smith v. Wade, 461 U.S. 30 (1983), n 8, citing 30 American and English Encyclopedia of Law, 529-530 (2d ed. 1905) (footnote omitted).

To avoid a finding of willfulness, it is important to distinguish the nature of the conduct (which must be unintentional), and not the violation of the regulation to which the conduct led. The FCC has used the example of “bumping a switch” as an example of a non-willful act that could give rise to a violation that would not be construed as willful. In re Valley Page, 12 FCC Rcd. 3087 at

¶ 6, 1997 WL 106481 (F.C.C.). (“[W]illfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question such as using a radio transmitter, as opposed to being accidental (for example, brushing against a power switch turning on a radio transmitter).”) In addition, the FCC has consistently found willfulness where “laxity” has led to preventable violations. In the Matter of Liability of Midwest Radio-Television, Inc., 45 FCC 1137, 1141 (1963). In the case of the TCPA and as used by the FCC, “willful” simply means that the act out of which a violation arises was not an accident or mistake, even if the resulting violation was unintended. Accordingly, a “willful” violation of the TCPA exists where there is a conscious and deliberate commission or omission of an act which results in a violation, irrespective of any intent to violate any law or regulation.

Defendant intended to send the faxes and did exactly what it intended to do. Therefore, these were willful actions in a violation of the statute and clearly within the “willful” standard proper for the TCPA.

The Court is not unsympathetic to Defendant Annex’s position. Annex avers that it retained ABF for its expertise in facsimile advertising and relied on the representations of ABF that sending unsolicited advertising faxes was legal “as newspaper, radio, and television advertising is.” If true, Annex relied on the advice of ABF to Annex’s detriment.⁴ However, ignorance of the law is no excuse. If one relies on another for such advice, they must accept the consequences of that reliance. The Supreme Court has noted when an agent causes harms within the scope of its agency, “that ‘few doctrines of the law are more firmly established or more in harmony with accepted notions of social

⁴ To the extent that any question of legality arises in the course of business, such a business would be expected to seek legal advice from an attorney licensed in the state, and not the layman’s legal advice of a vendor who is not a licensed attorney.

policy than that of the liability of the principal without fault of his own.” American Soc. of M. E.’s v. Hydrolevel Corp., 456 U.S. 556, 568 (1982).

Based on the constructions of “willful” and “knowing” explained above, the Court finds Annex’s conduct was both “willful” and “knowing.”

2. Trebled Damages

Having found that Defendant's violation of the statute was willful and knowing, the amount of exemplary damages is entirely within the discretion of this Court. Defendant Annex engaged in illegal conduct, and reaped a gain from this conduct in the form of reduced advertising costs - and possibly even new customers. The Court is mindful that there may be some manner of violative conduct more egregious than what Annex did and the full effect of the TCPA's trebled damages should be reserved for those most egregious violators. Annex’s conduct deserves a measured response. Therefore judgment shall be entered against Annex for the mandatory statutory damages of \$500.00 for each fax, and this Court finds that the appropriate amount of exemplary damages against Annex in this case to be one-fourth of the possible discretionary damages, equal to an additional \$250.00 of discretionary damages for each fax.

Judgment is hereby ordered for Plaintiffs as follows:

Stephanie Turner - \$750
David L. Harjoe - \$1,500
Marilyn Margulis - \$1,500
Jeffrey Rhone - \$1,500
National Educational Acceptance, Inc. - \$6,000
Neal Zeid - \$1,500

Total Judgment in the amount of \$12,750, plus Court cost awarded to Plaintiffs.

Defendants are permanently enjoined from sending any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person’s

facsimile machine without that person's prior express invitation or permission in violation of the Telephone Consumer Protection Act 47 U.S.C. §227.

IT IS SO ORDERED.

This the *18* day of *November* 2001.

A handwritten signature in black ink, appearing to read "Patrick Clifford", written over a horizontal line.

Judge Patrick Clifford, Division 39

FILED

APR 30 2002

STATE OF MISSOURI)
COUNTY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

JUAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

BRENTWOOD TRAVEL SERVICE, INC. and
ISRAEL DENLOW,

Plaintiffs,

v.

LORIE A. EWING d/b/a CAROUSEL OF
STITCHES,

Defendant.

Cause No. 01AC-022171 T CV

Division 39 - Tuesday

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

This matter came before the Court on April 30 , 2002. Defendant has moved this Court to dismiss Plaintiff's claims on the grounds that the unsolicited facsimile provisions of the Telephone Consumer Protection Act ("TCPA") violate First Amendment speech rights, based on the recent decision of the federal district court in State of Missouri v. Am Blast Fax, Inc., No. 4:00CV933 (March 13, 2002).

Division 39 has recently addressed a First Amendment challenge to the TCPA with a substantive order in Zeid v. The Reding Law Firm, P.C., No. 01AC-013005 (Div. 39, Cir. Ct. Mo., March 19, 2002), and held that the statute does not infringe on constitutionally protected speech rights. Defendant suggests that the recent ABF decision requires a different result.

As a preliminary matter, it is axiomatic that state courts are not bound by the decisions of lower federal courts. Like decisions of a sister state's court, we of course afford consideration of the well reasoned decisions of the lower federal courts, but as the Missouri Supreme Court has cautioned, "a state court should not hesitate to undertake its own independent assessment of the propriety of a

single lower federal court's attempt to construe a statute when the court perceives well-founded deficiencies in that court's analysis." Wimberly v. Labor and Indus. Relations Com'n of Missouri, 688 S.W.2d 344, 348 (Mo. banc 1985). The Court notes that a line of cases to date, including federal district courts in three circuits and a unanimous panel of the Ninth Circuit Court of Appeals have all been in agreement that the TCPA does not violate First Amendment speech provisions, and are contra to the recent ABF decision.

The order in Zeid v. The Reding Law Firm, P.C., No. 01AC-013005 (Div. 39, Cir. Ct. Mo., March 19, 2002) sets out cogent analysis of unsolicited fax advertisement as nonconsensual theft and trespass - the same argument Plaintiff presents here. It also rejects the conclusions of the recent district court in State of Missouri v. Am Blast Fax, Inc., No. 4:00CV933 (March 13, 2002), noting inter alia, that decision was based on a flawed evidentiary record.

"There simply is no 'right' to force commercial advertising material into another person's property at the property owner's expense." Id. "[T]he TCPA is properly examined as a restriction on non-consensual theft and trespass, irrespective of the "speech" activity a violator wishes to engage in after consummating his act of theft and trespass. There is no speech restriction here that requires First Amendment scrutiny. Any impact on speech is only incidental to the regulation of nonconsensual theft and trespass." Id. Using your own paper and ink to print your message is free speech. Using someone else's paper and ink is little more than petty theft.

CONCLUSION

Defendant's Motion to Dismiss is DENIED.

IT IS SO ORDERED.

This the 30th day of APRIL, 2002.


Judge Patrick Clifford, Division 39

MAY - 2 2002

STATE OF MISSOURI)
COUNTY OF ST. LOUIS)

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

DAVID L. HARJOE,

Plaintiff,

v.

COLONIAL LIFE & ACCIDENT
INSURANCE COMPANY,

Defendant

Cause No.: 01 AC - 11555 L

Div. No: 35

ORDER AND JUDGMENT

This matter came before the Court on April 30, 2002 on Plaintiff's Motion, for Summary Judgment and Defendant's cross Motion for Summary Judgment. This is an action originally brought by Plaintiff against Colonial Life & Accident Insurance Company ("Colonial"), alleging transmission of an unsolicited advertisement via facsimile in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227.

The parties have stipulated to a set of facts which establish the relevant facts. At all times relevant, Plaintiff had telephone facsimile service at the facsimile telephone number of (314) 878-7277. On March 28, 2000 Defendant sent a facsimile transmission to and received by Plaintiff at (314) 878-7277, and Defendant did not obtain prior express invitation or permission to send the fax to Plaintiff. Defendant knew it was sending the fax, and was fully aware of the content of the fax. The fax at issue were not sent as a result of any accident or mistaken act.

The Missouri Supreme Court reaffirmed the standard under which a summary judgment should

be entered in favor of the moving party in a lawsuit, in ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp., 854 S.W.2d 371, (Mo. banc 1993). In so defining, the Court stated:

If the non-movant cannot contradict a showing of the movant, *judgment is properly entered against the non-movant because the movant has already established a right to judgment as a matter of law.*

ITT, 854 S.W.2d at 381 (emphasis added). Further, a defendant cannot rely on pleadings of ultimate facts when confronted with a Motion for Summary Judgment. Snowden v. Northwest Missouri State University, 624 S.W.2d 161, 169 (Mo.App. 1981). In such a case, summary judgment, if appropriate, will be entered against the non-moving party. Rule 74.04(c)(3); Charity v. City of Haiti Heights, 563 S.W.2d 72, 75 (Mo. banc 1978).

Elements of the Telephone Consumer Protection Act.

With the facts as stipulated, the crux of this matter - indeed the only question remaining - is whether the fax at issue contains “material advertising the commercial availability of any property goods, or services.” 47 U.S.C. § 227(a)(4). Defendant describes the fax as merely “announcing employment opportunities” while Plaintiff argues that the fax advertises Defendant’s company and the services it offers, such as its website. Plaintiff also argues that the fax is a qualitative statement about Defendant’s services.

The elements of an unsolicited fax advertisement claim under the TCPA are that a person 1) uses a telephone facsimile machine, computer, or other device 2) to send an unsolicited advertisement. It is without question that the fax at issue was sent, and Defendant admits sending it to Plaintiff. The only question is whether or not the facsimile contains an “unsolicited advertisement.”

Definition of “unsolicited advertisement”

The statute defines “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services.” While a court can not adopt a construction of a statute that is contrary to its plain language, the TCPA is a remedial consumer protection statute and “should be liberally construed and interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers.” Scarborough v. Atlantic Coast Line R. Co., 178 F.2d 253, 258 (4th Cir. 1950). Exemptions from provisions of remedial statutes “are to be construed narrowly to limit exemption eligibility.” Hogar v. Suarez-Medina, 36 F3d 177, 182 (1st Cir 1994). See, e.g., the very first paragraph of the Missouri Revised Statutes, which requires “all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.” RSMo. § 1.010. Defendant’s fax is an advertisement of Defendant’s services that the “true intent and meaning” of the TCPA addresses.

So is this material “advertising?” Webster’s dictionary defines “advertise” as “to make something known to : notify.” This is a pristine example of where the application of the time honored “duck test” is appropriate - “If it walks like a duck, quacks like a duck, and looks like a duck, then it's a duck.” BMC Industries, Inc. v. Barth Industries, Inc., 160 F.3d 1322, 1337 (11th Cir., 1998). Taken as a whole, these faxes clearly are “advertisements” under the TCPA, and all the Court need to do is apply the statute to the facts.

Defendant’s web site is a service.

We have all seen the Nike commercials on TV and in magazines.... displaying nothing but the Nike logo and their web site address. If Defendant’s argument were correct that the referral of the reader of a fax to Defendant’s web site is not an advertisement under the TCPA, any fax advertiser could escape the TCPA by putting all the sales pitches on a web site, and broadcast millions of faxes

with a logo and a web site address. This type of subterfuge would destroy the statute by permitting easy evasion of the law. Prominently advertised on the fax is Defendant's web site. This web site is a service. It provides forms to the agents. The web site describes "Our Wellness Center" which is another service provided to agents who sign on with the company. A foundational rule of statutory construction, construing a statute broadly for the public benefit, and to prevent such evasions:

[T]he office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.

Heydon's Case, 3 Co. Rep. 7a, 7b; 76 Eng. Rep. 637, 638 (1584) (cited in Cummins v. Kansas City Public Service Co., 334 Mo. 672, 698-99 (Mo. banc 1933)).

CONCLUSION

Plaintiff's Motion is GRANTED. Defendant's Motion is denied. Plaintiff shall have and recover from Defendant Colonial Life & Accident Insurance Company, judgment in the amount of \$ 750 plus court costs.

It is SO ORDERED, this the ^{2nd} day of *May*, 2002

William Rader #17882
JUDGE WILLIAM RADER

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE SMALL CLAIMS COURT
CASE NO.: 01-SC-86-3799

JAY CONNOR,)
Plaintiff,)

vs.)

RICHARD CUMPSTON,)
Defendant.)

ORDER

The above captioned matter came before this Court for trial on February 11, 2001. Plaintiff brought suit under the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, (“TCPA”) seeking statutory damages for a solicitation call made with a recorded message, and trebled damages for “willful or knowing” violations as provided for by the TCPA. After considering all of the evidence and arguments, this Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff testified that on August 7, 2001, he received a telephone call that used a prerecorded voice to deliver a solicitation for burial insurance, and that the calling party was not identified in that message. Plaintiff further testified that the caller-ID displayed on the call indicated the source of the call was (832) 237-2582. Plaintiff indicated that he was certain that the entire call was prerecorded, that he was never asked permission for any prerecorded message to be made, and had even attempted to interrupt the caller repeatedly, further confirming its nature as prerecorded.

Defendant admitted that he had retained a company in Texas by the name of “Sales Connection” to obtain “leads” for his insurance business, knew these leads were being generated by telemarketing calls that delivered - at least in part - prerecorded solicitations, and that the call made by Sales Connection to Plaintiff was made on Defendant’s behalf.

Defendant claims that he was fully aware of the TCPA, and had given specific instructions to Sales Connection regarding the method and manner of the telemarketing calls placed by Sales Connection on Defendant’s behalf, including that the prerecorded message be “introduced” by a live

operator that was to obtain consent from the called party before any portion of a prerecorded message was played, and that full identification of the calling party be given. Other than relying on the written instructions to Sales Connection, Defendant admitted he took no other steps to verify or confirm that Sales Connection followed Defendant's instructions prior to this suit.

Plaintiff argues that even if true, Defendant's efforts at compliance were insufficient at best, that the statute imposes strict liability, that Defendant is the principle fully liable for the acts of its agents, and that compliance with statutory requirements is a nondelegable duty.

The Court is persuaded that Plaintiff's version of the facts is correct, and that the call he received was a fully prerecorded telemarketing call. The only evidence that went to the content of the call received by Plaintiff was Plaintiff's testimony. Defendant had no direct knowledge of the content of the call. While the Cumpstons may have made some effort in managing the actions of their agent, Sales Connection, those efforts failed to ensure compliance with the law. Defendant knew that prerecorded messages were involved in the marketing efforts of Sales Connection on Defendant's behalf, and knew that such messages were highly and specifically regulated by a strict liability statute.

The Court also finds that Defendant had ample knowledge of the provisions of the TCPA, and the acts in making the call to Plaintiff were both willful and knowing as those terms are used in the statute. The FCC has a well established construction of "knowing" as used throughout that agency's administration of the 1934 Communications Act. This standard is set out as a clear "knew or should have known" standard. Intercambio, Inc., 3 FCC Rcd. 7247 (1988); Audio Enterprises, Inc., 3 FCC Rcd. 7233 (1988). The FCC's construction of "willful" is set forth in In re Valley Page, 12 FCC Rcd. 3087 at ¶ 6 (1997) ("[W]illfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question such as using a radio transmitter, as opposed to being accidental (for example, brushing against a power switch turning on a radio transmitter).") and this is confirmed by the statutory definition of "willful" in the 1934 Communications Act at 47 U.S.C. § 312(f)(1). The interpretation of any act by the administrative agency overseeing that act is due great deference.

Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971); Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984).

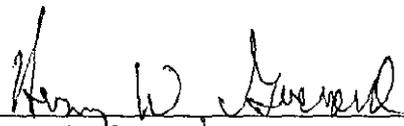
The Supreme Court has noted when an agent causes harms within the scope of its agency, "that 'few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own.'" American Soc. of M. E.'s v. Hydrolevel Corp., 456 U.S. 556, 568 (1982). Testimony was clear that Sales Connection was the agent of Defendant within the eyes of the law. The Court is not unsympathetic to Defendant's position. The acts by Sales Connection on Defendant's behalf may create liability of Sales Connection to Defendant, but they do not alter the liability of Defendant to this Plaintiff.

TREBLE DAMAGES

The TCPA provides that for willful or knowing violations, the Court may, in its discretion, increase the damage award up to three times the amount of regular damages. Having found that Defendant's acts were both willful and knowing, the full measure of the TCPA's trebled damages are warranted in this case, and this Court hereby trebles the damages to FIFTEEN HUNDRED DOLLARS (\$1,500).

It is hereby ORDERED, ADJUDGED AND DECREED, that Plaintiff shall have judgment against Defendant for FIFTEEN HUNDRED DOLLARS (\$1,500) plus FIFTY FIVE (\$55.00) court costs.

AND IT IS SO ORDERED.


Henry W. Guerard, Magistrate

February 13, 2002, Charleston South Carolina.

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FILED
COMMON PLEAS COURT
FRANKLIN CO., OHIO
2001 SEP -6 AM 8:08

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

Philip J. Charvat,

CLERK OF COURTS

Plaintiff :

v. :

Case No. 00-CVH-09-8352

Hallmark Mortgage Services, Inc., et al., :

Defendants. :

JUDGE McGRATH

DECISION AND ENTRY DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED JUNE 26, 2001

Rendered this 4th day of September, 2001.

McGRATH, J.

This matter comes before the court upon defendants' Motion for Summary Judgment pursuant to Civil Rule 56. Plaintiff filed a Memorandum Contra and defendants replied. The court has considered all Memoranda.

Plaintiff filed this Complaint alleging violations of 47 U.S.C. § 227, the Telephone Communications Practices Act (TCPA), 47 C.F.R. § 64.1200, and the Ohio Consumer Sales Practices Act (CSPA). Plaintiff, Mr. Charvat, alleges he was solicited by telephone by defendant, Hallmark, at which time Charvat made do not call demands. Plaintiff further alleges that after making such do not call demands, defendant engaged in further solicitation by phone via a prerecorded telephonic message playing device and personal calls.

Defendants contend that the TCPA is in violation of the First Amendment to the United States Constitution and that plaintiff's Complaint does not state a cause of action under the CSPA. Defendant now moves for judgment as a matter of law.

Summary judgment was established through Civ. R. 56 (C) as a procedural device designed to terminate litigation when there is no need for a formal trial. *See Norris v. Ohio Std. Co.* (1982), 70 Ohio St. 2d 1. The rule mandates that the following be established: (1) that there is no genuine issue of any material facts; (2) that the moving party is entitled to judgment as a matter of law, and (3) that reasonable minds can come to but one conclusion and, viewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the non-moving party. *See, e.g., Bostic v. Connor* (1988), 37 Ohio St. 3d 144.

However, summary judgment will not be granted unless the movant sufficiently demonstrates the absence of any genuine issue of material fact. A “party seeking summary judgment on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party’s claims.” *Dresher v. Burt* (1996), 75 Ohio St. 3d 280, 293.

Civ. R. 56(C) sets forth an exclusive list of documentary evidence that may be considered by a court reviewing a motion for summary judgment. The rule states that the court may consider the:

. . . pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in this action. . . . No evidence or stipulation may be considered except as states in this rule.

Where the moving party meets its initial burden, the nonmoving party has a reciprocal burden outlined in Civ. R. 56(E). Civ. R. 56(E) provides that when a motion for summary judgment is otherwise properly supported under division (C) of this rule:

[A]n adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

47 U.S.C. § 227 and 47 C.F.R. § 64.1200

The Telephone Consumer Protection Act, an amendment to the Communications Act of 1934 provides in part:

It shall be unlawful for any person within the United States . . . (B) to initiate any telephone call to any residential 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)

47 U.S.C. § 227(b)(1). Section 227(b)((2)(B) reads as follows:

(2) Regulations; Exemptions and Other Provisions. – The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission –

. . . (B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe –

(i) calls that are not made for a commercial purpose; and
(ii) such classes or categories of calls made for commercial purposes as the Commission determines –

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement.

It is defendants' position that that 47 U.S.C. § 227 and 47 C.F.R. § 64.1200 violate the First Amendment of the United States Constitution because they are not content-neutral and are not narrowly tailored to their purpose. Plaintiff contends that this statute is properly analyzed as a trespass statute, and even if the TCPA were subject to First Amendment scrutiny it qualifies as a content-neutral time, place, and manner restriction. The court agrees.

“The principal inquiry in determining content neutrality in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Hill v. Colorado*, 503 U.S. 703, 719 (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)). “The correct rule, rather, is captured in the formulation that a restriction is content based only if it is imposed because of the content of the speech and not because of offensive behavior identified with its delivery.” *Hill*, at 737. The TCPA addresses “offensive behavior” and there is no indication that Congress enacted the TCPA because of any disagreement with the message. See Congressional findings Act Dec 20, 1991, P.L. 102-243, § 2, 105 Stat. 2394. The fact that the TCPA applies to solicitation messages does not make the statute content-based. The TCPA does not address any harm from the content of the advertising itself, the regulatory target is a harmful advertising practice. Under this analysis, the TCPA is content-neutral. See also *Texas v. ABF*, 121 F.Supp. 2d 1085 (W.D. Tex. 2000) (TCPA’s ban on unsolicited fax ads not impermissible regulation of commercial speech); *Destination Ventures Ltd. V. FCC*, 46 F.3d 54 (9th Cir. 1995) (Ban on unsolicited fax ads in TCPA justified because it was a reasonable means of achieving Congress’ goals); *Moser v. FCC*, 46 F.3d 970(9th Cir. 1995) (TCPA did not violate free speech rights of telemarketing organization); *Kenro, Inc. v. Fax Daily, Inc.*, 904 F.Supp. 912 (S.D. Ind. 1995); *Szefczek v. Hillsborough Beacon*, 668 A.2d 1099 (Super. Ct. N.J. 1996) (telemarketing calls). Accordingly, the court finds that 47 U.S.C. § 227 and 47 C.F.R. § 64.1200 are not in violation of the First Amendment of the United States Constitution.

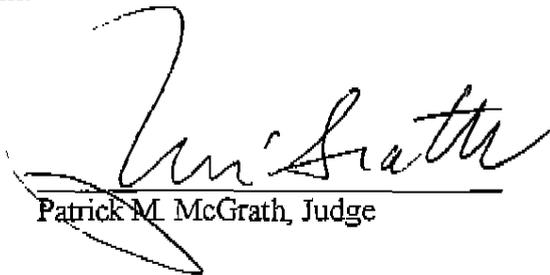
The Ohio Consumer Sales Practices Act

It is defendants' position that plaintiff failed to properly plead a cause of action under the CSPA. Specifically defendants states that plaintiff has not alleged that Hallmark has engaged in any deceptive practice forbidden by the rules promulgated under R.C. § 1345.05. Plaintiff contends that the CSPA claims are properly pleaded and factual issues remain to be resolved.

The CSPA provides for a consumer's private right of action at R.C. § 1345.09 for any violation of any act or practice previously declared by an Ohio court to be in violation of the CSPA. Plaintiff's Complaint offers cases wherein the alleged acts of the defendants' had previously been declared to be violation of the CSPA. Charvat has also pleaded such acts by the defendant in this case. Upon review the court finds that plaintiff has sufficiently pleaded a cause of action under the CSPA.

Upon review the court finds that there remain issues of fact to be resolved and that plaintiff's Complaint has been properly pleaded. Accordingly, the court **DENIES** defendants' Motion for Summary Judgment.

IT IS SO ORDERED.



Patrick M. McGrath, Judge

Copies to:

Brian Green
Counsel for Plaintiff

Benjamin S. Zacks
James R. Billings
Counsel for Defendant

IN THE ASSOCIATE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

FILED

AUG 28 2001

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

DAVIS, KELLER, WIGGINS, LLC, et
al.

Plaintiffs

v.

JTH TAX, INC.

Defendant

Cause No.: 00AC-023288

Div. No: 39

Judge Patrick Clifford

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

This matter came before the Court on August 28, 2001 on Defendant's Motion to Dismiss. This is an action originally brought by Plaintiffs against J.T.M. Tax, Inc., doing business as Liberty Tax Service in the Associate Circuit Court of St. Louis County, Missouri, alleging unsolicited facsimile advertisements sent in violation of the Telephone Consumer Protection Act ("TCPA") 47 U.S.C. § 227. Defendant argues that no cause of action is permitted in Missouri under the TCPA, and that Defendant's faxes are not "unsolicited advertisements" so as to come within the ambit of the statute. For the reasons states herein, Defendant's motion is denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Enabling legislation

Defendant has moved to dismiss this case, arguing that the Telephone Consumer Protection Act ("TCPA") requires this state to "opt-in" by passing enabling legislation to open Missouri courts to the private right of action in the TCPA. However, Defendant's interpretation of the statute was already rejected by this very Court. See Coleman v. Varone, No. 00AC-023298 (Div. 39) (Mo Cir. Ct., Feb. 13, 2001); Harjoe v. Freight Center, Inc., No. 00AC-005196 (Div. 39) (Mo. Cir. Ct., Jan.

9, 2001)). The Court is aware of no new authorities that affect the analysis in Coleman - certainly none that help Defendant. The lone decision supporting Defendant, Autoflex Leasing, Inc., v. Manufacturers Auto Leasing, Inc., 16 S.W.3d 815 (Tex. App. 2000), was addressed dispositively in Coleman as lacking “intrinsic logic” and unpersuasive. Other authorities agreed that Autoflex is simply in error. See, e.g., Kaufman v. HOTA, Inc., No. BC 222589 (Super. Ct. Ca. Aug. 25, 2000); Zelma v. Market U.S.A., -- A.2d --, 2001 WL 868049 (N.J.Super.A.D., Aug 02, 2001). Since the Coleman and Harjoe decisions, legal scholars have also rejected the “opt-in” interpretation. See Robert R. Biggerstaff, State Courts and the Telephone Consumer Protection Act of 1991: Must States Opt-In? Can States Opt-Out?, 33 Conn. L. Rev. 407 (2001). The latest state appellate court has also rejected Defendant’s argument:

We hold that the Congressional grant of exclusive jurisdiction in the state courts to enforce the private right of action created by the TCPA does not require an affirmative act by the Legislature or the adoption of rule by the Supreme Court in order for the Superior Court to exercise subject-matter jurisdiction over the TCPA claims filed by plaintiff.

Zelma v. Market U.S.A., -- A.2d --, 2001 WL 868049 (N.J.Super.A.D., Aug 02, 2001).

This Court noted in Coleman that “[i]n the interests of judicial economy, this Order should be dispositive in any future TCPA actions in this Court raising this question unless a movant presents new authorities or arguments to support their position.” Coleman, supra, at note 1. So to quote the conclusion in Coleman:

[T]he clause in 47 U.S.C. § 227 “if otherwise permitted by the laws or rules of court of a State” does not require affirmative state enabling legislation before a consumer can file suit in state court under the private right of action in the TCPA. International Science & Tech. Inst., Inc. v. Inacom Commun., Inc., 106 F.3d 1146, 1156 (4th Cir.1997); Nicholson v. Hooters of Augusta, Inc., 537 S.E.2d 468 (Ga. App, 2000) (en banc). The Circuit Courts of Missouri are courts of general jurisdiction, and therefore “otherwise permitted” by the state constitution to hear suits brought under the private right of action in the TCPA. Schulman v. Chase Manhattan Bank, 710 N.Y.S.2d 368, 372 (N.Y. App. 2000); Zelma v. Total Remodeling, Inc., 334 N.J.Super. 140, 143 (Super. Ct. N.J. 2000).

Id., slip op. at 10.

B. Definition of an “unsolicited advertisement” prohibited by the TCPA

The elements of a unsolicited fax claim under the TCPA are that a person 1) uses a telephone facsimile machine, computer, or other device 2) to send an unsolicited advertisement. It is not disputed that the faxes at issue were sent to Plaintiff by Defendant. The only question remaining is whether or not the facsimile contains an “unsolicited advertisement.”

The statute defines “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services.” The faxes at issue certainly fit this definition. Defendant is engaged in a commercial enterprise. The faxes are for the purpose of furthering that commercial enterprise. They mention specific goods and services of Defendant. It also makes several substantive quality statements about Defendant’s services.

So is this material “advertising?” Webster’s dictionary defines “advertise” as “to make something known to : notify.” This is a pristine example of where the application of the time honored “duck test” is appropriate - “If it walks like a duck, quacks like a duck, and looks like a duck, then it's a duck.” BMC Industries, Inc. v. Barth Industries, Inc., 160 F.3d 1322, 1337 (11th Cir., 1998). Taken as a whole, these faxes clearly are “advertising the commercial availability or quality of any property, goods, or services” under the TCPA.

Defendant’s reliance on Lutz Appellate Svcs. v. Curry, 859 F. Supp. 180 (E.D. Pa. 1994) is not on point. Lutz was an unappealed, early trial court decision, decided on the narrow issue that the short 4-line and 5-line faxes, sent from a man who opened his own business, which were sent to his former co-workers at his former place of business, was “not the advertisement of the commercial availability of property,” Id. at 181, but that court did not address whether the faxes advertised the availability or quality of “goods” or “services.” The court likened the faxes to a “help wanted” sign.

Id. The fax in this case is not a “help wanted” sign, it is a multi-paragraph exaltation of Defendant’s company, and advertisement of its web site. Lutz is simply not on point. Nor has it been subjected to appellate review. Had Defendant sent a fax stating nothing more than: “Liberty Tax is hiring Sales Managers. Call 1-800-790-3863 for more information” it would be more akin to a “help wanted sign.” But the fax in this case does much more, making several qualitative statements about the company and its products. More specifically, even a cursory review of the Liberty Tax Service fax reveals it is nothing like the sparse 5-line faxes in Lutz. The Liberty fax specifically advertises several products and services of Liberty, including “Market Tax Services,” their web site (www.libertytax.com), and a video and information package. These are “products” and “services” in anyone’s dictionary. It also makes several substantive quality statements about the Liberty services. Simply put, the Liberty fax is factually distinguishable from the faxes in Lutz.

Defendant argues that a franchise agreement is “akin” to an employment contract. Def. Memo. at 3. This proposition, unsupported by any citation to Missouri case law, is wholly inapposite. Even if a franchise agreement were construed as “akin” to an employment contract, the faxes did not advertise an “agreement” - they advertised the goods and services of Liberty Tax Service.

This conclusion is reinforced by the fact that the TCPA is a remedial consumer protection statute and “should be liberally construed and interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers.” Scarborough v. Atlantic Coast Line R. Co., 178 F.2d 253, 258 (4th Cir. 1950). Exemptions from provisions of remedial federal statutes “are to be construed narrowly to limit exemption eligibility.” Hogar v. Suarez-Medina, 36 F3d 177, 182 (1st Cir 1994); accord Olsen v. Lake Country, Inc., 955 F.2d 203, 206 (4th Cir. 1991). See, also, 3 N. Singer, Sutherland Statutory Construction § 60.01. To adopt Defendant’s argument would be to effectively exempt franchisers from the TCPA, who would then be free to engage in unlimited fax

advertising of their franchises. Such a construction would clearly conflict with the intent of the statute, and violate one of the oldest canons of construction:

[T]he office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.

Heydon's Case, 3 Co. Rep. 7a, 7b; 76 Eng. Rep. 637, 638 (1584) (cited in Cummins v. Kansas City Public Service Co., 334 Mo. 672, 698-99 (Mo. banc 1933)). This principle is restated in the very first paragraph of the Missouri Revised Statues, that "all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof." RSMo. § 1.010

CONCLUSION

Based on the foregoing, Defendant's Motion is DENIED.

It is SO ORDERED, this the 28th day of August, 2001


Div. 39

the organization.

CONCLUSIONS OF LAW

1. Standard of Review for Summary Judgment.

The rationale behind summary judgments as permitted under Rule 74.04(c)(3) of the Missouri Rules of Civil Procedure is to facilitate the expeditious determination of a controversy when there is no genuine issue as to any material fact. Rockwell International, Inc. v. West Port Office Equipment Company, 606 S.W.2d 477, 479 (Mo.App. 1980). The Missouri Supreme Court reaffirmed the standard under which a summary judgment should be entered in favor of the moving party in a lawsuit, in ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp., 854 S.W.2d 371, (Mo. banc 1993). Further, a non-moving party cannot rely on pleadings of ultimate facts when confronted with a Motion for Summary Judgment. Snowden v. Northwest Missouri State University, 624 S.W.2d 161, 169 (Mo.App. 1981). In such a case, summary judgment, if appropriate, will be entered against the non-moving party. Rule 74.04(c)(3); Charity v. City of Haiti Heights, 563 S.W.2d 72, 75 (Mo. banc 1978).

2. Elements of the Telephone Consumer Protection Act.

The statute prohibits the sending of any material constituting an “unsolicited advertisement” by facsimile. 47 U.S.C. § 227(b)(2). An “unsolicited advertisement” is defined by the statute as “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.” 47 U.S.C. § 227(a)(4). As a result, the only way such faxes can be sent is if 1) the faxes do not contain “any material advertising the commercial availability or quality of any property, goods, or services” or 2) if the faxes are sent with the “prior express invitation or permission” of the recipient.

The parties have stipulated that the fax at issue in this case contains material advertising the

commercial availability or quality of any property, goods, or services. Thus the only way to escape the broad proscription the TCPA imposes in this case is if the sender obtained “prior express invitation or permission” to send the solicitation. 47 U.S.C. § 227(b)(1)(C). Thus this case is reduced to a single question - did Defendant obtain “prior express invitation or permission” to send this fax to Plaintiff? This Court holds it did not.

3. Construction of “prior express invitation or permission”

The only connection whatsoever Defendant has with Plaintiff is that Plaintiff is a travel member of IATAN and Defendant is a supplier member of that organization. Defendant argues that by providing its facsimile number to IATAN knowing that IATAN shares contact information with other members, Plaintiff has expressly consented to receipt of advertising faxes from other members of IATAN. Plaintiff argues that such conduct does not rise to the level of “express” consent.

This is a question of ordinary statutory interpretation, and in this case the statute’s plain language is crystal clear. The TCPA requires express permission, not implied permission. The two terms are mutually exclusive. Black’s Law Dictionary defines “express” as:

Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C.A.Minn., 34 F.2d 270, 274. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with “implied.”

Black’s Law Dictionary (Revised 6th ed.) (emphasis added). Webster’s dictionary provides a similar definition. This is the proper definition to use within the context of the TCPA.

4. Statutory Construction of “willful or knowing” within the TCPA

The TCPA provides for mandatory liquidated statutory damages of \$500 per violation. If the Court finds that the defendant willfully or knowingly violated the prescribed regulations, it may in its

discretion, increase the amount of the award to an amount equal to not more than 3 (three) times the amount available under 47 U.S.C. § 227(3) (Private Right of Action) . The court declines to exercise any of its discretion in regard to assessing any discretionary damages.

5. Damages

The TCPA provides for a mandatory minimum liquidated statutory damages of \$500 per violation. The discretion to award trebled damages of \$1,500 upon a showing of willful or knowing violations is in the discretion of the Court.

CONCLUSION

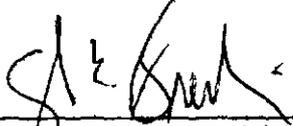
IT IS THEREFOR ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment is GRANTED; and

IT IS FURTHER ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is DENIED; and

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs BRENTWOOD TRAVEL, INC. and Stephanie Turner have and recover from Defendant LANCER, LTD., the sum of \$500.00 plus the court assess court costs against the defendant

SO ORDERED.

This, the 15th day of August, 2001



Judge John Frerking, Division 45.

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

R.F. SCHRAUT HEATING &
COOLING, INC.,

Plaintiff

v.

MAIO SUCCESS SYSTEMS, INC.

Defendant.

) Cause No.: 01AC11568y

) Division: 39 - Tuesday

) Judge Patrick Clifford

FILED

AUG 14 2001

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

ORDER

This matter came before the Court on August 14, 2001, on Defendant's Motion to Dismiss for lack of personal jurisdiction. The parties have filed memoranda of law and the Court has heard the arguments of both parties. For the reasons set forth below, Defendant's Motion is DENIED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff brought suit against Defendant under the private right of action provided in 47 U.S.C. § 227(b), the Telephone Consumer Protection Act, ("TCPA"). Plaintiff alleges that Defendant sent one(1) facsimile containing an unsolicited advertisement to Plaintiff's fax machine in Missouri, and that this fax violates the TCPA and subjects Defendant to the personal jurisdiction of the Missouri Courts. Defendant argues that mere telephone contact, without more, can not satisfy personal jurisdiction, citing Norman v. Fischer Chevrolet-Oldsmobile, Inc., No. ED78618 (Mo. App. E.D. June 29, 2000). Plaintiff argues that the sending of a facsimile advertisement into this state which violates the TCPA is both the "transaction of any business" and the "commission of a tortious act" subjecting Defendant to the personal jurisdiction of Missouri courts.

The issue of whether faxes or telemarketing calls made into Missouri will subject the sender to the personal jurisdiction of Missouri courts under the TCPA is not new to St. Louis courts. See Brentwood Travel, Inc. v. Lancer, Ltd., No. 01CC-000042 (Div. 45, Mo. Cir. Ct. Feb. 21, 2001) (unsolicited faxes); Margulis v. VoicePower Telecom., Inc., No. 00AC-013017 (Div. 39, Mo. Cir. Ct. March 22, 2001) (telemarketing calls). Because this issue is likely to recur, and since the Norman

case relied on by Defendant was decided after this the previous decisions on this issue, this substantive order is in the interest of judicial economy.

I. Standard for asserting personal jurisdiction

When a defendant asserts lack of personal jurisdiction in a motion to dismiss, a plaintiff bears only the minimal burden of establishing a prima facie case that (1) the suit arose out of the activities enumerated in the Missouri long-arm statute, Section 506.500; and (2) the defendant has sufficient contacts with Missouri to satisfy due process requirements. Schilling v. Human Support Svcs., 978 S.W.2d 368, 370-71 (Mo. App. E.D. 1998). “The basic due process test is whether the defendant has ‘purposefully availed itself of the privilege of conducting activities within the forum state.’” Farris v. Boyke, 936 S.W.2d 197 (Mo. App. S.D. 1996) citing Elaine K. v Augusta Hotel Assocs. Ltd. Partnership, 850 S.W.2d 376, 378 (Mo. App. E.D. 1993).

Section 506.500, RSMo 1994, states:

1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:

- (1) The transaction of any business within this state;
- (2) The making of any contract within this state;
- (3) The commission of a tortious act within this state;
- (4) The ownership, use, or possession of any real estate situated in this state;
- (5) The contracting to insure any person, property or risk located within this state at the time of contracting;
- (6) Engaging in an act of sexual intercourse within this state with the mother of a child on or near the probable period of conception of that child.

Jurisdiction is proper under due process where “the defendant has ‘purposely directed’ his activities at residents of the forum, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984), and the litigation results from alleged injuries that ‘arise out of or relate to’ those activities, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984).” Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-473 (1985).

Missouri's long arm statute is intended to reach "to the fullest extent permissible under the due process clause of the Fourteenth Amendment." State ex rel. Deere & Co. v. Pinnell, 454 S.W.2d 889 (Mo. banc 1970). However, "Random, fortuitous, or attenuated contacts with the forum state cannot create jurisdiction." Elaine K., *supra*. Missouri courts have been explicit that the exercise of long arm jurisdiction "is not susceptible to mechanical application; rather the facts of each case must be weighed to determine whether requisite affiliating circumstances are present." State ex rel. Sperandio v. Clymer, 581 S.W.2d 377, 382 (Mo. banc 1979). The fact that telephone calls, unrelated to the cause of action, may not provide minimum contacts in some situations, is therefore not dispositive of the case at bar.

Defendant relies on the case of Norman v. Fischer Chevrolet-Oldsmobile, Inc., No. ED78618 (Mo. App. E.D. June 29, 2000), arguing that mere telephone contact, without more, does not satisfy personal jurisdiction. There are other cases seeming to support this conclusion in dicta. *See, e.g., Capitol Indem. Corp. v. Citizens Nat'l Bank*, 8 S.W.3d 893, 904 (Mo. App. W.D. 2000) ("[U]se of the mail or telephone communications, without more, does not constitute the transaction of business for purposes of long arm jurisdiction in Missouri.") In Norman, that plaintiff initiated contact with the Florida defendant, and the reply letter from the Florida defendant was the "contact" with Missouri. That court noted that such a single contact "can be sufficient to establish minimum contacts" but did not find jurisdiction over the defendant in that case. The issues that tipped the scales in Norman were the facts that 1) the plaintiff initiated the contact with the out-of-state defendant, and 2) neither party to the litigation was a Missouri resident. The defendant in Norman did not purposely avail himself of conducting business in Missouri. This is the opposite of the case at bar, and Norman is inapposite.

The other cases involving telephone contacts such as Capitol Indem. Corp., *supra*, Farris v. Boyke, 936 S.W.2d 197 (Mo. App S.D. 1996), Mead v. Conn, 845 S.W.2d 109 (Mo. App. W.D. 1993), and TSE Supply Co. v. Cumberland Nat. Gas Co., 648 S.W.2d 169 (Mo. App. E.D. 1983) are also distinguishable from the case at bar. They deal with causes of action such as breach of contract, that did not arise out of the telephone contacts themselves. Some of those cases involve

unilateral initiation of business contact by a Missouri seller with an out-of-state purchaser. It has been recognized that such unilateral activity where the plaintiff was an in-state seller that solicited an out-of-state buyer, militates in favor of the defendant seeking to resist personal jurisdiction. See, e.g., Scullin Steel Co. v. National Ry. Utilization Corp., 676 F.2d 309, 313 (8th Cir. 1982). Defendant in this case is in the opposite situation -- an out-of-state seller that has purposefully directed its advertising into Missouri. The fact that the out-of-state party initiated the contact into Missouri is very important. Schilling v. Human Support Svcs., 978 S.W.2d 368, 371 (Mo. App. E.D. 1998); State ex rel. Metal Serv. Center v. Gaertner, 677 S.W.2d 325, 327 (Mo. banc 1984). This was not “random”... it was obviously directed at Missouri.

II. Transacting Business in Missouri

Plaintiff has alleged only a single facsimile transmission, yet that can be sufficient to confer jurisdiction. “‘Transaction of any business’ as used in the Missouri Long Arm Statute, must be construed broadly and may consist of a single transaction if that is the transaction sued upon.” Mead v. Conn., 845 S.W.2d 109, 112 (Mo. App. W.D. 1993) citing State ex rel. Metal Serv. Ctr. v. Gaertner, 677 S.W.2d 325, 327 (Mo. banc 1984); Laser Vision Centers, Inc. v. Laser Vision Centers International, 930 S.W.2d 29, 32 (Mo. App. E.D. 1996). “A single business proposal to a Missouri corporation has been found sufficient to constitute the transaction of business.” Chromalloy American Corp. v. Elyria Foundry Co., 955 S.W.2d 1, 4-5 (Mo. banc 2000); “Minimum contacts necessary to support jurisdiction are met by a single act done or a single transaction consummated within the forum state, on a claim relating to that act or transaction.” State ex rel. Metal Serv. Center of Georgia, Inc. v. Gaertner, 677 S.W.2d 325, 327 (Mo. banc 1984); State ex rel. Caine v. Richardson, 600 S.W.2d 82 (Mo. App. E.D. 1980), citing McGee v. Int’l Life Insurance Co., 355 U.S. 220 (1957).

There appears to be no appellate decision regarding the sending of out-of-state advertising faxes into Missouri as grounds for personal jurisdiction, but the Missouri Court of Appeals recently addressed the issue of an out-of-state advertiser sending advertising into Missouri in State ex rel. Nixon v. Beer Nuts, Ltd., 29 S.W.3d 828, 835 (E.D. Mo. 2000):

In the case at bar, the trial court found that [out-of-state seller] Beer Nuts had regularly solicited customers in and from Missouri and this activity constitutes the transaction of business within the State.

This is not a new concept. In Welkener v. Kirkwood Drug Store Co., 734 S.W.2d 233, 239-40 (Mo. App. E.D. 1987) the out-of-state corporation was held subject to personal jurisdiction in Missouri because it “solicited purchases by sending out thousands of brochures and catalogs of its products throughout the United States, including Missouri.” “[A] foreign manufacturer’s regular solicitation of orders is sufficient to sustain jurisdiction.” Id. at 240. When a seller knows his products are entering other states, that corporation “could reasonably anticipate being haled into court in every state” where his products are going. Dillaplain v. Lite Industries, Inc., 788 S.W.2d 530 (Mo. App. W.D. 1990). Promotional activity directed at Missouri in order to sell items of merchandise was sufficient to subject the non-resident corporation to jurisdiction. State ex inf. Danforth v. Reader’s Digest, 527 S.W.2d 355 (Mo. banc 1975).

When an out-of-state seller sends marketing materials into Missouri, asserting long arm jurisdiction is proper “so long as the marketing is intentional and distribution into the forum state is an anticipated and foreseeable event as part of the manufacturer’s business.” State ex rel. Caine v. Richardson, 600 S.W.2d 82 (Mo. App. E.D. 1980). By calling numbers in the 314 area code it is “anticipated and foreseeable” that the calls would reach customers in Missouri. “[A] nonresident seller subjects itself to the obligation of amenability to suit in return for the right to compete for sales [in the forum state].” Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F.2d 365, 368 (8th Cir. 1969). These are sound principles that clearly apply to the case at bar. This Court holds that sending advertisements by facsimile into Missouri satisfies the “transacting any business” prong of Section 506.500(1) for a cause of action - such as the TCPA - arising out of such transmissions.

III. Commission of a tortious act.

Plaintiff also argues that personal jurisdiction is proper because this suit arose out of a tortious act committed by Defendant. The “tortious act” in this case is alleged to be the violation of the TCPA. To support such jurisdiction, the plaintiff must make a prima facie showing on the validity of his claim of tort. State ex rel. Ranni Associates, Inc. v. Hartenbach, 742 S.W.2d 134, 139 (Mo.

banc 1987).

The provision in the Missouri Long Arm statute of “commission of a tortious act” is given broad meaning by Missouri courts, and not restricted to causes of action based solely in tort law:

Provision of this section [Missouri Long Arm Statute] pertaining to “commission of a tortious act within this state” did not mean that cause of action had to sound in tort and this section applied to any cause of action arising from the doing of such acts, and it was not necessary to characterize the Carmack Amendment claim of plaintiff as a cause of action in tort for this section to apply.

Fulton v. Chicago, Rock Island & P. R. Co., 481 F.2d 326 (8th Cir, 1973) cert. denied 414 U.S. 1040 (1973). Under Missouri law, the phrase “[c]ommission of tortious act within the state which will subject defendant to long-arm jurisdiction includes extraterritorial acts of negligence which produce actionable consequences in Missouri.” William Ranni Associates, Inc., 742 S.W.2d at 139. Statutes establishing personal liability to the aggrieved party, such as the TCPA, create statutory torts. See, e.g., Yellow Freight Sys., Inc. v. Mayor's Comm'n on Human Rights of the City of Springfield, 791 S.W.2d 382, 384 (Mo. banc 1990) (Violations of a law “may establish an element of tortious conduct in a common law or statutory tort action cognizable in the circuit court.”); See, also, Labine v. Vincent, 401 U.S. 532, 535 (1971) (With statute providing for cause of action, the state “created a statutory tort ... so that a large class of persons injured by the tort could recover damages in compensation for their injury.”)

Plaintiff makes an analogy to “the well known law school example of a man who fires a gun from across the border in Kansas, and hits a person in Missouri. The shooter will be subject to suit in Missouri for the damage from the gunshot, but not for a breach of contract action unrelated to the gunshot.” In this case, Defendant “shot” from California to Missouri, and jurisdiction lies where his “bullet” struck its victim.

At this stage in the proceedings, all the “allegations of the petition are given an intendment most favorable to the existence of the jurisdictional fact.” Moore v. Christian Fidelity Life Ins. Co., 687 S.W.2d 210, 211 (Mo. App. W.D. 1985). Plaintiff has alleged a facsimile advertisement transmission that if true would clearly constitute a violation of the TCPA’s prohibition on such transmissions. Plaintiff has therefore plead a prima facie case, and that meets the requirement of a

“tortious act” to satisfy § 506.500(3).

IV. Fair Play and Substantial Justice

After a determination that a defendant is subject to personal jurisdiction under the long arm statute, a court will consider additional “traditional notions of fair play and substantial justice” factors before finding jurisdiction over a non-resident defendant. These include: “1) the burden on the defendant; 2) the interest of the forum state; 3) the plaintiff’s interest in obtaining relief; 4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and 5) the shared interest of the several states in furthering fundamental substantive social policies.” Beer Nuts, at 835-36. “In reviewing minimum contacts to satisfy the due process requirements, a court focuses on the relationship among the defendant, the forum, and the litigation.” Id., at 835. Defendant’s own purposeful initiation of a contact with a Missouri business is an important factor in weighing the fair play analysis. Elaine K. v Augusta Hotel Assocs. Ltd. Partnership, 850 S.W.2d 376, 379 (Mo. App. E.D. 1993); State ex rel. Metal Svc. Center v. Gaertner, 677 S.W.2d 325, 327 (Mo. banc 1984).

In the context of this “fair play” analysis, the Supreme Court has noted that “modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.” McGee v. Int’l Life Ins. Co., 355 U.S. 220, 223 (1957). This is certainly true in this case. Defendant’s burden is minimal, and he is the initiator of the contact with Missouri. If he didn’t want to be hailed into Missouri’s courts, he could have not sent a fax to a Missouri telephone number and reached out to Missourians with his advertising transmissions. The Plaintiff’s and society’s interest, indeed, the entire TCPA, would be undercut if consumers could not bring suit where they sustained their injury. The TCPA was intended to make it “as easy as possible for consumers to bring such [TCPA] actions.” 137 CONG.REC. S16,205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings). The state has an interest in protecting its citizens from harm, from whatever source those harms spring, and the “interstate judicial system’s interest” in enforcing the uniform federal law is furthered.

CONCLUSION

Defendant directed his activities at a telephone number that is in the 314 area code, which serves only Missouri. Defendant is in complete control of what forums he is exposed to in a TCPA action by his own choice of which states he targets with his advertising transmissions. He directed his activities at the consumers in Missouri. He clearly should expect to be subject to the Missouri courts based on that contact. Accordingly, sending an unsolicited fax advertisement into Missouri in violation of the prohibitions under the TCPA satisfies both the “transacting any business” and “tortious act in this state” prongs of the Missouri long arm statute and establishes personal jurisdiction in this state that is consistent with minimum contacts and due process under the Fourteenth Amendment.

Defendant has “transacted business” in this state by his advertising contact, and the cause of action has arisen out of that specific contact. Independently, Plaintiff has alleged that Defendant engaged in a tortious act with actionable consequences in this state. Plaintiff has thus made a prima facie case for personal jurisdiction. Defendant’s Motion is DENIED.

IT IS SO ORDERED.

This the th day of August, 2001.


Judge Patrick Clifford, Division 39

8-15-01



DISTRICT COURT, BOULDER COUNTY, COLORADO
Case Number: 00 CV 951 Division 5

RULING AND ORDER

MATHEMAESTHETICS, INC.,
Plaintiff / Appellant,

v.

CHRISTINE D. REINER, C.P.A.,
Defendant / Appellee.

This matter comes before the Court on Plaintiff's Appeal of the County Court's May 25, 2000 Ruling. After considering the parties' briefs and the applicable law, the Court issues the following Ruling and Order.

BACKGROUND

Defendant hired a company called American Blast Fax to distribute advertising for her business via fax machines. Plaintiff received an unsolicited fax advertisement for Defendant's services and brought a claim against Defendant alleging violations of 47 U.S.C. 227(b)(1)(C), the Telephone Consumer Protection Act ("TCPA"). The claim was originally brought in Boulder County Small Claims Court but was transferred to Boulder County Court pursuant to C.R.C.P. 520.

Magistrate Clifford heard the matter on May 25, 2000 and issued an oral ruling. He made the following findings: Defendant had sent an unsolicited fax (the TCPA applies to those who hire someone else to send a fax for them); the Federal TCPA applies to intrastate transmissions; the Colorado Consumer Protection Act, C.R.S. § 6-1-702, is less restrictive than the Federal TCPA; the Colorado Consumer Protection Act, C.R.S. § 6-1-702, is not preempted by the Federal TCPA; the Colorado Consumer Protection Act, C.R.S. § 6-1-702, controls; and Defendant did not violate the Colorado Consumer Protection Act, C.R.S. § 6-1-702.

STANDARD

Appeals from Small Claims Court are governed by C.R.S. §§ 13-6-410 and 13-6-310. Such appeals are based on a review of the transcript and any exhibits received into evidence. See Id. The function of the District court is to correct any errors of law committed by the trial court and not to try, or to retry issues of fact. People v. Williams, 473 P.2d 982 (Colo. 1970). The District Court is bound by findings of the trial court which have been determined on disputed evidence. People v. Brown, 485 P.2d 500 (Colo. 1971).

APPLICABLE STATUTES

The Federal Telephone Consumer Protection Act (“TCPA”) was enacted in 1991 and places restrictions on the use of telephone equipment. It provides, in part:

It shall be unlawful for any person within the United States -- ... to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine...

47 U.S.C. §227(b)(1)(C). The TCPA also provides for a private right of action for violations of the Act.

A person or entity may, *if otherwise permitted by the laws or rules of court of a State*, bring in an appropriate court of that State –

- (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
- (B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or
- (C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

47 U.S.C. §227(b)(3) (emphasis added).

The Colorado provision on unsolicited faxes was added to the Colorado Consumer Protection Act (“CCPA”) in 1999, eight years after the TCPA was enacted. It provides that:

A person engages in a deceptive trade practice when, in the course of such person’s business, vocation, or occupation, such person: ... (b)(I) Solicits a consumer residing in Colorado by a facsimile transmission without including in the facsimile message a toll-free telephone number that a recipient of the unsolicited transmission may use to notify the sender not to transmit to the recipient any further unsolicited transmissions....

C.R.S. § 6-1-702.

The State provision also includes a private right of action for violations of the CCPA. Section 6-1-113, C.R.S., provides:

[A]ny person who, in a private civil action, is found to have engaged in or caused another to engage in any deceptive trade practice listed in this article shall be liable in an amount equal to the sum of:

- (a) the greater of: (I) The amount of actual damages sustained; or (II) Five hundred dollars; or (III) Three times the amount of actual damages sustained,

if it is established by clear and convincing evidence that such person engaged in bad faith conduct; plus

- (b) In the case of any successful action to enforce said liability, the costs of the action together with reasonable attorney fees as determined by the court.

C.R.S. § 6-1-113(2).

MERITS

A. DOES COLORADO LAW PERMIT PLAINTIFF TO BRING A PRIVATE TCPA ACTION IN STATE COURT?

The parties dispute the meaning of the language in §227(b)(3) of the TCPA, “if otherwise permitted by the laws or rules of court of a State.” Defendant argues that actions under the TCPA may only be brought in a state court if the legislature of that state has expressly permitted such actions, i.e. states must “opt in”. Plaintiff argues that such actions are permitted unless a state’s legislature expressly prohibits such actions, i.e., states must “opt out.” The County Court stated that “the Court finds that ... if a State elected not to accept the act that it could elect not to accept the act.” Transcript at 90. While this statement was made in relation to the preemption issue, it demonstrates that the County Court implicitly accepted Plaintiff’s position that States must hear TCPA actions unless they “opt out” of the TCPA. Defendant challenges that determination in her Cross-Appeal.

Courts have split on the meaning of the “otherwise permitted” language. In support of her “opt in” argument, Defendant relies on Autoflex Leasing, Inc. v. Manufacturers Auto Leasing, Inc., 16 S.W.3d 815 (Tex. App. 2000) which held that a State must affirmatively enact specific legislation allowing a private cause of action under the TCPA. In support of his “opt out” argument, Plaintiff relies on International Science & Technology Institute, Inc. v. Inacom Communications, Inc., 106 F.3d 1146 (4th Cir. 1997), which held that a state must “opt out.” The majority of states that have considered the issue have followed the “opt out” interpretation¹.

“Permitted” is synonymous with “not disallowed” and the phrase is stated in the alternative. The private right of action is available if it is permitted by the laws of a state or if it is permitted by the rules of court of a state. Reading the TCPA as a whole, the “otherwise permitted” language of the provision is ambiguous. Therefore, the Court must turn to other methods of statutory construction.

The private right of action was added relatively late in the bill’s development and the legislative history of the TCPA is sparse on the “opt in / opt out” issue. Senator Hollings made the following comments on the day he added the private right of action to the TCPA bill:

¹ A third interpretation proposes that a specific reference to TCPA actions is not necessary and such actions may be brought in a state court as long as they meet the general jurisdictional requirements as found in the state law or court rules. See Robert R. Biggerstaff, State Courts and the Telephone Consumer Protection Act of 1991: Must States Opt-In? Can States Opt-Out?, 33 Conn. L. Rev. 407 (2001). This interpretation rejects the “opt in” idea but does not embrace the idea that states may “opt out”.

The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court ... Small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages. I thus expect that the states will act reasonably in permitting their citizens to go to court to enforce this bill.

137 CONG. REC. S16204, S16205 (Nov. 7, 1991)(statement of Sen. Hollings). This language indicates an intent to provide an easy remedy to consumers and supports the idea that the remedy should be widely available. The statement that the TCPA does not dictate which state court "shall" be the proper venue indicates that Congress intended state courts to hear such actions unless the state's legislature expressly prohibited them.

The FCC is the Federal agency charged with enforcing the Communications Act of 1934 and its interpretation of the statute is entitled to great deference. Smith v. Robinson, 468 U.S. 992, 1027 (1984). While certain FCC statements on the issue can be interpreted to support all of the above interpretations, one statement clearly supports the "opt out" approach. "The TCPA provides consumers with a private right of action, if otherwise permitted by state law or court rules ... Absent state law to the contrary, consumers may immediately file suit in state court if a caller violates the TCPA's prohibitions...." In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd 8752, 8780 (FCC 1992).

The fact that Colorado passed its provision after the enactment of the TCPA raises the question of whether it thereby intended to "opt out" of the TCPA. Certainly Colorado did not explicitly state that it was opting out when it passed C.R.S. 6-1-702. Contrarily, Colorado may have intended to create and maintain a separate state cause of action for more egregious situations where, for instance, the defendant was guilty of more defiant and willful misconduct. The jurisdiction of Colorado district courts is fixed by Colorado Constitution Article VI, § 9(1) (and that of the county courts by Colorado Constitution Article VI, § 17) and "no statute should be held to limit it unless it does so plainly." People v. Higa, 735 P.2d 203 (Colo.App. 1987).

Specific jurisdictional limitations on the Colorado County Courts are contained in C.R.S. § 13-6-105, which provides, in part:

The county court shall have no civil jurisdiction except that specifically conferred upon it by law. In particular, it shall have no jurisdiction over the following matters: ... (f) Original proceedings for the issuance of injunctions, except as provided in section 13-6-

104(5)², except as required to enforce restrictive covenants on residential property [and to enforce the provisions of article 2.5 of title 6, C.R.S.]³, and except as otherwise specifically authorized in this article, or, if there is no authorization, by rule of the Colorado Supreme Court.

C.R.S. § 13-6-105(1). The jurisdictional limitations on the small claims division of the county court in Colorado is contained in C.R.S. § 13-6-403, and contains similar limitations.

These limitations indicate that only TCPA actions for monetary damages, under 47 U.S.C. § 227(b)(3)(B), may be brought in county court. TCPA actions for injunctive relief, under 47 U.S.C. § 227(b)(3)(A), or for injunctive relief and monetary damages, under 47 U.S.C. § 227(b)(3)(C), must be brought in district court.

The 2000 amendment to the county court jurisdictional provisions, to permit suits for injunctive relief for violations of Colorado's Junk Email Law, demonstrates that the legislature is willing to expand county court jurisdiction regarding the receipt of certain unsolicited messages. County court jurisdiction regarding injunctive relief for unsolicited facsimile advertisements, however, has not been granted either for the Colorado Consumer Protection Act or the TCPA. Under the Colorado Consumer Protection Act, only an attorney general or district attorney may petition for a temporary restraining order and/or injunction against violations of the faxing statute and such actions must be brought in the district court. C.R.S. § 6-1-110. The private right of action available for violations of the state faxing statute is only for money damages and therefore may be brought in county court. C.R.S. § 6-1-113.

Based on the foregoing, the Court finds that no enabling legislation is required and that subject matter jurisdiction is proper if no other jurisdictional barriers exist. To the extent Plaintiff was seeking only money damages, the County Court below had proper jurisdiction. To the extent that Plaintiff was seeking an injunction, the County Court did not have jurisdiction and the action should have been brought in District Court.

B. DOES THE TCPA APPLY TO INTRASTATE FAXES?

Plaintiff argues that the TCPA applies to intrastate and interstate faxes. Defendant argues that the TCPA applies only to interstate faxes and that intrastate faxes are left to the States to regulate. The County Court determined that the TCPA applies to intrastate and interstate faxes, relying on 47 U.S.C. § 152(b). It held: "The Court rejects the defendant's argument that it doesn't apply to – the federal law doesn't apply to intrastate – intra, i-n-t-r-a state transmissions. And the proposition to that is 47 U.S.C. § 152(b)." Transcript at 89. Defendant challenges this determination in her Cross-Appeal.

² 13-6-104(5) permits jurisdiction for temporary and permanent civil restraining orders to prevent: assaults and threatened bodily harm; domestic abuse; emotional abuse of the elderly or stalking, as provided in article 14 of title 13.

³ The language in brackets refers to the Colorado Junk Email Law. It was added in 2000 and applies only to those actions occurring after the effective date of August 2, 2000.

According to the general provisions section of the Communications Act (47 U.S.C. 151 et seq.), “the provisions of this Act shall apply to all interstate and foreign communication...” 47 U.S.C.S. 152(a). That section further provides, in part:

Except as provided in sections 223 through 227, [47 USCS §§ 223-227], inclusive ... nothing in this Act [47 USCS §§ 151 et seq.] shall be construed to apply or to give the Commission jurisdiction with respect to (1) ... practices ... or regulations for or in connection with intrastate communication service by wire or radio of any carrier....

47 U.S.C. § 152(b). Section 152 states that generally the Telecommunications Act, and the jurisdiction of the Federal Communications Commission (“FCC”), is limited to interstate communications and indicates that each of the sections listed as exceptions provides, at least in part, for intrastate application/jurisdiction. The question therefore becomes where § 227 (the TCPA) provides for intrastate application/jurisdiction.

Certain of the sections listed in § 152(b) expressly provide for intrastate application. See, e.g. § 225(b)(2). The TCPA (§227), on the other hand, does not contain such an explicit statement of applicability to intrastate communications. It does, however, contain provisions directing the FCC to initiate a rulemaking proceeding to consider “whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits.” 47 U.S.C. § 227(c)(1). Section 227 also directs the FCC to “consider the different needs of telemarketers conducting business on a national, regional, State, or local level” if a national database is instituted. 47 U.S.C. § 227(c)(4). Finally, it contains a preemption provision that saves from preemption, with some limitations, “any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits-- (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements.” 47 U.S.C. § 227(e).

Defendant argues that only the technical specification provisions of §227(d) and the database restrictions in §227(e)(2) – the provisions as to which all state laws are preempted - apply to intrastate communications. This interpretation, however, ignores the rulemaking language of the statute that directs the FCC to consider whether different rules are needed on a local level. The preemption provision certainly contemplates and intends that the TCPA apply to intrastate faxes and provides that unless the state is more restrictive, the Federal provision will control.

The FCC has interpreted the TCPA as applying to both intrastate and interstate communications. An FCC Consumer Alert, issued in 1993, contains the following question and answer: “Does the FCC regulate automated calls and telephone solicitations placed locally within my state? Yes. FCC rules apply to in-state calls.” Telephone Solicitations, Autodialed and Artificial or Prerecorded Voice Message Telephone Calls, and the Use of Facsimile Machines, FCC Consumer Alert, 8 FCC Rcd 480, 481 (FCC 1993).

There is also support for intrastate application in the legislative history. The Legislative History of a companion bill⁴ that was integrated into the TCPA contains the following statements:

Mr. GORE. Finally, I would like a clarification as to the relationship between the Federal regulations to be enacted by the FCC and State laws in the area of intrastate telephone solicitations. It would seem to me that in the area of these telephone solicitations, it would be preferable to have the Federal law as a national scheme to protect telephone subscribers. While the States remain free to adopt laws affecting intrastate communications, I am sure the Senator would join me in encouraging the States to adopt laws consistent with the Federal system to facilitate the telemarketers' ability to comply fully with both the State and Federal laws regarding intrastate communications.

Mr. PRESSLER. The Senator is correct in his understanding.

137 CONG. REC. S16203, S16204 (Nov. 7, 1991).

This exchange reinforces the interpretation that the language of §227(c)(1)(C) gives the FCC jurisdiction to deal with intrastate calls.

C. IS C.R.S. § 6-1-702(b) PRE-EMPTED BY THE FEDERAL TCPA?

The County Court held that the Colorado statute is less restrictive than the TCPA and that it is not preempted by the TCPA. The TCPA provides: "nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits ... the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements." 47 U.S.C. § 227(e)(1).

The court in Van Bergen v. State of Minnesota, 59 F.3d 1541 (8th Cir. 1995), analyzed the language of the TCPA to determine whether a Minnesota provision was pre-empted either expressly, by implication, or by conflict with the Federal provision. As to express preemption, that court held:

The savings clause, however, does not state that all less restrictive requirements are preempted; it merely states that more restrictive intrastate requirements are not preempted. The TCPA, therefore, does not expressly preempt the Minnesota statute....

59 F.3d at 1547-48.

I cannot agree with the holding of Van Bergen that less restrictive State provisions are not preempted by the Federal act. The TCPA specifically states that more restrictive State provisions will not be preempted and that essentially identical State provisions will not be

⁴ S. 1410 – the Telephone Advertising Consumer Rights Act, is where the FCC Rulemaking provision of § 227 originated

preempted. While the statute could have explicitly outlined how less restrictive State provisions are to be handled, by failing to mention them Congress was indicating that such less restrictive provisions are to be preempted. Expressio unius est exclusio alterius, the expression of one thing implies the exclusion of others.

The FCC's interpretation of the preemption issue is in accord. In an Industry Bulletin, the FCC addressed federal preemption in the following question and answer:

Do the TCPA and the FCC's rules preempt state law? The TCPA specifically preempts state law where it conflicts with the technical and procedural requirements for identification of senders of telephone facsimile messages or automated artificial or prerecorded voice messages. The TCPA and the FCC's rules do not preempt state law which imposes more restrictive requirements or regulations for (1) the use of facsimile machines or other electronic devices to send unsolicited advertisements ... Thus, depending on state law, the TCPA, the FCC's rules and/or state laws could apply to your company's services. You should contact the state public utilities commission in each state where your company provides the services listed ... to determine what laws apply in those states.

Telephone Solicitations, Autodialed and Artificial or Prerecorded Voice Message Telephone Calls, and the Use of Facsimile Machines, Industry Bulletin, 8 FCC Rcd 506, 508 (FCC 1993).

The legislative history contains some indications that preemption was intended to be more limited⁵. However, given that the Court finds the language of the statute unambiguous, resort to the legislative history is unnecessary. Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302; 149 L. Ed. 2d 234 (2001).

The Colorado provision can be interpreted as both more restrictive and less restrictive than the Federal provision. The Colorado provision does not prohibit all unsolicited fax advertisements and it is therefore less restrictive than the TCPA⁶. To the extent that Colorado's provision permits unsolicited faxes that contain identifying information, it is preempted by the TCPA. Colorado's statute does prohibit additional conduct not proscribed by the TCPA – it adds a penalty for failing to provide certain identifying information on the transmission – and in that respect it is more restrictive. Plaintiff brought this suit under only the TCPA, however, acknowledging that there had been no violation of the state provision.

⁵ After revisions incorporating two other bills had been made, Senator Hollings stated that: "Section 227(e)(1) clarifies that the bill is not intended to preempt State authority regarding intrastate communications except with respect to the technical standards under section 227(d) and subject to section 227(e)(2). Pursuant to the general preemptive effect of the Communications Act of 1934, State regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted." 137 CONG. REC. S18783 (Nov. 27, 1991).

⁶ The Court rejects Defendant's argument that the Colorado provision is "virtually identical" to the TCPA. While such a characterization was strained in Van Bergen, it is completely untenable here.

D. DOES THE COLORADO PROVISION “REVERSE-PREEMPT” THE TCPA?

The County Court held that C.R.S. § 6-1-702 was not preempted and was controlling as to intrastate faxes.

In State of Texas v. American Blast Fax, Inc., 121 F.Supp.2d 1085 (W.D.Tex. 2000), the court emphatically rejected that argument. That court stated:

Simply because a party complies with one law does not preclude it from violating another. The State is suing Blastfax for violating the TCPA, not the Texas statute governing intrastate faxes. Blastfax also argues that, because the Texas statute is allegedly more restrictive than the TCPA, it somehow trumps the TCPA. ... This argument turns the supremacy clause of the federal constitution on its head. While the TCPA does provide that more restrictive state laws are not preempted by the TCPA ... it does not follow that, should a state pass more restrictive laws regarding junk faxes, the TCPA is then preempted in that state. The TCPA contains no “reverse preemption” clause for its ban on unsolicited fax advertisements. This ground for dismissal is wholly without merit.

121 F.Supp.2d at 1089.

While Sections 224 and 226 of the Telecommunications Act contain provisions stating that the federal provisions will not apply if a state has regulations in the area, no such language is present in Section 227. The Court finds, therefore, that to the extent that Colorado’s provision is more restrictive than the TCPA, and therefore not preempted, it does not reverse-preempt the Federal statute.

E. DOES THE TCPA APPLY ONLY TO PERSONS WHO TRANSMIT A FAX DIRECTLY?

The County Court found that Defendant contracted with American Blast Fax to transmit advertisements by fax and therefore intended that fax advertisements be sent. The County Court determined that this was sufficient to bring Defendant within the prohibitions of the TCPA. Defendant argues that the TCPA’s prohibitions and penalties apply only to those persons who personally transmit the offending fax and that Plaintiff’s only proper claim, if any, would be against American Blast Fax.

An FCC Industry Bulletin contains the following question and answer: “Who is responsible for compliance with FCC rules on telephone facsimile transmissions? The person on whose behalf a facsimile transmission is sent will ultimately be held liable for violations of the TCPA or FCC rules.” Telephone Solicitations, Autodialed and Artificial or Prerecorded Voice Message Telephone Calls, and the Use of Facsimile Machines, Industry Bulletin, 8 FCC Rcd 506, 507 (FCC 1993).

This issue was raised in Hooters of Augusta, Inc. v. Nicholson, 245 Ga.App. 363; 537 S.E.2d 468 (2000), where Hooters had used Value-Fax of Augusta to send its fax advertising and claimed it was not liable for the acts of an independent contractor. The Georgia Court of Appeals held that a jury question remained as to whether the company was an independent contractor. To “provide some guidance to the trial court,” the court in Hooters also held that based on the language in an FCC release, Hooters may be liable even if Value-Fax was an independent contractor. Id. at 367.

In reconsidering an amendment to its rules requiring that a fax contain the identifying information for both the sender and the broadcaster of a fax ad, the FCC stated, “Facsimile broadcast service providers are businesses or individuals that transmit messages on behalf of other entities to selected destinations and that do not determine either the message content or to whom they are sent. . . . We clarify that the sender of a facsimile message is the creator of the content of the message.” 12 FCC Rcd 4609. The FCC determined that only the identifying information for the sender need be included and that broadcasters would not be liable unless there was a “high degree of involvement.” Id.

In this case, Defendant controlled the content of the offending message. She indicated that she did not have control over the list of recipients or have knowledge of the numbers in American Blast Fax’s database. Transcript at 51. She did intend, however, that her advertisement be distributed by American Blast Fax via fax machine. Under these circumstances, she is a sender for purposes of the TCPA and can be held liable for violations of its ban on unsolicited fax advertising⁷.

CONCLUSION

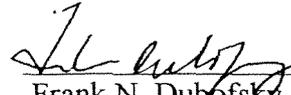
For the reasons stated above, the Court finds that: 1) private state actions under the TCPA are permitted without specific enabling legislation from the states; 2) the TCPA applies to intrastate communications; 3) the TCPA preempts the less restrictive aspects of the Colorado provision; 4) the Colorado provision does not reverse-preempt the TCPA; and 5) the TCPA applies to the person controlling the content of the message when they intend that the message be sent via facsimile machine.

The legal basis for the County Court’s determination that the TCPA did not apply and that the Colorado provision was controlling is not entirely clear. Because I find that the TCPA preempts the Colorado provision in this case, the judgment of the County Court is reversed, in part, and the case is remanded with directions to apply the TCPA.

⁷ Defendant may have an action against American Blast Fax. Blast Fax may have been in the business of sending unsolicited faxes and charged for this service. If it made or participated in the determination of which persons received the faxes it would not be immune from liability as a broadcast service provider. 12 FCC Rcd 4609. In fact, by listing its own identifying information on the fax, rather than Defendants, Blast Fax was acknowledging that it was a sender. Here Defendant is charged with knowledge of the law and she is not claiming that she was unaware the advertisements would be sent by fax. If Blast Fax did not disclose the illegality and risk to Defendant of these faxes, this would be actionable.

As part of the application of the TCPA, the County Court must review the testimony on the issue and determine whether Defendant willfully or knowingly violated the TCPA, i.e., whether she consciously and deliberately directed American Blast Fax to send advertisements to persons she knew to have no pre-existing relationship to Blast Fax or herself, or had knowledge that Blast Fax would send the faxes to such persons⁸.

BY THE COURT this 15 day of August, 2001.


Frank N. Dubofsky
District Court Judge

Cc: McKenna
Redmiles

CERTIFICATE OF SERVICE:
I certify that I mailed the foregoing document by
AUG 15 2001
mailing same to all counsel and/or pro se party at
addresses listed in file. K.T.

⁸ The July 27, 1999 letter of clarification from the FCC to Robert Biggerstaff states that the terms willfully and knowingly have not been defined by the FCC in the TCPA context. It notes that knowingly has been defined in other contexts to mean either the same as “willfully” or to mean “knew or should have known.” The “knew or should have known” definition was adopted in the dial-a-porn cases to prevent providers from saying they did not intend to allow children to hear the messages when children could freely call and access obscene materials. This context is not analogous and “knowingly” should be interpreted to mean the same thing as “willfully.”

STATE OF MISSOURI)
)
COUNTY OF ST. LOUIS)

FILED

MAR 27 2001

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

CHERYL COLEMAN, and SUZON
POGUE

Plaintiffs

v.

J.J. MINEHART, individually REAL
ESTATE DEPOT, INC.

Defendants

Cause No.: 00AC 013006 F CV

Div. No: 39
Judge Clifford

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This matter came before the court on March 27, 2001 on Plaintiffs' Motion for Summary Judgment. This is an action originally brought by Plaintiffs against Real Estate Depot and J. J. Minehart individually, in the Associate Circuit Court of St. Louis County, Missouri, alleging four violations of the Telephone Consumer Protection Act ("TCPA") 47 U.S.C. § 227. For the reasons stated herein, Plaintiffs' motion is GRANTED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants have filed no response to Plaintiff's Motion for Summary Judgment, and as such, the facts set forth in Plaintiffs' motion are unrefuted. Plaintiffs' Motion was validly served by fax transmission sent to defendant as provided under Rule 43.01(c)(2) of the Missouri Rules of Civil Procedure Plaintiffs received four facsimiles containing unsolicited advertisements promoting the goods and services sold by Defendant Real Estate Depot, Inc. These faxes are before the Court as exhibits to Plaintiffs' motion. Each of the faxes at issue contains material advertising the

commercial availability or quality of property, goods or services. Defendant Real Estate Depot, Inc., sent the faxes at issue, or caused them to be sent by employing an agent to send them on its behalf. Defendants did not obtain prior express invitation or permission from any Plaintiff to send the faxes to Plaintiffs. Defendant J. J. Minehart was the party responsible for, and participated in, the acts of Defendant Real Estate Depot, Inc., that resulted in the sending of the faxes at issue, by authorizing the sending of unsolicited fax advertisements, or by failure to act, permitted the sending of unsolicited faxes on behalf of Defendant Real Estate Depot, Inc. Defendant J. J. Minehart was aware that he had authorized or permitting the sending of unsolicited facsimiles containing advertisements, and was aware that such faxes were being sent without prior express consent of the recipients.

1. Standard of Review for Summary Judgment.

The rationale behind summary judgments as permitted under Rule 74.04(c)(3) of the Missouri Rules of Civil Procedure is to facilitate the expeditious determination of a controversy when there is no genuine issue as to any material fact. Rockwell Int'l, Inc. v. West Port Office Equipment Co., 606 S.W.2d 477, 479 (Mo.App. 1980). If the non-movant cannot contradict a showing of the movant, judgment is properly entered against the non-movant because the movant has already established a right to judgment as a matter of law. ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp., 854 S.W.2d 371, 381 (Mo. banc 1993).

2. Elements of the Telephone Consumer Protection Act.

The elements of a claim under the TCPA consists of sending material constituting an “unsolicited advertisement” by facsimile to a recipient who has not given “prior express invitation or permission” for such transmissions. 47 U.S.C. § 227(b)(2). An “unsolicited advertisement” is defined by the statute as “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.” 47 U.S.C. § 227(a)(4). Violations of the statute gives rise to a private right of action for each such violation, to recover \$500 or actual damages, whichever is greater. 47 U.S.C. § 227(b)(3)(A). The damages can be trebled upon a finding that the Defendant’s acts were done “willfully or knowingly,” however the Court is informed that Plaintiffs here have waived their prayer for trebled damages for willful or knowing violations.

With no facts in dispute, TCPA cases are well suited for summary judgment. See Parker v. American Blast Fax, Inc., No. 141-182692-00 (Dist. Ct. Tex. Sep 6, 2000) (granting summary judgment to the plaintiff in a class action under the junk fax provisions of the TCPA); State of Arkansas v. Tri-Star Marketing, Inc., No. C99-18888R (W.D. Wash. Sep. 13, 2000) (granting Plaintiff’s motion for summary judgment).

3. Personal Jurisdiction

Defendants aver that Real Estate Depot, Inc. is a Vermont Corporation, and not subject to the personal jurisdiction of this Court. This argument has been squarely dealt with in recent TCPA cases. Sending unsolicited faxes into Missouri subjects the sender to the jurisdiction of Missouri courts for a cause of action for sending those faxes in violation of the TCPA. Brentwood Travel, Inc. v. Lancer, LTD., No. 01CC-000042 (Division 45) (Feb. 21, 2001) (“[S]ending unsolicited fax advertisements into Missouri in violation of the prohibitions under the TCPA satisfies both the “transacting any business” and “tortious act in this state” prongs of the Missouri long arm statute and establishes personal jurisdiction in this state that is consistent with minimum contacts and due process under the Fourteenth Amendment.”). “If he didn’t want to be hailed into Missouri’s courts, he could have not called Missouri telephone numbers and reached into Missourians’ homes with his advertising transmissions.” Id.

4. Personal Liability of J. J. Minehart

Plaintiff points out the important difference between piercing the corporate veil as opposed to holding an individual in the corporation personally liable as a joint tortfeasor, the latter often described as piercing the “corporate shield.” The claim against J. J. Minehart individually is based on Minehart’s personal conduct that ultimately caused harm to Plaintiffs in Missouri. Just as if Minehart had been driving a delivery vehicle for Real Estate Supply, Inc., Plaintiffs allege he is personally liable for harms he causes through illegal acts while driving, along with Real Estate Supply, Inc.

It is well established in Missouri, that individuals can be held personally liable for acts done in a corporate enterprise. Such individuals in a corporation can be held personally liable without piercing the corporate veil, when an individual is aware of, and then engages in or authorizes illegal or tortious conduct in their corporate capacity. Constance v. B.B.C. Dev. Co., 25 S.W.3d 571, 590 (Mo App. W.D. 2000). “To hold an officer of a corporation liable, he must be shown to have had actual or constructive knowledge of the actionable wrong and participated therein.” Osterberger v. Hites Const. Co., 599 S.W.2d 221, 229 (Mo. App E.D. 1980). This limits liability to the actual wrongdoers engaged in or responsible for the wrongdoing, and not to the officers and stockholders in general, as piercing the corporate veil would do. Every citizen is expected to comport his actions to the law, regardless of whether those acts are under corporate direction or not. It is appropriate in such a case to hold the actor, and the corporation, both jointly and severally liable. Id. Piercing the veil places liability with the officers and/or stockholders regardless of who in the corporation committed the act complained of. Personal liability for a corporate wrongdoer places liability with the individuals solely because of their specific illegal conduct causing the harm to Plaintiffs.

Plaintiff has properly alleged and it is undisputed that Mr. Minehart had knowledge of and

participated in the facsimile advertising. While Minehart may not have pressed the button and dialed the fax machine himself, he was the driving force. “He could not consciously become a participant in the general scheme and accomplish indirectly through the [corporation] what he could not do directly by himself and then successfully declare himself exempt from complicity.” Bittiker v. State Bd. of Registration, 404 S.W.2d 402, 409 (Mo. App, 1966).

In Osterberger v. Hites Const. Co., 599 S.W.2d 221 (Mo. App E.D. 1980), purchasers of house brought action against corporate vendor and its president, personally, for damages alleging that there had been a fraudulent concealment of the existence of an outstanding deed of trust on house. The president, “executed the warranty deed, and, as noted, the warranty deed failed to show that such an encumbrance existed.” Osterberger, 599 S.W.2d at 229. The president argued that he should not have been held personally liable because he merely executed the warranty deed in question in his corporate capacity, as president of defendant corporation. The court nevertheless upheld judgment against him personally, noting his personal knowledge and participation make him personally liable, even though he was acting in his corporate capacity. Id.

Also relevant from Osterberger, is the fact that the defendant had a practice of the same conduct, and had engaged in “other similar transactions in the course of a systematic way of doing business.” Id. Similarly, Minehart has been complicit in his corporation’s systematic junk fax advertising practices. The facsimile advertisements that are the cause of action in this case, and the time period that they were utilized by Defendant is ample evidence of the systematic practice by Defendant.

The Missouri Court of Appeals has addressed a very similar situation regarding responsibility for corporate advertising done with the full knowledge, and complicity, of the individual behind the corporation. In Bittiker v. State Bd. of Registration, 404 S.W.2d 402 (Mo. App. 1966), a

physician was held responsible for advertising placed in a national magazine by a clinic ... a clinic where the doctor practiced, and which the doctor owned. The statutes at that time prohibited solicitation by physicians, much like the TCPA prohibits solicitation by unsolicited faxes. The court held the defendant personally responsible for the advertising done by the corporation:

The advertisements were palpable solicitations designed to attract patients to the clinic for examination and treatment by the licensee and his staff. . . . He knew that the advertising had been going on since he became chief of staff in 1958 and 'always, always', and that it was 'still' going on. From every point of view, and in the logic of this whole atmosphere, how can we say, without blinding our eyes to the obvious, that the licensee did not consciously engage in the clinic's general scheme to solicit patients for him to examine and treat? With his knowledgeable cooperation, the clinic's whole operation was made complete. He chose to be the physician completing that operation. He accepted the patients when they arrived and examined and treated them for the clinic. He knew the source of those patients and he connived at it for personal gain and aided and abetted in the consummation of the whole operation. He wants us to hold, as he repeats he earnestly believes, that he merely examined and treated the clinic's patients, meanwhile standing professionally aloof and innocent of the clinic's program of solicitation. . . . He could not lurk behind the corporate shield and profess a naivete beneath the intelligence of everyone of average intelligence. . . . He could not consciously become a participant in the general scheme and accomplish indirectly through the clinic what he could not do directly by himself and then successfully declare himself exempt from complicity.

Bittiker, 404 S.W.2d at 409.

In this case, Minehart is in the business of selling real estate supplies. He sells those packages to the consumers who, *inter alia*, call his company in response to the unsolicited fax advertising. This is precisely analogous to the doctor in Bittiker who accepted the patients obtained by the illegal advertising.

This is not a situation where Plaintiff is trying to hold a corporate officer in a huge corporation responsible for conduct of a rogue, unknown employee, whose acts were completely unknown and unauthorized. Nor is this a case where the officer told an employee to mop a floor, and some water was spilled, resulting in a slip and fall action. There is nothing specifically illegal about mopping

floors or spilling water. In this case, however, Minehart was directly responsible for activities that are specifically prohibited by law - unsolicited fax advertising. Had this been done outside a corporation, there would be no question of Minehart's liability. Minehart can not "accomplish indirectly through the [corporation] what he could not do directly by himself and then successfully declare himself exempt from complicity." Bittiker v. State Bd. of Registration, 404 S.W.2d 402, 409 (Mo. App. 1966).

DAMAGES

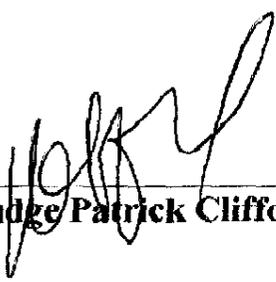
The TCPA provides for mandatory liquidated statutory damages of \$500 per violation. Therefore damages are easily calculated and can be decided without a jury.

IT IS THEREFORE ORDERED AND ADJUDGED that Plaintiff Cheryl Coleman have and recover from Defendants J.J. MINEHART, individually and REAL ESTATE DEPOT, INC., jointly and severally, the sum of \$1,000 and;

IT IS THEREFORE ORDERED AND ADJUDGED that Plaintiff Suzon Pogue have and recover from Defendants J.J. MINEHART, individually and REAL ESTATE DEPOT, INC., jointly and severally, the sum of \$1,000.

SO ORDERED.

This, the 27 day of MARCH, 2001



Judge Patrick Clifford, Division 39

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

NEIL ZEID,

Plaintiff,

v.

THE REDING LAW FIRM, P.C., et al.,

Defendants.

Cause No. 01AC-013005 F CV

Division 39 - Tuesday

FILED

MAR 19 2002

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

ORDER

This matter came before the Court on January 8, 2002. Defendant has moved this Court to dismiss Plaintiff's claims, raising seven separate grounds for that motion. Plaintiff has filed a substantive memorandum on all seven grounds. After considering the filings and the oral arguments of the parties, the Court DENIES Defendant's motion.

1. Enabling Legislation

As this Court has repeatedly held, there is no need for state "enabling legislation" to open the state's courts to TCPA claims. Coleman v. Varone, No. 00AC-023298 (Div. 39) (Mo Cir. Ct., Feb. 13, 2001); Harjoe v. Freight Center, Inc., No. 00AC-005196 (Div. 39) (Mo. Cir. Ct., Jan. 9, 2001); Davis, Keller, Wiggins, LLC. v. JTH Tax, Inc., No. 00AC-023289 (Div. 39) (Mo. Cir. Ct. Aug. 28, 2001). The Court relies on its reasoning stated in Davis, Keller, Wiggins, LLC. v. JTH Tax, Inc., *supra*.

2. "Commandeering" Tenth Amendment argument

Defendants' argument that the TCPA violates the Tenth Amendment by "commandeering" state courts can only be premised on a fundamental misunderstanding of federalism, and distortion of United States Supreme Court precedent. The U.S. Supreme Court has held that federal law can not commandeer state legislatures (New York v. United States, 505 U.S. 144 (1992)) and can not

commandeer state executives (Printz v. United States, 521 U.S. 898 (1997)), but those same cases make clear that state courts are different: “Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal ‘direction’ of state judges is mandated by the text of the Supremacy Clause.” New York v. United States, 505 U.S. 144, 178 (1992).

Indeed, it was manifest intent of the drafters of the Constitution, that state courts would have original jurisdiction to hear federal claims (except those reserved for the Supreme Court such as impeachment and trials of foreign officials). It is hard to imagine state court jurisdiction for a federal cause of action as being any infringement on states’ rights, when it was the most jealous protectors of those states rights that insisted on that scheme. For example, John Rutledge, delegate the the convention from South Carolina, succeeded in having struck from the Constitution, the provision for the mandatory creation of an infrastructure of inferior Article III courts to hear federal claims. James Madison, Notes of the Debates in the Federal Convention of 1787, June 5, pp 71-2 (Koch ed.). Instead, inferior federal courts became optional, and lay in the hands of Congress and thus in the hands of the states through their representatives. The desire of the states’ rights supporters against the federalists, was that state courts would hear federal claims, so that those states’ courts would play a role in development of the national law. “[I]ndeed, for ought I see, every case that can arise under the constitution or laws of the United States ought in the first instance to be tried in the court of the state, . . . This method would preserve the good old way of administering justice, would bring justice to every man’s door, and preserve the inestimable right of trial by jury.” Antifederalist No. 82 (Robert Yates) (Morton Borden ed. 1965).

From the very founding of our system of federalism, it has been axiomatic that the states are parts of “one whole,” and by express design “the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.” THE FEDERALIST NO. 82, at 132 (Alexander Hamilton) (E. Bourne ed. 1947). “Under this system of dual

sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.” Tafflin v. Levitt, 493 U.S. 455, 458 (1990).

A number of federal statutes find jurisdiction in State Courts, such as the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.* and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961-1968. These present no Tenth Amendment infringement. This issue was also addressed comprehensively by a leading authority in this field Robert R. Biggerstaff, State Courts and the Telephone Consumer Protection Act of 1991. Must States Opt-In? Can States Opt-Out?, 33 CONN. L.REV. 407 (2001):

Using those parameters for guidance, the TCPA presents no constitutional infirmity. It does not require the states to create any courts or take any action legislatively. It regulates individual conduct directly and does not require a state to prosecute violators. Nor does it abrogate states' sovereign immunity. It does not attempt to regulate the jurisdiction or mandate the modes of procedure of the state courts. The TCPA is simply enforceable under the Supremacy Clause in an appropriate state court in accordance with the laws and rules of court of that state, like FELA, RICO, and other federal acts. “Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause.” [New York v. United States, 505 U.S. at 178] Following the line of cases anchored by the unanimous Supreme Court in Testa v. Katt, [330 U.S. 386 (1947)] any state court that is competent to hear similar civil suits, must also hear TCPA cases, unless otherwise provided by Congress.

See, also, Miles v. Illinois Cent. R. Co., 315 U.S. 698, 703-704 (1942) (“By virtue of the Constitution, the courts of the several states must remain open to such litigants on the same basis that they are open to litigants with causes of action springing from a different source. This is so because the Federal Constitution makes the laws of the United States the supreme law of the land, binding on every citizen and every court and enforceable wherever jurisdiction is adequate for the purpose.”)

Finally, Defendant's exact Tenth Amendment argument has been raised, and rejected in every court to consider it. See Int'l Science & Tech. Inst., Inc. v. Inacom Commun., Inc., 106 F.3d 1146 (4th Cir.1997); Foxhall Realty Law Offices, Inc. v. Telecomm. Premium Svcs, Ltd., 156 F.3d

432, (2nd Cir.1998), and Murphey v. Lanier, 204 F.3d 911 (9th Cir 2000).

3. Application to “intrastate” faxes

Defendants’ argument that the TCPA does not apply to “intrastate” faxes has also been rejected by this Court. Harjoe v. Freight Center, Inc., No. 00AC-005196 (Div. 39) (Mo. Cir. Ct. Jan. 9, 2001). The federal courts agree. See Texas v. American Blastfax, Inc., 121 F.Supp.2d 1085 (W.D.Tex.2000). The only appellate court from our another state to address the question also agrees. See Hooters of Augusta, Inc. v. Nicholson, 537 S.E.2d 468, 366-367 (Ga. App.2000) (en banc). Legal scholars have also reached the same inescapable conclusion. Hilary B. Miller and Robert R. Biggerstaff, Application of the Telephone Consumer Protection Act To Intrastate Telemarketing Calls and Faxes, 52 Fed. Comm.L.J. 667 (2000). As the plain language of the TCPA, the legislative history, and every case to date has ultimately held, the TCPA does apply to intrastate, as well as interstate, facsimiles.

It is true that most sections of the 1934 Communications Act do not reach purely intrastate matters, by virtue of 47 U.S.C. § 152. The exception to this limitation imposed by Section 152(a), is the list of special sections of the Communications Act found in Section 152(b). When Congress wants a portion of the Communications Act to apply to intrastate matters, Congress amends Section 152(b). Congress did so with the TCPA, by amending Section 152(b), to explicitly add the TCPA to that list of exceptions. Nothing could be clearer indication of Congressional intent. Had Congress not intended the TCPA to reach intrastate matters, there would have been no need for Congress to add the TCPA to the list of exceptions in Section 152(b). In fact, the Court recognized this in AT&T Corp. v. Iowa Util. Board, 119 S. Ct. 721, 730-31 (1999). Both the majority and dissent in AT&T acknowledged the “except” clause is the standard mechanism for conferring intrastate jurisdiction on the FCC. To help make his point, Justice Thomas specifically cited to the inclusion of the TCPA (i.e., § 227) in the “except” clause as evidence that “Congress has elsewhere

demonstrated that it knows how to exempt certain provisions from [§ 152(a)'s] reach." Id., 119 S. Ct. at 744 (Thomas, J., dissenting).

By specifically exempting the TCPA from the 1934 Act's general ban on intrastate regulation, Congress necessarily intended the TCPA to cover both interstate and intrastate communications. See Hooters of Augusta, Inc. v. Nicholson, 537 S.E.2d 468, 366-367 (Ga. App.2000) (en banc) ("Congress expressed its intent to regulate both interstate and intrastate communications under the TCPA by amending 47 U.S.C. § 152(b) to specifically except the TCPA from the 'interstate' limitation of 47 U.S.C. § 152(a).")

If any doubt remains, the sponsor of the TCPA in the House, congressman Markey, makes it irrefutably clear that the TCPA applies to both interstate and intrastate calls:

The legislation, which covers **both intrastate and interstate unsolicited calls**, will establish Federal guidelines that will fill the regulatory gap due to differences in Federal and State telemarketing regulations. This will give advertisers a **single set of ground rules** and prevent them from falling through the cracks between Federal and State statutes.

137 Cong. Rec. E793 (daily ed. March 6, 1991) (Statement of Rep. Markey) (emphasis added). This is an unrebutted and explicit statement of intent from the sponsor of the TCPA in the House. "It is the sponsors that we look to when the meaning of the statutory words is in doubt." Labor Board v. Fruit Packers, 377 U.S. 58, 66 (1964) (additional citations omitted).

4. Commerce Clause challenge

The Commerce Clause, U.S. Const. art. I, § 8, provides broad powers for Congress to regulate even intrastate matters when those matters involve a sufficient impact on interstate commerce. Weiss v. United States, 308 U.S. 321, 327 (1939) ("And, as Congress has power, when necessary for the protection of interstate commerce, to regulate intrastate transactions [footnote omitted], there is no constitutional requirement that the scope of the statute be limited so as to exclude intrastate communications.") This century has seen technological and transportation advances contribute to the nationalization of commerce, which has led to a natural and

corresponding expansion of Congress' authority under the Commerce Clause. "The volume of interstate commerce and the range of commonly accepted objects of government regulation have, however, expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them." New York v. United States, 505 U.S. 144, 157 (1992).

Defendants argument that application of the TCPA to intrastate faxes would violate the Commerce Clause is without merit. Faxes are transmitted by telephone, and "[i]t is well established that telephones, even when used intrastate, constitute instrumentalities of interstate commerce." United States v. Weathers, 169 F.3d 336, 341 (6th Cir. 1999). The findings made by Congress in passing the TCPA expressly found that junk faxes, even local faxes, tie up the recipients fax machine, thereby interfering with his ability to receive other faxes - thus interfering with interstate commerce.

The telephone is an instrumentality of interstate commerce, and Congress' authority to regulate its use is plenary. "Since the telephone is an instrumentality of interstate commerce, Congress has plenary power under the Constitution to regulate its use and abuse." Paylak v. Church, 727 F.2d 1425, 1427 (9th Cir.1984); "It is well established that telephones, even when used intrastate, constitute instrumentalities of interstate commerce." United States v. Weathers, 169 F.3d 336, 341 (6th Cir. 1999). See, also, United States v. Gilbert, 181 F.3d 152, 158 (1st Cir.1999) (discussing the "long standing" line of cases holding Congress may regulate purely intrastate telephone activity under the Commerce Clause).

In addition, unsolicited fax advertising activity can properly be governed by Congress under Commerce Clause powers as a "class of activity" as pointed out in cases such as Fry v. United States. "Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." Fry v. United States, 421 U.S. 542 (1975). The fact that cases such as United States v. Sullivan, 332 U.S. 689 (1948), and Wickard v. Filburn, 317 U.S. 111 (1942),

remain good law, reinforces that conclusion.

5. First Amendment Challenge

First Amendment challenges to the TCPA have been rejected by every court to hear them, including Missouri trial courts. Coleman v. ABF, No. 00AC-005196 (Div. 32) (Mo. Cir. Ct. Oct. 12, 2000). Six different federal judges in three different federal circuits have unanimously held that the junk fax provisions of the TCPA present no First Amendment infirmity. This militates strongly against Defendants' proposition that any speech rights are improperly restricted by the TCPA.

Even considering this question without the ample guidance of the federal courts which have addressed the First Amendment challenge to the TCPA, this Court is not persuaded by Defendant's position. Defendant's argument can only be premised on a perceived right to consume another person's paper and toner, and to use that person's facsimile machine, all without permission of the property owner. To make this a speech case, is to insist on a right to use someone else's paper, ink, and printing press to print your message, all without the permission of the owner of that printing press.

It has been said that trespass for speech purposes does not invoke scrutiny under the First Amendment. Hudgens v. NLRB, 424 U.S. 507 (1976) (trespass not protected by First Amendment); Lloyd Corp. v. Tanner, 407 U.S. 551, 568 (1972) ("this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only.") The Court noted that the picketers "did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co." Hudgens, 424 U.S. at 520-21. There simply is no First Amendment right to access private property. Indeed, this Court agrees with Plaintiff that the TCPA is properly examined as a restriction on non-consensual theft and trespass, irrespective of the "speech" activity a violator wishes to engage in after consummating his act of theft and trespass. There is no speech

restriction here that requires First Amendment scrutiny. Any impact on speech is only incidental to the regulation of nonconsensual theft and trespass. Arcara v. Cloud Books, Inc., 478 U.S. 697, 702-3 (1986) (bookselling on premises used for prostitution does not confer First Amendment coverage). A speaker can't steal a ream of paper at Office Depot and demand theft laws be justified by the government under First Amendment doctrine because he intended to use the stolen paper for political flyers. Otherwise "any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment." Arcara, 478 U.S. at 708 (O'Connor, Stevens, JJ, concurring).

There simply is no "right" to force commercial advertising material into another person's property at the property owner's expense. In State v. Nye, 943 P.2d 96 (1997), the Supreme Court of Montana considered a case where a man claimed a "free speech" right to put bumper stickers on other peoples' private property - without the consent of the owners:

Nye points out that many others in the Gardiner community have similar stickers affixed to their vehicles or in their windows as a protest against what they perceive to be objectionable practices of CUT. However, Nye fails to recognize that the difference between his conduct and that of others in the Gardiner community is that the others he refers to placed the stickers on their own property while Nye placed the stickers on other people's property without their permission. As the State asserts in its brief, if Nye had limited his attack on CUT to the display of a bumper sticker on his car or living room window, the First Amendment would have protected his right to do so. Nye lost his First Amendment protection when he coupled the message on the bumper sticker with defacement of the property of others.

Id., at 101. See, also, State v. Mortimer, 641 A.2d 257 (N.J. 1994) (free speech protection was lost when defendants delivered their message through defacement of private property); People v. Steven S., 31 Cal.Rptr.2d 644 (Cal.App. 1994) (defendant was not entitled to First Amendment protection for trespassing on private property for speech purposes); Cincinnati v. Thompson, 643 N.E.2d 1157 (Ohio App. 1994) (protesters not entitled to First Amendment protection for protesting on private property). "[I]t is untenable that conduct such as vandalism is protected by the First Amendment merely because those engaged in such conduct intend thereby to express an idea." In re Michael M.,

86 Cal.App.4th 718, 729 citing Texas v. Johnson, (1989) 491 U.S. 397, 404; “The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another person’s home or office.” Dietmann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971).

In the case at hand, Defendants lost their First Amendment protection when they stole untold sheets of paper without permission to subsidize their advertising distribution mechanism. See U.S. v. Collins, 56 F.3d 1416, 1418 & 1421 (DC.Cir. 1995) (no First Amendment right to make 56,500 photocopies without permission, even though copies were made to further speech interest). “To permit the thief to thus misuse the [First] Amendment would be to prostitute the salutary purposes of the First Amendment.” U.S. v. Morrison, 844 F.2d 1057, 1069-70 (4th Cir. 1988). A thief or trespasser can not excuse his trespass by espousing political discourse while he steals or trespasses. “To be sure, our cases reject the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” Wisconsin v. Mitchel, 508 U.S. 476, 483 (1993) (penalty enhancement statute that considered content of speech of accused was not invalid under First Amendment).

“[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” Arcara v. Cloud Books, Inc., 478 U.S. 697, 702-3 (1986) Tying up the recipients’ fax machines and the shifting of advertising cost of flyers to the unwilling recipients are “nonspeech elements” of the commercial practice of non-consensual broadcast fax advertising. It is these nonspeech elements that are the evils the statute addresses - not the speech itself. “[L]aw must reflect the ‘differing natures, values, abuses and dangers’ of each method [of communication]” Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) (regulation of billboards allowed because of unique harms caused by billboards, such as visual clutter, not manifest by other forms of advertising).

Justice Marshal’s famous quote with respect to unwanted mail, is that the “journey from the

mailbox to the trash can is an acceptable burden” but this analogy does not extend to junk faxes. With junk faxes, the recipient is **throwing away his own paper and toner**. This Court does not think Justice Marshall would make the same statement if we all had to feed blank paper and supplies into the mailbox like a fax machine.

a. Application of First Amendment doctrine.

If the Court was to apply First Amendment principles, the threshold question that must be addressed is whether the TCPA is content neutral. This is a critical step, as “we cannot avoid the necessity of deciding . . . whether the regulation is in fact content based or content neutral.” Simon & Schuster v. Crime Victims Bd., 502 U.S. 105, 128 (1991) (Kennedy, J, concurring in judgment) (challenge to New York “Son of Sam” law). On this question, the Court finds that the TCPA is content neutral as amply demonstrated by the latest Supreme Court decision on point in Hill v. Colorado:

As we explained in Ward: “The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”

Hill v. Colorado, 503 U.S. 730, 719 (2000) citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). As a content neutral restriction, the lesser scrutiny of “time, place, and manner” is the proper test to apply, if the TCPA were to be subjected to First Amendment scrutiny. This is reinforced by the fact Congress intended with the TCPA to implement a “time, place and manner” restriction. 137 Cong.Rec. S9840 (daily ed. July 11, 1991) (statement of Sen. Hollings, noting “The bill does not ban the message; it bans the means used to deliver that message,” consistent with “reasonable time, place and manner restrictions.”)

b. Elements of Time, Place, and Manner restrictions

A valid time, place, and manner restriction is one that is content neutral, narrowly tailored to serve a significant government interest, and leaves open alternative channels for communications

of the information. Clark v. Comm. for Creative Non-Violence, 468 U.S. 288 (1984); Metromedia, Inc., v. San Diego, 453 U.S. 4980 (1981). We agree with the other courts that have determined that protecting consumers from non-consensual and unfair cost shifting of unsolicited fax advertisements was a significant government interest. Destination Ventures Ltd. v. FCC, 46 F.3d 54 (9th Cir.1995) aff'g 844 F.Supp. 632 (D. Or.1994); Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162 (S.D. Ind. 1997); Texas v. American Blast Fax, Inc, 121 F.Supp 2d 1085 (W.D. Tex. 2000). The same courts also concluded that the TCPA was narrowly tailored to serve those interests. This Court agrees.

With regard to leaving open alternative channels for communications of the information, it is clear that those alternatives are available. In fact, even the channel of fax transmissions is open - for those who have permission of the recipient to use that recipient's paper, toner and facilities. The only channel closed, is facsimile transmissions that are achieved by way of tortuous conduct - theft and trespass.

While this Court holds that the TCPA is properly examined as a restriction on non-consensual theft and trespass, and not under the First Amendment as a speech restriction, even if applicable First Amendment doctrine were applied to the TCPA, it passes muster as a valid time, place, and manner restriction.

6. Due Process and Excessive Fines Challenge

Defendants next claim that the TCPA's liquidated damages violate Due Process and Excessive Fines clauses. Like Defendants' First Amendment challenge, every court to address this question has unanimously rejected it. See, e.g., Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162 (S.D. Ind. 1997); Texas v. American Blast Fax, Inc, 121 F.Supp 2d 1085 (W.D. Tex. 2000). Case law scrutinizing excessive damage awards such as Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994), deal with excessive **jury** awards. Congress is a diverse and deliberative body, not likely to exhibit the bias or animus that can lead a jury to an improper award. In addition Defendant

advances a bare mathematical ratio test between “actual” injury and the punishment. Unfortunately for Defendants, this approach was **categorically rejected** by the Supreme Court - BMW of North Am., Inc. v. Gore, 517 U.S. 559, 582-3 (1996).

If Defendants’ argument was correct, a simple trespasser could never be subjected to civil damages since he would cause no actual “monetary” loss. A petty theft penalty could never exceed three times the value of the item stolen. What shoplifter would be deterred by a \$10 consequence for stealing a pack of cigarettes? This situation was perfectly summarized by Lord Halifax: “Men are not hanged for stealing horses, but that horses may not be stolen.” (George Savile, First Marquess of Halifax, Political, Moral, and Miscellaneous Thoughts and Reflections, 1750).

The TCPA’s provision of liquidated compensatory damages is not unique. Similar provisions are contained in many other federal statutes: the Copyright Act, 17 U.S.C. § 504 (\$500 floor); the Truth in Lending Act, 15 U.S.C. § 1640 (\$100 floor); the Expedited Funds Availability Act, 12 U.S.C. § 4010 (\$100 floor); the Truth in Savings Act, 12 U.S.C. § 4310 (\$100 floor); the Omnibus Crime Control Act, 18 U.S.C. § 2520 (floor of \$100 per day of illegal wiretapping or \$10,000, whichever is greater); the Cable Television Consumer Protection and Competition Act, 47 U.S.C. § 553 (\$250 floor); the Financial Right of Privacy Act, 12 U.S.C. § 3417 (\$100 floor); the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 (\$5000 floor); and the Wiretapping and Electronic Surveillance Act, 47 U.S.C. § 605 (\$1000 floor).

Congress often employs such provisions to free persons with meritorious claims from burdens of proof that are inherently difficult to meet and the desire to stimulate private enforcement of public laws by creating incentives to sue. In Brady v. Daly, 175 U.S. 148 (1899), the Supreme Court upheld a provision in the Copyright Act requiring the payment of the greater of actual damages of one hundred dollars for the first performance of an infringing dramatic work and fifty dollars for every subsequent performance. The Justices opined that “[t]he minimum amount appears

to us to have been fixed because of the inherent difficulty of always proving by satisfactory evidence what the amount [of the loss] is that has been actually sustained.” *Id.* at 157. The same reason met with the Justices’ approval in Chicago, Burlington & Quincy R.R. Co. v. Cram, 228 U.S. 70 (1913). There, the Supreme Court upheld a liquidated damages provision requiring a transporter of livestock to pay \$10 per hour of unlawful delay in transit. The difficulty of proving the extent of harm to the animals justified the state’s decision to provide for liquidated damages. *Id.* at 82-84.

Damages floors are especially important when statutes seek to prevent wrongdoers from imposing small losses on each of a large numbers of persons. When the cost to any individual is small, victims are unlikely to sue, even though the cost to the entire population of victims may be quite large. Consumer protection laws, like the TCPA, attempt to remedy this problem by authorizing liquidated damages in lieu of having to prove difficult to quantify actual losses. D. LAYCOCK, *MODERN AMERICAN REMEDIES* 703-704 (2d ed. 1994) (observing that liquidated damages “encourage enforcement by creating a minimum recovery that is worth suing for”).

Furthermore, when Congress decides the appropriate sanctions for an act against public policy, that determination is due substantial deference. “[T]he reviewing court must accord ‘substantial deference’ to legislative judgments concerning appropriate sanctions for the conduct at issue.” Browning-Ferris Industries v. Kelco Disposal, 492 U.S. 257, 301 (1989) (Brennan, Marshall, JJ., concurring). This is again, the deliberative and thoughtful act of Congress, and not an act of a jury with potential biases.

In considering a statute providing a specific dollar amount of damages in lieu of actual damages, the Supreme Court as spoken very clearly:

It is in reparation of a private injury, not in punishment of ‘an offense against the public justice of the state.’ Its reparation is in a fixed amount, it is true, but it is in an amount that has been fixed by a consideration of the determining factors, they necessarily having a certain similarity in all cases. It was the legislative judgment, therefore, that the interests of the state would best be served by an exact definition of the measure of responsibility and relief when the circumstances were such as are represented in the law. It is not less reparative because

so defined.

Atchison v. Nichols, 264 U.S. 348, 352 (1924). This reasoning is sound and applicable.

7. Trebled Damages

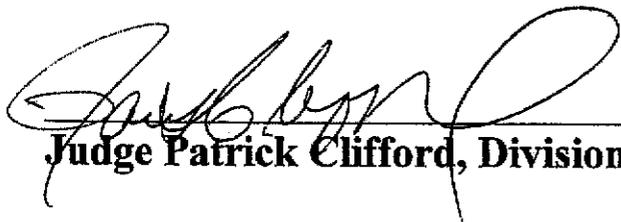
Finally, Defendants restate their Excessive Fines and Due Process arguments in the context of the trebled damages provision in the TCPA. But as the U.S. Supreme Court has repeatedly held, punitive damages limited to three times regular compensatory damages do not offend either Due Process or the Excessive Fines clauses. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (permitting a 4:1 ratio).

CONCLUSION

For the reasons stated herein, Defendants' Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

This the 19 day of MARCH, 2002.



Judge Patrick Clifford, Division 39

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE SMALL CLAIMS COURT
CASE NO.: 00-SC-86-2537

RYAN P. AGOSTONELLI,)
Plaintiff,)

vs.)

DAVID G. ROBERTS, d.b.a ROBERTS)
MORTGAGE CO.)
Defendant.)

ORDER

The above captioned matter came before this Court for trial on February 26, 2002. Plaintiff filed suit under the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, (“TCPA”) seeking statutory damages for a solicitation call made with a recorded message, and trebled damages for “willful or knowing” violations as provided for by the TCPA. After considering all of the evidence and arguments, this Court makes the following findings.

EVIDENCE AND TESTIMONY

Plaintiff testified that on June 15, 2001, he received a telephone call to his home that used a prerecorded voice to deliver a solicitation identifying “Roberts Mortgage Company” and the telephone number 1-877-886-8878, and he produced a tape recording he testified was a true and accurate recording of the call. The recording revealed that the call had voices of two persons, one was Defendant, and the other was unknown. Plaintiff further testified he had not given his prior express permission to be solicited by such calls, and had no business relationship whatsoever with Defendant.

Defendant admitted making the telemarketing call in question, but testified he did so in response to a request he alleges was from Plaintiff, and that his voice in the call was “live” and not prerecorded. Mr. Roberts produced a document purporting to be a printout of information entered by someone who provided an e-mail address of “ragostinelli@aol.com” and requesting information on 30 year mortgages. Mr. Roberts further testified that this information is sent to him via e-mail when someone enters information on his Internet web site at www.robertsmortgage.com, which is operated for Mr. Roberts

claimed that the Plaintiff must have visited his web site at, www.robertsmortgage.com, and provided this information. Mr. Roberts also testified that the information contained in these "contacts" from his web site are invalid at least 90% of the time. Defendant admitted that the only evidence he had purporting to establish express consent to make the call to Plaintiff was this e-mail. Plaintiff denied he had ever visited Mr. Roberts' web site, and that for privacy reasons, he does not give out personal information such as his name or his phone number on web sites. Defendant also testified that he was aware of the existence of the TCPA, and had conducted training of others in at least some provisions of the TCPA while working for U.S. Army recruiting.

The Plaintiff's expert, Stewart Flood, gave expert testimony with regard to Internet and computer issues. Mr. Flood was qualified by the Court as an expert, and testified that the document Defendant claimed to have received and printed in e-mail, could not have been produced as Defendant described. Among the discrepancies noted by Mr. Flood was the misspelling of the day "Wednesday" that was printed out on the e-mail from the Defendant's site as "Wensday." Mr. Flood testified that such a misspelling could not be produced the way that the Defendant described. Mr. Flood also reviewed the contents of Mr. Roberts' web site, and noted other discrepancies between the way the web site operated and the text contained in the alleged e-mail received from the Plaintiff. When the Roberts' web site collects information from the user, the State's name is selected by the user from a preset list. That list contains an entry spelled "SouthCarolina" and consistent with all the other two-word states, there is no space between the words of the State's name. However, the e-mail in question shows the state as "South Caroline" which misspells the name and has an added space between the words. The user visiting the web site also selects the time of day that he wishes to be contacted from a preset list, and one of the choices is "afternoon." However, the e-mail in question has the entry as "after noon" with a space between after and noon that is inconsistent with the preset list at the web site. Mr. Flood also compared the e-mail claimed to be from the Plaintiff with other e-mails in the Defendant's files. He found that the other e-mails in the file were consistent with each other, in that they contained the correct spelling of

“Wednesday,” they had the State of South Carolina written as “SouthCarolina” and they had the contact preference “after noon” represented as “afternoon.” The other e-mails in the file were consistent with the preset lists unlike the e-mail that the Defendant claimed was from the Plaintiff.

Mr. Flood also explained that the web site such as the one operated by Lion, Inc., and used by Mr. Roberts at www.robertsmortgage.com, maintains a perpetual log that records all visits to the web site, analogous to a visitors log kept by a guard in a building, listing each person as they come through the door. This perpetual log is frequently used by persons such as Mr. Flood to track down web site users for law enforcement and in litigation. The “contact information” collected by Mr. Roberts’ site would be recorded in the perpetual web site log. It is also stored in a separate database, that may require old information to be deleted periodically. The limited retention time of data in the separate database and the e-mails to Mr. Roberts, do not affect the retention of the data in the perpetual log.

Mr. Flood testified that conventional industry practice is to retain the perpetual log files for many years, if not indefinitely, even though the e-mails and the contact information stored in the separate database may be deleted after only a few months. Mr. Flood explained that if the e-mail came to Mr. Roberts from his Lion, Inc., web site, it would have been stored in the perpetual log. It would also record the Internet Protocol address of the computer being used to access the site. This would allow absolute identification of the source of the e-mail, and prove that it did (or did not) come through the web site. Plaintiff’s final witness, Robert Biggerstaff, testified that he was able to call Lion, Inc., and request a search of the perpetual log files for this data for this exact purpose.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Faced with the incompatible testimony of the witnesses, their credibility becomes a serious issue. The e-mail evidence of the Defendant does not appear to be authentic and the authenticity of the e-mail is further damaged in the light of the testimony of the Plaintiff and his witnesses, particularly the errors from the web site’s preset lists. The testimony of Mr. Roberts himself also lacked credibility. The Court is persuaded that the Plaintiff proved by a preponderance of the evidence that the Defendant did not

receive an authentic e-mail from the Plaintiff and that the Defendant did make the telemarketing call to the Plaintiff using a prerecorded voice to deliver a solicitation message without permission from the Plaintiff.

The Court also rejects Defendant's interpretation of the statute, as requiring that a call be a "completely" prerecorded call to be prohibited by the TCPA. The Act makes it unlawful to "[i]nitiate 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,..." The act does not require that the entire call be prerecorded, only that the caller use an artificial or prerecorded voice at any point to deliver a message without consent. There was only a short portion of an allegedly "live" message at the end of the call. Defendant's construction would permit prerecorded calls of any length, as long as some small portion of live conversation takes place at the end.

Willful or Knowing Violations

The FCC has a well established construction of "knowing" as used throughout that agency's administration of the 1934 Communications Act. This standard is set out clearly as "knew or should have known" standard. Intercambio, Inc., 3 FCC Rcd. 7247 (1988); Audio Enterprises, Inc., 3 FCC Rcd. 7233 (1988). The FCC's construction of "willful" is set forth in In re Valley Page, 12 FCC Rcd. 3087 at ¶ 6 (1997) ("[W]illfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question such as using a radio transmitter, as opposed to being accidental (for example, brushing against a power switch turning on a radio transmitter).") and this is confirmed by the statutory definition of "willful" in the 1934 Communications Act at 47 U.S.C. § 312(f)(1). The interpretation of any act by the administrative agency overseeing that act is due great deference. Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971); Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984).

Given the standards set out above, and in light of the discrepancies with the Defendant's evidence, it would be inconsistent not to find that the Defendant's acts were willful and knowing.

The Court concludes that the telemarketing call to Plaintiff on June 15, 2001 constituted a violation of the FCC regulations promulgated under the TCPA, as a violation of 47 C.F.R. § 64.1200(a)(2). Plaintiff is therefore entitled to the mandatory statutory damages of \$500 for that violation. The call also did not "at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call." 47 C.F.R. § 64.1200(d)(1). This is also a violation of the TCPA, and Plaintiff is entitled to the statutory damages of \$500 for that violation.

TREBLE DAMAGES

The TCPA provides that if the violations are willful or knowing violations, the Court may, in its discretion, increase the damage award up to three times the amount of the regular statutory damages. 47 U.S.C. § 227(b)(3). Having found that Defendant's acts were both willful and knowing, the full measure of the TCPA's trebled damages are clearly warranted in this case, and this Court hereby trebles the damages for each violation for a total of Three Thousand Dollars (\$3,000).

It is hereby ORDERED, ADJUDGED AND DECREED, that Plaintiff shall have judgment against Defendant for Three Thousand Dollars (\$3,000) plus court costs of \$85.00.

IT IS SO ORDERED!



Helen E. Clawson, Magistrate

March 25, 2002, Charleston South Carolina.

It is, therefore, ORDERED, ADJUDGED and DECREED that plaintiff take nothing against Donald Stafford Borden, Individually and d/b/a Mortgage Miracles.

The Court is further of the opinion that Lone Star Utility Savers, Inc. d/b/a as Home Improvements of Texas and d/b/a Miracle Mortgage Services and d/b/a Kingdom Builders made five telephone calls to the plaintiff in violation of the Telephone Consumer Protection Act and that the actions of the said defendant were done willfully or knowingly and that plaintiff is thus entitled to recover additional damages. The Court further finds that the defendant should be permanently enjoined as herein after stated.

It is therefor ORDERED, ADJUDGED AND DECREED by the Court that Joe Shields do have and recover statutory damages from Lone Star Utility Savers, Inc. d/b/a Home Improvements of Texas and d/b/a Miracle Mortgage Services and d/b/a Kingdom Builders in the sum of Two Thousand Five Hundred and No/100 Dollars (\$2,500.00). It is further ordered that Joe Shields do have and recover from Lone Star Utility Savers, Inc. d/b/a Home Improvements of Texas and d/b/a Miracle Mortgage Services and d/b/a Kingdom Builders additional damages in the sum of Two Thousand Five Hundred Dollars & No/100 (\$2,500.00).

It is further ORDERED that Lone Star Utility Savers, Inc. d/b/a Home Improvements of Texas and d/b/a Miracle Mortgage Services and d/b/a Kingdom Builders, its agents, trustees, attorneys, and employees be and it is hereby permanently enjoined from violating the Telephone Consumer Protection Act, 47 U.S.C. § 227, and Section 35.47(f) of the Texas Business and Commerce Code and it is and specifically enjoined from:

- a. making more than one telephone call to the residence of members of the public within a 12-month period on behalf of any seller of goods or services for the purpose of soliciting the sale or lease of goods or services;
- b. initiating a telephone call to a residential telephone of members of the public using an artificial or prerecorded voice to deliver a message unless Lone Star Utility Savers, Inc. d/b/a Home Improvements of Texas and d/b/a Miracle Mortgage Services and d/b/a Kingdom Builders has the specific consent of the recipient of the call to make such a call;

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- c. initiating pre-recorded telephone calls to members of the public which include the transmission of an unsolicited advertisement unless Lone Star Utility Savers, Inc. d/b/a Home Improvements of Texas and d/b/a Miracle Mortgage Services and d/b/a Kingdom Builders has the specific consent of the recipient of the call to make such a call;
 - d. making pre-recorded calls to members of the public with whom Lone Star Utility Savers, Inc. d/b/a Home Improvements of Texas and d/b/a Miracle Mortgage Services and d/b/a Kingdom Builders has no established business relationship;
 - e. failing to clearly state at the beginning of the message in telephone calls which it initiates its identity;
 - f. failing to clearly state at the beginning of the message in telephone calls which it initiates the identity of the individual making the call;
 - g. failing to clearly state, at the beginning of the message in telephone calls which it initiates the identity of the entity which it represents;
 - h. failing to clearly state its telephone number during or at the end of the message in telephone calls it initiates;
 - i. failing to clearly state its address during or at the end of the message in telephone calls it initiates;
 - j. failing to clearly state the telephone number of the individual making the call during or at the end of the message in telephone calls it initiates;
 - k. failing to clearly state the address of the individual making the call during or at the end of the message in telephone calls it initiates;
 - l. failing to clearly state the telephone number of the entity which it represents during or at the end of the message in telephone calls it initiates;
 - m. failing to clearly state the address of the entity which it represents during or at the end of the message in telephone calls it initiates;
 - n. failing to have a written policy available upon demand for maintaining a "do not call" list;
 - o. failing to provide copies of its written "do not call" policy upon demand;
 - p. failing to inform its personnel engaged in telephone solicitation of the existence and use of its "do not call" list;
 - q. failing to train its personnel engaged in telephone solicitation in the use of the "do not call" list;
 - r. failing to record the requests made by members of the public not to receive calls from it;
 - s. failing to record at the time a member of the public makes a request, the request not to receive calls from it;

- t. failing to provide members of the public with the telephone number at which it can be contacted;
- u. failing to provide members of the public with the address at which it can be contacted;
- v. failing to maintain records of members of the public who request not to receive future telephone solicitations.
- w. failing to maintain a separate accounting of the names, addresses, and telephone numbers of all persons who have agreed or requested to receive telephone solicitations from Long Star Utility Savers, Inc. d/b/a Home Improvements of Texas and d/b/a Miracle Mortgage Services and d/b/a Kingdom Builders. Such written accounting must also include the dates on which such approval was granted and how the approval was granted.
- x. failing to maintain a separate accounting of members of the public who request not to receive future telephone solicitations. Such accounting shall include, at a minimum, the name, telephone number, and date on which the request not to receive future telephone solicitations was received by Lone Star Utility Savers, Inc. d/b/a Home Improvements of Texas and d/b/a Miracle Mortgage Services and d/b/a Kingdom Builders.
- y. failing to provide, in each telephone solicitation made by Lone Star Utility Savers, Inc., d/b/a Home Improvements of Texas and d/b/a Miracle Mortgage Services and d/b/a Kingdom Builders, the true and correct name of the owner of such entity along with the correct home telephone number of such person. In addition, Lone Star Utility Savers, Inc. d/b/a Home Improvements of Texas and d/b/a Miracle Mortgage Services and d/b/a Kingdom Builders may include the correct home telephone number of the person initiating the call.

The requirement, if any is applicable, for a bond is hereby waived by the Court.

It is further ORDERED that the judgment hereby rendered shall bear interest at ten percent (10%) per annum, compounded annually, from the date hereof until paid.

All costs of court expended or incurred in this cause are hereby adjudged against Lone Star Utility Savers, Inc. d/b/a as Home Improvements of Texas and d/b/a Miracle Mortgage Services and d/b/a Kingdom Builders. All writs and processes for the enforcement and collection of this judgment or the costs of court may issue as necessary. All other relief not expressly granted herein is denied.

MAY 10 2002

SIGNED this _____ day of May, 2002.

JUDGE

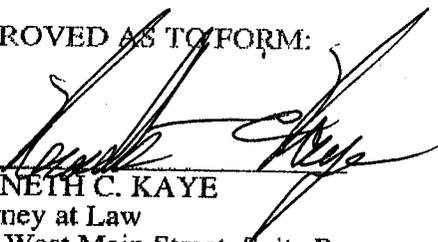
[Handwritten Signature]
 COUNTY CLERK
 HARRIS COUNTY, TEXAS

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FILED

740-77-4238

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740-77-4239

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

FILED

MAR 26 2001

JUAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

CHERYL COLEMAN, DAVID
PROTTE, FRANKLIN COUNTY
EXPRESS, LLC., and ROBERT
COLEMAN

Plaintiffs

v.

JOHN VARONE

Defendant

Cause No. 00AC-023298 B CV

Div. No: 39

Judge Patrick Clifford

ORDER

This matter came before the Court on February 13, 2001, on Defendant's Motion to Dismiss for lack of Subject Matter Jurisdiction. The parties have filed memoranda of law and the Court has heard the arguments of both parties. For the reasons set forth below, Defendant's Motion is DENIED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant is alleged to have sent unsolicited advertisements to Plaintiffs' facsimile machines. Plaintiffs filed suit under the private right of action provided by the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, December 20, 1991, which amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 et seq., by adding a new section, 47 U.S.C. § 227 (the "TCPA") to that Title. This statute prohibits sending of "unsolicited advertisements" to fax machines without "prior express invitation or permission" and provides for liquidated statutory damages of \$500 per violation, which may be trebled if the violations are willful or knowing. Id. at § 227(b).

Defendant argues that this Court lacks jurisdiction to hear claims brought under the TCPA.

As basis for this argument, Defendant points to the private right of action language in the TCPA, which states that “[a] person or entity may, if otherwise permitted by the laws or rules of a State, bring in an appropriate court of the State [an action for injunctive relief or monetary damages or both].” 47 U.S.C. § 227(b)(3) (emphasis added). Defendant interprets this language to mean that before a plaintiff can bring suit under the TCPA in a court of this state, the Missouri legislature must pass specific enabling legislation to “opt-in” to the TCPA.

Plaintiff argues that the statutory language at issue does not require a state to “opt-in” to the TCPA, and “does not condition the substantive right to be free from unsolicited faxes on state approval.” International Science & Tech. Inst., Inc. v. Inacom Commun., Inc., 106 F.3d 1146, 1156 (4th Cir.1997). Plaintiff’s interpretation of the statute is that the language at issue merely recognizes that state courts that are “otherwise permitted” by virtue of being courts of general jurisdiction, have jurisdiction to hear TCPA cases, citing a number of TCPA cases. Plaintiff argues that at most, the TCPA gives states an ability to “opt-out,” but does not require them to “opt-in.”

ANALYSIS

It appears that there are no reported or appellate decisions in Missouri construing the TCPA. While the vast majority of authorities from the federal courts and other states favor Plaintiff’s interpretation of the statute, the issues raised by the TCPA deserve thoughtful analysis. The Court is well aware that there are several cases pending in the St. Louis County courts under the TCPA, and that this is the second case within a month to bring this precise question before this Court.¹

A. The Role of State Courts in Federal Law

From the very founding of our system of federalism, it has been axiomatic that the states are

¹ In the interests of judicial economy, this Order should be dispositive in any future TCPA actions in this Court raising this question unless a movant presents new authorities or arguments to support their position.

parts of “one whole,” and by express design “the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.” THE FEDERALIST NO. 82, at 132 (Alexander Hamilton) (E. Bourne ed. 1947). “Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.” Tafflin v. Levitt, 493 U.S. 455, 458 (1990). Prior to the twentieth century, however, states were generally not compelled to exercise that jurisdiction if they objected to it:

At different times various duties have been imposed by acts of [C]ongress on state tribunals; they have been invested with jurisdiction in civil suits, and over complaints and prosecutions for fines, penalties, and forfeitures arising under laws of the United States. 1 Kent, 400. And though the jurisdiction thus conferred could not be enforced against the consent of the states, yet, when its exercise was not incompatible with state duties, and the states made no objection to it, the decisions rendered by the state tribunals were upheld.

United States v. Jones, 109 U.S. 513, 520 (1883). See, also, Kentucky v. Dennison, 65 U.S. 66, 109 (1860); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). In the early days of the republic, states willingly consented to their courts being open to adjudication of federal claims. Some authorities allude to this as a “Golden Age of cooperation ... when state courts were rather more willing to do what they later refused to do.” Michael D. Collins, Article III cases, State Court Duties, and the Madisonian Compromise, 1995 WIS. L.REV. 39, 157 (1993). See also Jones, supra at 520 (“Their [state courts] use has not been deemed violative of any principle or as in any manner derogating from the sovereign authority of the federal government; but as a matter of convenience and as tending to a great saving of expense.”)

A number of states, including Missouri, eventually did decline to hear federal claims. See, e.g., Mathison v. Missouri, 3 Mo. 421 (1834); Davidson v. Champlin, 7 Conn. 244 (1828); Haney v. Sharp, 31 Ky. 442 (1833); Re. Stephens, 4 Gray 559 (Mass. 1855); State v. McBride, 24 S.C.L. 400 (1839); Jackson v. Rose, 4 Va. 34 (1815); United States v. Lathrop, 17 Johns. 4 (N.Y. 1819).

This line of cases however, has not survived into this century.

Soon after the Civil War, the Supreme Court dispelled the fiction that states could refuse to hear claims brought under federal law or that the enforcement of federal rights in state courts was contingent on the “consent” of the states. Clafin v. Houseman, 93 U.S. 130, 137 (1876). (“But this is no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied.”) Any remaining doubt was erased by Mondou v. New York, New Haven, & Hartford R.R. Co. (Second Employers’ Liability Cases), 223 U.S. 1 (1912):

[W]e deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure.

Id. at 56-7. The proverbial nail in the coffin for the argument that states had the power to close their courts to federal claims came in Testa v. Katt, 330 U.S. 386 (1947), which expressly held states had no power to close their courts of general jurisdiction to federal claims. The modern view has not changed. State courts are under a constitutional obligation to fulfil their role in the federal scheme. “Once Congress has vested jurisdiction over a federal claim in the state courts, the state courts, including the courts of [a state] are under a constitutional obligation to exercise jurisdiction.” Donnelly v. Yellow Freight Sys., 874 F.2d 402 (7th Cir. 1989), aff’d 494 U.S. 820 (1990). A state can not deny federal rights to the citizenry by preventing access to the state’s courts of general jurisdiction to bring federal claims. Indeed, federally created rights “are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it.” Lawrence v. State Tax Comm’n, 286 U.S. 276, 282 (1932).

B. Application to the TCPA

With these principles of federalism and binding Supreme Court precedent in mind, it is clear that state courts must be open to federal claims, including the TCPA, in accordance with their regular jurisdiction and modes of procedure. In Missouri, the State Constitution has “otherwise” directed state courts to hear these claims because the Circuit Courts of Missouri are courts of general jurisdiction, empowered to hear all claims brought, *inter alia*, under federal statutes: “The circuit courts shall have original jurisdiction over all cases and matters, civil and criminal.” Missouri Constitution, art. V, Sec 12(a).

The particulars of this case - the parties, amount in controversy, relief sought, etc. - clearly fit the jurisdiction of this Court as described by the Missouri Constitution, and Plaintiff has brought this case in accordance with the “laws and rules of court of [this] state.” This Court therefore has proper jurisdiction to hear this case.

Defendant also argues that the language “if otherwise permitted” must be read to require an affirmative act by the state, arguing that “permitted” is different from “not prohibited” Def. Mtn. at 2. While we have already concluded *supra* that the Missouri Constitution has “otherwise permitted” Plaintiff’s suit, Defendant’s “dictionary definition” argument flies in the face of Webster’s definition of “permit,” adopted by the Missouri Court of Appeals, as “to allow by silent consent, or by not prohibiting...” (cited in *Egenreither v. Carter*, 23 S.W.3d 641, 644 (Mo.App. E.D. 2000), *reh’g denied* (July 5, 2000)) and Black’s Law Dictionary which includes “to acquiesce, by failure to prevent, ...” Blacks Law Dictionary (6th Ed. 2000). By the ordinary dictionary definitions, “otherwise permitted” can be rewritten as “otherwise allowed by not prohibiting.” As discussed *supra*, states “consent” in this context where “the states made no objection to it.” *Jones*, *supra*, at 520. In light of the foregoing analysis, the Court finds Plaintiffs’ interpretation more persuasive.

Even under the pre-Civil War understanding of federalism, where states could not be forced

against their will to adjudicate federal claims, this Court would have jurisdiction to hear TCPA claims. The state of Missouri has passed no legislation declaring that consumer actions under the TCPA can not be brought in the Courts of this state.²

C. Other Authorities.

While there is no controlling authority in this state, the federal courts and our sister states have addressed this precise question. Missouri courts often look to the federal courts and other states' courts in analogous situations. Sloan v. Bankers Live & Casualty Co., 1 S.W. 3d 555, 561 (Mo. App. W.D. 1999); Swyers v. Thermal Science, Inc., (Mo. App. E.D. 1994). While decisions from other states are not binding on this Court, they do represent persuasive authority where they are based on sound reasoning and "intrinsic logic." Rashall v. St. Louis I. M. & S. Ry. Co., 155 S.W. 426, 428 (Mo. 1913).

1. Construction by Federal Courts

The leading federal case directly addressing the "if otherwise permitted" language in the TCPA, is International Science & Tech. Inst., Inc. v. Inacom Commun., Inc., 106 F. 3d 1146 (4th Cir. 1997). The plaintiff in that case argued the TCPA's language provided a private right of action only if the state law allowed such private actions. That plaintiff further argued that the TCPA would therefore violate the Equal Protection Clause of the Fourteenth Amendment unless there was concurrent federal court jurisdiction for citizens in states that had not "opted-in." The Fourth Circuit Court of Appeals **flatly rejected** this interpretation of the "if otherwise permitted" language, and held specifically that:

The clause in 47 U.S.C. § 227(b)(3) "if otherwise permitted by the laws or rules of court of a State" does not condition the substantive right to be free

² This Court does not reach any conclusion whether such an action by the legislature would be permissible or not. Until and unless the state takes such an action, the question of whether or not the state can do so is not before the Court, and we express no opinion on that question.

from unsolicited faxes on state approval. . . . Rather, the clause recognizes that states may refuse to exercise the jurisdiction authorized by the statute. Thus, a state could decide to prevent its courts from hearing private actions to enforce the TCPA's substantive rights.

International Science, 104 F.3d at 1156. While Defendant claims that this phrase is dicta, Plaintiff correctly points out that this conclusion is one of the grounds of the holding that the TCPA presents no Equal Protection Clause problem, and is therefore entitled to the same weight as the holding. See e.g. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 67 (1996) (“When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.”); Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949) (“[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.”).

The second federal court to address this question was Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Svcs, Ltd., 156 F.3d 432 (2nd Cir. 1998). In Foxhall the Second Circuit faced the same Equal Protection Clause challenge to the statute faced in International Science. Foxhall quoted International Science and expressly held that there is no requirement for state to “opt-in” to the TCPA because the statute “does not condition the substantive right to be free from unsolicited faxes on state approval.” Foxhall at 438, citing International Science at 1156.

2. Construction by other states' courts

The leading state court authorities concur. Schulman v. Chase Manhattan Bank, 710 N.Y.S.2d 368 (N.Y. App. 2000) (“We therefore conclude that the phrase ‘if otherwise permitted by the laws or rules of court of a State’ merely acknowledges the principle that states have the right to structure their own court systems and that state courts are not obligated to change their procedural rules to accommodate TCPA claims. In the case at bar, [defendant] has not asserted the existence of any procedural rules which would prevent the Supreme Court from exercising jurisdiction over the plaintiff's claim.”); Zelma v. Total Remodeling, Inc., 756 A.2d 1091 (Super. Ct. N.J. 2000)

(“The court finds that the common-sense meaning of the language ‘if otherwise permitted by the laws or rules of Court of a State’ manifests a Congressional intent that does not condition state court jurisdiction over private enforcement of TCPA claims on an affirmative legislative act creating such jurisdiction, where the state [court] already has the ability to hear such cases.”); Hooters of Augusta, Inc. v. Nicholson, 537 S.E.2d 468 (Ga. App, 2000) (en banc) cert. denied (“We are persuaded by the analysis in Int’l. Science quoted above and therefore construe the TCPA as creating a private right of action and conferring jurisdiction upon state courts.”); Kaufman v. HOTA, Inc., NO. BC 222589 (Super. Ct. Ca. Aug. 25, 2000) (“This Court finds persuasive the Schulman Court analysis: ‘the phrase ‘if otherwise permitted by the laws or rules of court of a State’ merely acknowledges the principle that states have the right to structure their own court systems and the state courts are not obligated to change their procedural rules to accommodate TCPA claims.’”); Physicians Data Inc., v. US West Wireless, No. 00-CV-631 (Dist. Ct. Colo. Aug. 14, 2000) (“Accordingly, the Court determines that ‘if otherwise permitted’ language does not require the Colorado legislature to pass enabling legislation before the private right of action under the TCPA is available.”); Kaplan v. First City Mortgage, 701 N.Y.S.2d 859 (N.Y. City Ct. Dec. 8, 1999) (“[I]n the absence of a State statute refusing to exercise the jurisdiction conferred by the statute, a State court has jurisdiction over TCPA claims.”) This Court find the analysis of these decisions cogent and persuasive.

3. *Contra authorities cited by Defendant*

Defendant cites Murphey v. Lanier, 204 F.3d 911, 913 (9th Cir. 2000) for the proposition that states must “consent” to TCPA suits. Def. Memo. at 5. To the extent Murphey is relevant to the Motion sub judice, Murphey was specifically citing International Science, and stated:

The statute thus contemplates that private actions will be litigated in state court “if the state consents.” International Science, 106 F.3d at 1154.

International Science used the term “consent” consistent with its holding that states do not have to “opt-in.” The Murphey court was faced with the exact same Equal Protection challenge as in International Science and Foxhall. It would be inconsistent for the term “consent” to be construed to mean “opt-in” in Murphey when it was used to mean “opt-out” in International Science. With this in mind, it is difficult to see how Murphey citing International Science could support Defendant’s “opt-in” interpretation.

Nor does the Court find the decision cited by Defendant from the Texas Court of Appeals to be persuasive. Autoflex Leasing, Inc., v. Manufacturers Auto Leasing, Inc., 16 S.W.3d 815 (Tex.App. 2000). Autoflex has been criticized by at least one subsequent court reviewing the question. “This Court is not persuaded by Autoflex. It appears to be contrary to the overwhelming weight of authority, Federal and State, as well as an interpretative memorandum of the Federal Communications Commission.” Kaufman v. HOTA, Inc., No. BC 222589 (Super. Ct. Ca. Aug. 25, 2000) “Further, unlike the New York and New Jersey Courts in Schulman, supra and Zelma, supra, in Autoflex the Texas Court of Appeals does not consider the fact that general subject matter jurisdiction normally is afforded State Trial Courts.” Id. At least five cases, all decided since the Autoflex case was heard by the Texas court, have rejected the Autoflex holding. It does not present “intrinsic logic” contemplated in Rashall, supra, that would be persuasive. This Court finds the Autoflex decision unpersuasive for the same reasons stated above..

D. Administrative Agency Interpretation

It is black letter law that “[t]he administrative interpretation of the Act by the enforcing agency is entitled to great deference” Griggs V. Duke Power Co., 401 U.S. 424, 433, 34 (1971). Additionally, “[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, ...” Chevron USA v. Natural Resources Defense Council, 467 U.S. 837, 843. n 11 (1984) (additional citations omitted) In this case, it is

the Federal Communication Commission ("FCC") that administers the TCPA, and the FCC has spoken on this issue:

Absent state law to the contrary, consumers may immediately file suit in state court if a caller violates the TCPA's prohibitions on the use of automatic telephone dialing system and artificial or prerecorded voice messages. (Emphasis added)

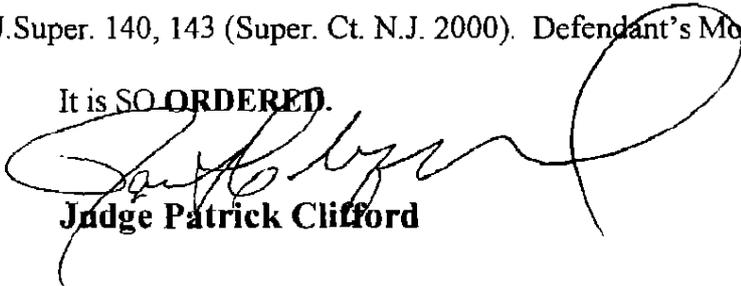
In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd. 8752 ¶ 55 (1992).

The FCC clearly interprets the TCPA to allow consumer to "immediately file suit" unless the state has taken an affirmative act "to the contrary" to prevent such suits. This is a wholly reasonable interpretation, which should not be disturbed even if it is not "the reading the court would have reached." Chevron, at 843. It is also consistent with the vast majority of authorities and the analysis presented supra.

CONCLUSION

Based on the foregoing analysis, this Court holds the clause in 47 U.S.C. § 227 "if otherwise permitted by the laws or rules of court of a State" does not require affirmative state enabling legislation before a consumer can file suite in state court under the private right of action in the TCPA. International Science & Tech. Inst., Inc. v. Inacom Commun., Inc., 106 F.3d 1146, 1156 (4th Cir.1997); Hooters v. Nicholson, 537 S.E.2d 468 (Ga. App, 2000) (en banc). The Circuit Courts of Missouri are courts of general jurisdiction, and therefore "otherwise permitted" by the state constitution to hear suits brought under the private right of action in the TCPA. Schulman v. Chase Manhattan Bank, 710 N.Y.S.2d 368, 372 (N.Y. App. 2000); Zelma v. Total Remodeling, Inc., 334 N.J.Super. 140, 143 (Super. Ct. N.J. 2000). Defendant's Motion is DENIED.

It is SO ORDERED.


Judge Patrick Clifford

3-26-01
February, 2001.

IN THE ASSOCIATE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

MARILYN MARGULIS,

Plaintiff

v.

VOICE POWER
TELECOMMUNICATIONS, INC.,

Defendant.

)
) Cause No.: 00AC-013017 CCV
)
) Div. No: 39
) Judge Clifford
)
)
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FILED

MAR 22 2001

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

ORDER

This matter came before the Court on February 13, 2001, on Defendant's Motion to Dismiss for lack of Personal Jurisdiction. The parties have filed memoranda of law and the Court has heard the arguments of both parties. For the reasons set forth below, Defendant's Motion is DENIED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff brought suit against Defendant under the private right of action provided in 47 U.S.C. § 227(b), the Telephone Consumer Protection Act. ("TCPA"). Plaintiff alleges that Defendant made four unsolicited telemarketing calls using an artificial or prerecorded voice, delivering an unsolicited advertisement to Plaintiff's home in Missouri, and that these calls violate the TCPA and subject Defendant to the personal jurisdiction of the Missouri Courts. Defendant argues that telephone contact, without more, does not satisfy Section 506.500(1), citing cases including Capitol Indem. Corp. v. Citizens Nat'l Bank, 8 S.W.3d 893 (Mo. Ct. App. 2000) and Farris v. Boyke, 939 S.W.2d 197 (1996).

A. Transaction of any Business

The cases relied on by Defendant are not applicable to this case. They do not deal with a defendant's **advertisements** directed at Missouri consumers. Advertising contacts with the forum state by an out-of-state seller is well settled to be sufficient to establish jurisdiction over that foreign

seller. “[A] foreign manufacturer’s regular solicitation of orders is sufficient to sustain jurisdiction.” Welkener v. Kirkwood Drug Store Co., 734 S.W.2d 233, 240 (Mo. App. E.D. 1987); “[A] nonresident seller subjects itself to the obligation of amenability to suit in return for the right to compete for sales [in the forum state].” Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F.2d 365, 368 (8th Cir. 1969). This finding was reinforced by the Missouri Court of Appeals with regard to an out-of-state advertiser soliciting consumers in this state in State ex rel. Nixon v. Beer Nuts, Ltd., 29 S.W.3d 828, 835 (E.D. Mo. 2000):

In the case at bar, the trial court found that [out of state seller] Beer Nuts had regularly solicited customers in and from Missouri and this activity constitutes the transaction of business within the State.

In the case at bar, the telephone calls directly caused the alleged violation, and are themselves the basis for the cause of action. The cases relied on by Defendant deal with causes of action such as breach of contract that did not arise out of the telephone contacts themselves, so that the language relied upon by Defendant from those cases is simply not applicable here.

Defendant in this case is an out of state seller that has purposefully directed his advertising into Missouri. He should clearly expect to be held accountable by a Missouri court “so long as the marketing is intentional and distribution into the forum state is an anticipated and foreseeable event as part of the manufacturer’s business.” State ex rel. Caine v. Richardson, 600 S.W.2d 82 (Mo. App. E.D. 1980). “‘Transaction of any business’, as used in the Missouri Long Arm Statute, must be construed broadly and may consist of a single transaction if that is the transaction sued upon.” Mead v. Conn, 845 S.W.2d 109 112 (Mo. App. 1993) citing State ex rel Metal Serv. Ctr. v. Gaertner, 677 S.W.2d 325, 327 (Mo. banc 1984). We also note that this question was recently before this Court in Division 45, which reached a similar conclusion. Brentwood Travel, Inc. v. Lancer, LTD., No. 01CC.0042 (Feb. 21, 2001). This Court agrees, and holds that solicitation calls transmitted into Missouri, promoting the sale of Defendant’s goods or services, suffice as a “transaction of business” within the Missouri long arm statute, § 506.500(1).

B. Commission of a tortious act.

Plaintiff also argues that personal jurisdiction is proper because this suit arose out of a tortious act committed by Defendant. The “tortious act” in this case is alleged to be the violation of the TCPA. To support such jurisdiction, the plaintiff must make a prima facie showing on the validity of her claim of tort. State ex rel. William Ranni Associates, (Sup. 1987) 742 S.W.2d 134, 139.

The provision in the Missouri Long Arm statute of “commission of a tortious act” is given broad meaning by Missouri courts, and not restricted to causes of action based solely in tort law:

Provision of this section [Missouri Long Arm Statute] pertaining to "commission of a tortious act within this state" did not mean that cause of action had to sound in tort and this section applied to any cause of action arising from the doing of such acts, and it was not necessary to characterize the Carmack Amendment claim of plaintiff as a cause of action in tort for this section to apply.

Fulton v. Chicago, Rock Island & P. R. Co., 481 F.2d 326 (8th Cir, 1973) cert. denied 414 U.S. 1040 (1973). Under Missouri law, the phrase “[c]ommission of tortious act within the state which will subject defendant to long-arm jurisdiction includes extraterritorial acts of negligence which produce actionable consequences in Missouri.” State ex rel. William Ranni Associates, Inc. v. Hartenbach (Sup. 1987) 742 S.W.2d 134. Statutes establishing personal liability to the aggrieved party, such as the TCPA, create statutory torts. See, e.g., Yellow Freight Sys., Inc. v. Mayor's Comm'n on Human Rights of the City of Springfield, 791 S.W.2d 382, 384 (Mo. banc 1990) (Violations of a law “may establish an element of tortious conduct in a common law or statutory tort action cognizable in the circuit court.”); See, also, Labine v. Vincent, 401 U.S. 532, 535 (1971) (With statute providing for cause of action, the state “created a statutory tort ... so that a large class of persons injured by the tort could recover damages in compensation for their injury.”)

At this state in the proceedings, all the factual allegations of the Plaintiff are taken as true, and all facts in dispute are construed in the light most favorable to the Plaintiff. The TCPA prohibits making “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, . . .” 47 U.S.C. § 227(b)(1)(B). Plaintiff has alleged that Defendant has made three such prerecorded telemarketing calls. Plaintiff has properly alleged her TCPA claim, and that meets the requirement of a “tortious act” to satisfy § 506.500(3).

C. Fair Play and Substantial Justice

Having found Defendant subject to personal jurisdiction under § 506.500, we must consider additional “traditional notions of fair play and substantial justice.” factors before deciding jurisdiction over a non-resident defendant. These include: “1) the burden on the defendant; 2) the interest of the forum state; 3) the plaintiff’s interest in obtaining relief; 4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and 5) the shared interest of the several states in furthering fundamental substantive social policies.” Beer Nuts, at 835-36. “In reviewing minimum contacts to satisfy the due process requirements, a court focuses on the relationship among the defendant, the forum, and the litigation.” Id., at 835.

The factor that weighs heavily against this defendant is the fact that he is the initiator of the contact with Missouri. Defendant’s own purposeful initiation of a contact with a Missouri business is an important factor in weighing the fair play analysis. Elaine K. v Augusta Hotel Assocs. Ltd. Partnership, 850 S.W.2d 376, 379 (Mo.App. E.D.1993). “If he didn’t want to be hailed into Missouri’s courts, he could have not called Missouri telephone numbers and reached into Missourians’ homes with his advertising transmissions.” Brentwood Travel, *supra*.

The TCPA is a uniform federal law. When the statute’s prohibitions are violated, the injury is visited upon the recipient of the call here in Missouri, and the state has an interest in protecting its citizens from such harms in an efficient and meaningful manner. The effectiveness of the statute would be severely undercut if defendants could secret the source of the calls in a far away place, and control the choice of forum to the detriment of their victims. Therefore both the state’s and Plaintiff’s interest in this forum is substantial, and the “interstate judicial system’s interest” in

furthered by finding proper jurisdiction over a TCPA cause of action where the call to the consumer was received.

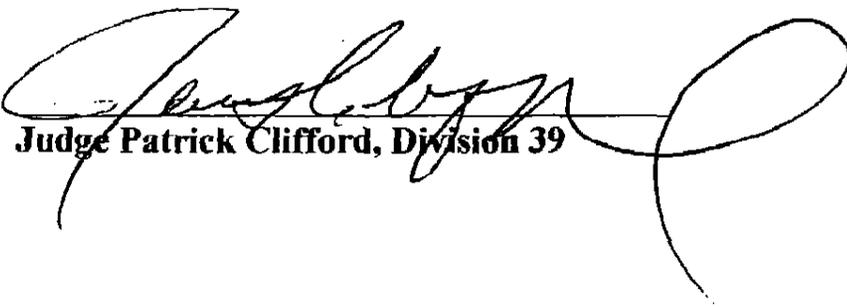
CONCLUSION

Defendant directed his activities at a telephone number that is in the 314 area code, which serves only Missouri. Defendant is in complete control of what forums he is exposed to a TCPA action by his own choice of which states he targets with his telemarketing transmissions. He directed his activities at the consumers in Missouri. He clearly should expect to be subject to the Missouri courts based on those contacts. Accordingly, making telemarketing calls into Missouri in violation of the prohibitions under the TCPA satisfies both the “transacting any business” and “tortious act in this state” prongs of the Missouri long arm statute and establishes personal jurisdiction in this state that is consistent with minimum contacts and due process under the Fourteenth Amendment.

For the reasons set forth above, Defendant’s Motion is DENIED.

IT IS SO ORDERED.

This the 22nd day of March, 2001.


Judge Patrick Clifford, Division 39

STATE OF MISSOURI)
COUNTY OF ST. LOUIS)

FILED

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI **OCT 30 2001**

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

NEAL ZEID,

Plaintiffs

v.

THE IMAGE CONNECTION, LTD.

Cause No.: 01AC - 002885 Z CV

Div. No: 39

ORDER GRANTING SUMMARY JUDGMENT

This matter came before the Court on Oct. 30, 2001 on Plaintiff's motion for summary judgment. This is an action originally brought by Plaintiff against The Image Connection, LTD., in alleging an unsolicited facsimile advertisement sent in violation of the Telephone Consumer Protection Act ("TCPA") 47 U.S.C. § 227. The parties have filed memoranda of law and the Court has heard the arguments of both parties. For the reasons stated herein, Plaintiffs' motion is GRANTED.

FINDINGS OF FACT

Plaintiff alleges that on or about February 23, 2000, Plaintiff received one facsimile transmission sent by Defendant and that fax contained material advertising the commercial availability or quality of property goods or services. Discovery has revealed that Defendant retained a third party, American Blast Fax, Inc., to send advertising faxes to "generate business" for Defendant. (Def. Resp to Pl. Interrogs. 2(b) and 9(a)). Defendant admits that the faxes contain "material advertising the commercial availability or quality of any of property, goods or services." (Def. Resp to Pl. Request for Admis., No. 1). Defendant does not contend that any "established

business relationship existed” with Plaintiff (Def. Resp to Pl. Interrogs. No. 7) or that Defendant or any agent obtained “prior express invitation or permission” to send the fax to Plaintiff. (Def. Resp to Pl. Interrog. No. 8).

Defendant avers in its response to Plaintiffs’ motion that it has no knowledge of the specific fax sent to Plaintiff. However Plaintiff’s affidavit accompanying his motion is competent summary judgment evidence attesting to the receipt of the fax as alleged. This evidence set forth by the motion is sufficient to require Defendant to make some factual showing to the contrary. ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp., 854 S.W.2d 371, 381 (Mo. banc 1993). Defendant did not provide any such evidence or testimony. Therefore, the Court also finds that Plaintiff received the fax as alleged in the Petition as supported by his affidavit.

CONCLUSIONS OF LAW

1. Standard of Review for Summary Judgment.

The rationale behind summary judgments as permitted under Rule 74.04(c)(3) of the Missouri Rules of Civil Procedure is to facilitate the expeditious determination of a controversy when there is no genuine issue as to any material fact. Rockwell International, Inc. v. West Port Office Equipment Company, 606 S.W.2d 477, 479 (Mo.App. 1980). The Missouri Supreme Court reaffirmed the standard under which a summary judgment should be entered in favor of the moving party in a lawsuit, in ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp., 854 S.W.2d 371, (Mo. banc 1993). Further, a non-moving party cannot rely on pleadings of ultimate facts when confronted with a Motion for Summary Judgment. Snowden v. Northwest Missouri State University, 624 S.W.2d 161, 169 (Mo.App. 1981). In such a case, summary judgment, if appropriate, will be entered against the non-moving party. Rule 74.04(c)(3); Charity v. City of Haiti Heights, 563 S.W.2d 72, 75 (Mo. banc 1978).

2. Elements of the Telephone Consumer Protection Act.

The elements of a claim under the TCPA are simple.

It shall be unlawful for any person within the United States— * * *

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

47 U.S.C. § 227(b)(2). There are no exceptions to this broad prohibition except those incorporated in the definition of “unsolicited advertisement.” An “unsolicited advertisement” is defined by the statute as “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.” 47 U.S.C. § 227(a)(4). As a result, the only way such faxes can be sent is if 1) the faxes do not contain “any material advertising the commercial availability or quality of any property, goods, or services” or 2) if the faxes are sent with the “prior express invitation or permission” of the recipient.

Since Defendant admits that the fax at issue in this case contains material advertising the commercial availability or quality of any property, goods, or services, and no “prior express invitation or permission” to send the solicitation was obtained, there is little question of liability. Defendant argues that it relied on the advice of American Blast Fax, Inc. (“ABF”), as to the legality of sending unsolicited advertising faxes of this nature, implying that Defendant should not be held liable for the acts of ABF.

3. Liability for acts of its agent, American Blast Fax, Inc.

Defendant has admitted that he retained ABF to send the faxes on his behalf, but infers that liability should lie with ABF, and not with Defendant. Plaintiff argues for strict vicarious liability, pointing out that the TCPA is a remedial consumer protection statute that is due a liberal

construction. “[T]he familiar canon of statutory construction [is] that remedial legislation should be construed broadly to effectuate its purposes.” Tcherepnin v. Knight, 389 U.S. 332, 335 (1967). The question of the TCPA’s strict liability is thus reduced to one of statutory construction.

In construing the TCPA, a court is not without ample guidance. The interpretation of any act by the administrative agency overseeing that act is due great deference. Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971); Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984). “The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” Chevron, 467 U.S. at 843, n 11 (additional citations omitted).¹ This deference is not simply a matter of statutory construction, but is part of the design of the separation of powers. The courts have long recognized that Congress legislates with full knowledge of the canons of construction that the courts apply. McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 496 (1991) (“It is presumable that Congress legislates with knowledge of our basic rules of statutory construction,...”). Among those canons that Congress is presumptively aware, is the deference due an agency’s interpretations of the statute. Rejecting the agency interpretation, absent compelling indications that it is wrong is therefore a rejection of congressional intent. This is one of the principles underlying the Chevron Doctrine:

The principal rationale underlying [Chevron] deference is that in this context the agency acts as a congressional proxy; Congress develops the statutory framework and directs the agency to flesh out the operational details.

Atchison, Topeka and Santa Fe Ry. Co. v. Pena, 44 F.3d 437, 441-42 (7th Cir. 1994), aff’d 516 U.S. 152 (1996).

¹ For a discussion of the policy of deference to agency construction, see Chevron and Canons of Statutory Construction, 58 Geo. Wash. L. Rev. 829 (1990).

The FCC obviously construes the term “use” in the TCPA’s prohibitions to include both direct use, and indirect use by way of an agent: “We clarify that the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements.” In the Matter of the Telephone Consumer Protection Act of 1991, 10 FCC Rcd 12391 (1995) at ¶ 35. This is wholly reasonable, since if liability could be avoided by using such an intermediary, advertisers could use a series of fly-by-night fax advertising firms to send waves of unsolicited faxes, and be insulated from liability. Such a construction would clearly allow avoidance of the statute, and such a construction is to be avoided. A remedial statute “should be liberally construed and interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers.” Scarborough v. Atlantic Coast Line R. Co., 178 F.2d 253, 258 (4th Cir. 1950). This principle is restated in the very first paragraph of the Missouri Revised Statutes, RSMo. § 1.010, that “all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof” and this Court has applied that very principle in recent TCPA cases. See Davis, Keller, Wiggins, LLC v. JTH Tax, Inc., No. 00AC-023289 (Div. 39, Mo. Cir. Ct. Aug. 28, 2001) (citing Heydon's Case, 3 Co. Rep. 7a, 7b; 76 Eng. Rep. 637, 638 (1584) and applying a remedial construction so as to “suppress subtle inventions and evasions for continuance of the mischief.” Id.)

a. Deference to FCC interpretation ensures consistency of the federal scheme

It has long been an accepted principle “that Congress normally intends that its laws shall operate uniformly throughout the nation so that the federal program will remain unimpaired.” Reconstruction Finance Corp. v. Beaver County, Pa., 328 U.S. 204, 209 (1946). Delegating authority to implement a statutory scheme to a federal agency is one way that such consistency is achieved. However, the “dual enforcement” of the TCPA creates a potential for dangerous non-

uniformity if the FCC's interpretation of its own rules is ignored.

In addition to private suits brought by individual consumers (such as the case at bar), the FCC is empowered by the Communications Act to take actions against persons violating portions of that act, including the TCPA. 47 U.S.C. § 503. The FCC has done so, issuing numerous citations and fines for TCPA violations. See, e.g., In the Matter of 21st Century Fax(es) Ltd., a.k.a. 20th Century Fax(es), Notice of Apparent Liability for Forfeiture, (FCC 00-425) 200 WL 1799579 (Dec. 4, 2000) (forfeiture order for \$1,107,500 fine against 21st Century Fax(es) Ltd. for violations of the TCPA).

Without question, the FCC would properly impose vicarious liability in its own enforcement actions against TCPA violators. It would subvert uniform enforcement of the TCPA if state courts hearing TCPA cases imposed a different interpretation than the FCC. In other words, conduct that would be violation of the statute in an action brought by the FCC might not be held to be a violation if the same action was brought by a consumer in a state court. Other courts have reached analagous conclusions. “[W]e appreciate the legitimate concerns that inconsistent interpretations may create for telephone subscribers and solicitors alike. Accordingly, in an effort to seek consistency, we shall give substantial weight to persuasive interpretations of the TCPA by both the FCC and our sister states. Worsham v. Nationwide Ins., 772 A.2d 868, 874 (Md. App. 2001). The Court holds that the FCC's construction adopting strict vicarious liability of the advertiser on whose behalf the faxes are sent is wholly proper.

b. Statutory Construction of “willful or knowing” within the TCPA

The TCPA provides for mandatory liquidated statutory damages of \$500 per violations. The statute further provides for trebled damages to be awarded if the violations were “willful or knowing.” 47 U.S.C. § 227(b)(3). “Willfully” and “knowingly” are terms of art within the law.

“‘Willfully’ means something not expressed by ‘knowingly,’ else both would not be used conjunctively.” United States v. Illinois Central R. Co., 303 U.S. 239, 243 (1938). The terms therefore have different meanings within the TCPA, and each must be considered separately.

i. Knowing

The FCC has a well established construction of “knowing” as used throughout that agency’s administration of the 1934 Communications Act. This standard is set out as a clear “knew or should have known” standard. Intercambio, Inc., 3 FCC Rcd. 7247 (1988); Audio Enterprises, Inc., 3 FCC Rcd. 7233 (1988).

Rather, the “knowingly” standard only requires that a person either had reason to know or should have known that it engaged in acts which could constitute a violation of the statute.

Intercambio, ¶ 41. Other authorities agree with the FCC, having held that “knowingly” “does not have any meaning of bad faith or evil purpose or criminal intent.” United States v. Sweet Briar, Inc., 92 F.Supp. 777, 780 (D.S.C. 1950). Similarly, “knowingly” can not be held to mean knowledge that a particular act was a violation of the law, as this would conflict with the truism that all persons are presumed to know the law.

Applying this “knew or should have known” standard, it is clear that Defendant should have known that its actions could constitute a violation of the statute. While it may seem harsh to apply such strict liability with a “knew or should have known” standard, that is nonetheless the standard that is the appropriate standard for this Court to apply to the TCPA. It has been long established that harshness is no justification for a court to alter its interpretation of the law. “If the true construction has been followed with harsh consequences, it cannot influence the courts in administering the law. The responsibility for the justice or wisdom of legislation rests with the Congress, and it is the province of the courts to enforce, not to make, the laws.” United States v. First Nat’l Bank of

Detroit, 234 U.S. 245, 260 (1914).

ii. Willfully

The proper construction of “willful” within the context of the 1934 Communication’s act is set forth at 47 U.S.C. § 312(f), and reiterated in In re Southern California Broadcasting Co., 6 FCC Rcd. 4387 (1991). An amendment to the 1934 Communications Act, established a statutory definition for the term “willful” at 47 U.S.C. § 312(f)(1):

(1) The term “willful,” when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter [Chapter 5 of the Communications Act] or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States.

Congress further stated that this statutory definition would control “for any other relevant section of the [1934 Communications] Act.” H.R. Conf. Rep. No. 765, 97th Cong., 2nd Sess. 1982, 1982 U.S.C.C.A.N. 2261, at ¶ 50. The TCPA, as an amendment to the 1934 Communications Act, is such a relevant section since it uses “willful” as the defined term of art.

The result of the statutory definition and FCC construction of “willful” is to remove any element of intent or mens rea from the term, which is a common construction in the law. Other authorities recognize that “willful” can be used in a sense “which does not imply any malice or wrong.” See 94 C.J.S. 625-26 and cases cited therein. Intent to do a wrongful act is not an essential element of willfulness. Id. at 625. It implies nothing blamable, but simply the act of a free agent. Smith v. Wade, 461 U.S. 30 (1983), n 8, citing 30 American and English Encyclopedia of Law, 529-530 (2d ed. 1905) (footnote omitted).

To avoid a finding of willfulness, it is important to distinguish the nature of the conduct (which must be unintentional), and not the violation of the regulation to which the conduct led. The FCC has used the example of “bumping a switch” as an example of a non-willful act that could give

rise to a violation that would not be construed as willful. In re Valley Page, 12 FCC Rcd. 3087 at ¶ 6, 1997 WL 106481 (F.C.C.). (“[W]illfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question such as using a radio transmitter, as opposed to being accidental (for example, brushing against a power switch turning on a radio transmitter).”) In addition, the FCC has consistently found willfulness where “laxity” has led to preventable violations. In the Matter of Liability of Midwest Radio-Television, Inc., 45 FCC 1137, 1141 (1963). In the case of the TCPA and as used by the FCC, “willful” simply means that the act out of which a violation arises was not an accident or mistake, even if the resulting violation was unintended. Accordingly, a “willful” violation of the TCPA exists where there is a conscious and deliberate commission or omission of an act which results in a violation, irrespective of any intent to violate any law or regulation.

Defendant intended to send the faxes and did exactly what it intended to do. Therefore, these were willful actions in a violation of the statute and clearly within the “willful” standard proper for the TCPA.

The Court is not unsympathetic to Defendant’s position. Defendant implies that it retained ABF for its expertise in facsimile advertising and relied on the representations of ABF that sending unsolicited advertising faxes was legal. If true, Defendant relied on the advice of ABF to Defendant’s detriment.² However, ignorance of the law is no excuse. If one relies on another for such advice, they must accept the consequences of that reliance. The Supreme Court has noted when an agent causes harms within the scope of its agency, “that ‘few doctrines of the law are more

² To the extent that any question of legality arises in the course of business, such a business would be expected to seek legal advice from an attorney licensed in the state, and not the layperson’s legal advice of a vendor who is not a licensed attorney.

firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own.” American Soc. of M. E.'s v. Hydrolevel Corp., 456 U.S. 556, 568 (1982).

Based on the constructions of “willful” and “knowing” explained above, the Court finds Defendant’s conduct was both “willful” and “knowing.”

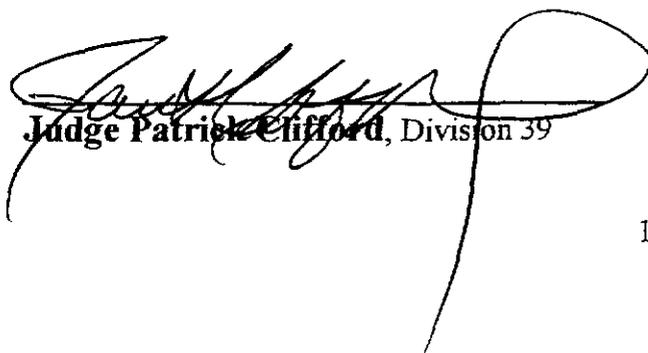
4. Trebled Damages

Having found that Defendant’s violation of the statute was willful and knowing, the amount of exemplary damages is entirely within the discretion of this Court. Defendant engaged in illegal conduct, and reaped a gain from this conduct in the form of reduced advertising costs - and possibly even new customers. The Court is mindful that there may be some manner of violative conduct more egregious than what this defendant did and the full effect of the TCPA’s trebled damages should be reserved for those most egregious violators. Defendant’s conduct deserves a measured response. Therefore judgment shall be entered against Defendant for the mandatory statutory damages of \$500.00 for each fax, and this Court finds that the appropriate amount of exemplary damages against Defendant in this case to be one-fourth of the possible discretionary damages, equal to an additional \$250.00.

IT IS THEREFORE ORDERED AND ADJUDGED that Plaintiff Neal ZEID have and recover from Defendant THE IMAGE CONNECTION, LTD., the sum of \$750.00.;

SO ORDERED.

This the 30 day of October, 2001.


Judge Patrick Clifford, Division 39

STATE OF MISSOURI)
COUNTY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

FILED

JAN - 9 2001

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

DAVID HARJOE, and NATIONAL)
EDUCATIONAL ACCEPTANCE, INC.)

Plaintiffs)

v.)

FREIGHT CENTER, INC. D/B/A)
EXPRESS ONE)

Defendant)
_____)

Cause No.: 00AC-17682

Div. No: 39

Judge Patrick Clifford

ORDER

This matter came before the Court on 1-9, 2001, on Defendant's Answer moving this Court to dismiss Plaintiffs' claims. The Court has heard the arguments of both parties, and for the reasons set forth below, Defendant's Motion is DENIED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs brought suit against Defendant under the private right of action provided in 47 U.S.C. § 227(b), the Telephone Consumer Protection Act. ("TCPA"). Plaintiffs allege that Defendant sent unsolicited advertisements to Plaintiffs' facsimile machines in violation of § 227(b)(2)(B) of the TCPA. Defendant answered, denying sending the faxes at issue, and moving the Court to dismiss Plaintiffs' claims, on grounds that 1) Plaintiffs suffered no "actual injury" compensable by the TCPA, 2) that the TCPA requires state enabling legislation to "opt-in" to the private right of action, and 3) the TCPA only applies to "faxes transmitted between states." In resolving a motion to dismiss, we take the factual allegations of the complaint as true and normally resolve any ambiguities or doubts regarding the sufficiency of the claim in favor of the Plaintiff. Magee v. Blue Ridge Professional Bldg., 821 S.W.2d

839, 842 (Mo. banc 1991). However, Defendant's motion is based solely on questions of law and is resolved without construing any ambiguities or doubts in favor of Plaintiff.

I. Actual Injury is not an element of the cause of action under the TCPA

Defendant claims that Plaintiffs have no cause of action because Plaintiffs' suit "is an attempt to reap financial gain without an injury or without a violation of the privacy rights the Federal Law sued under is intended to protect." Defendant's argument is without merit. Plaintiffs here seek the mandatory statutory damages provided by the statute, and not actual damages. "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." Linda R.S. v. Richard D., 410 US 614, 617 n.3, (1973) (emphasis added). Congress obviously intended to address the totality of unsolicited fax advertising, to "take into account the difficult to quantify business interruption costs imposed upon recipients of unsolicited fax advertisements, effectively deter the unscrupulous practice of shifting these costs to unwitting recipients of 'junk faxes', and 'provide adequate incentive for an individual plaintiff to bring suit on his own behalf.'" Kenro, Inc. v. Fax Daily, Inc., 962 F.Supp. at 1166 citing Forman v. Data Transfer, Inc., 164 F.R.D. 400, 404 (E.D.Pa.1995). Defendant's motion is denied on this ground.

II. Enabling Legislation

Plaintiff claims Missouri "has not enacted enabling legislation to allow persons to sue for civil damages under 47 USC 227" and cites a federal district court decision for the proposition that such "opt-in" legislation is required. Nicholson v. Hooters of Augusta, Inc., No. CV 195-101 (S.D. Ga. 1996), vacated by 136 F.3d 1287 (11th Cir. 1998), modified and remanded, 140 F.3d 898 (11th Cir. 1998). Had Defendant done more research, he would have discovered that not only was that district court decision vacated, further proceedings in the Nicholson case expressly held that no such "opt-in" legislation is needed. Hooters of Augusta, Inc. v. Nicholson -- S.E.2d --, 2000 WL 973601 (Ga. Ct. App,

July 14, 2000) (en banc). Furthermore, Defendant's argument is contrary to the overwhelming weight of authority, Federal and State, as well as an interpretative memorandum of the Federal Communications Commission. International Science & Tech. Inst., Inc. v. Inacom Commun., Inc., 106 F.3d 1146, 1156 (4th Cir.1997) ("The clause in 47 U.S.C. § 227(b)(3) 'if otherwise permitted by the laws or rules of court of a State' does not condition the substantive right to be free from unsolicited faxes on state approval."); Foxhall Realty Law Off., Inc. v. Telecommunications Premium Svcs., Ltd., 156 F.3d 432, 438 (2nd Cir.1998) (same); Schulman v. Chase Manhattan Bank, 710 N.Y.S.2d 368, 372 (N.Y. App. 2000); Zelma v. Total Remodeling, Inc., 334 N.J. Super. 140, 756 A.2d 1091, 148 (Super. Ct. N.J. 2000); Kaplan v. Democrat and Chronicle, 698 N.Y.S.2d 799, 800 (App. Div. 1999) ("In the absence of a State statute declining to exercise the jurisdiction authorized by the statute, a State court has jurisdiction over TCPA claims"); Kaplan v. First City Mtg., 701 N.Y.S.2d 859, 862 (N.Y. City Ct. 1999) (same).

Nor is this issue new to the St. Louis County Courts. Plaintiff notes that a number of cases have addressed this issue, all rejecting Defendant's interpretation. The latest, Coleman v. American Blast Fax, Inc., No.:00AC-005196 (St. Louis Co., Div 32, Oct. 12, 2000), reinforces this conclusion. This Court agrees that no "opt-in" legislation is needed to enable consumers to sue in state courts under the TCPA.

III. Application of the TCPA to Intrastate faxes

Defendant argues that the TCPA "only applies to faxes transmitted between states" and to do otherwise would violate the Commerce Clause, citing another federal district court for that proposition. Plaintiff argues that the telephone is an instrumentality of interstate commerce, and Congress' authority to regulate its use is plenary. Once again, had Defendant done competent research, he would have found that the decision he relies upon was vacated and is without authority.

Defendant's position is clearly in error. "It is well established that telephones, even when used intrastate, constitute instrumentalities of interstate commerce." United States v. Weathers, 169 F.3d 336, 341 (6th Cir. 1999); "Since the telephone is an instrumentality of interstate commerce, Congress has plenary power under the Constitution to regulate its use and abuse." Pavlak v. Church, 727 F.2d 1425, 1427 (9th Cir.1984). See also United States v. Gilbert, 181 F.3d 152, 158 (1st Cir.1999) (discussing the "long standing" line of cases holding Congress may regulate purely intrastate telephone activity under the Commerce Clause). Congress undoubtedly can apply the TCPA to intrastate calls and faxes. The question is, was that the intent of the TCPA?

Plaintiffs point to the duality in the 1934 Communications Act, between the statutory language of "interstate and foreign" communications, and communications "within the United States." "Interstate and foreign" communications is the language that Congress uses when a portion of the Communications Act is to be excluded from reaching intrastate matters. In contrast, "within the United States" is the language that Congress uses to expand application of a provision of the Communications Act to all communications - both interstate and intrastate. See 135 Cong. Rec. S16177-02 (Nov. 19, 1989) (Statement of Sen. Helms); see also, 135 Cong. Rec. H8885-03 (Nov. 17, 1989) (Statement of Sen. Rinaldo). This dichotomy is perfectly demonstrated in 47 U.S.C. § 223(a) (applying only to "interstate and foreign communications") and § 223 (b) (applying to all communications "within the United States"). Since the TCPA uses the more expansive "within the United States," the conclusion is plain from the statutory language of the TCPA itself, that the statute expressly applies to intrastate faxes.

The application of the TCPA to intrastate faxes is confirmed by a number of authorities. The sponsor of the TCPA in the House, Congressman Markey, introduced the house version of the TCPA noting that it "covers both intrastate and interstate unsolicited calls..." 137 Cong. Rec. E793 (daily ed.

March 6, 1991) (Statement of Rep. Markey). The FCC has issued a published notice clarifying that the TCPA does apply to intrastate calls. Telephone Solicitations, Autodialed and Artificial or Prerecorded Voice Message Telephone Calls, and the Use of Facsimile Machines, 8 FCC Rcd. 480, 481 (1995).

Other courts agree. “The Court finds the TCPA applies both to intrastate and interstate fax advertisements.” State of Texas v. American Blast Fax, Inc., 121 F.Supp 2d 1085 (W.D. Tex. 2000). “Congress expressed its intent to regulate both interstate and intrastate communications under the TCPA by amending 47 U.S.C. § 152 (b) to specifically except the TCPA from the ‘interstate’ limitation of 47 U.S.C. § 152 (a).” Hooters of Augusta, Inc. v. Nicholson, -- S.E.2d --, 2000 WL 973601 (Ga. Ct. App, July 14, 2000) (en banc). This Court concurs, and holds that the TCPA applies to both interstate and intrastate transmissions, and that application is a wholly permissible exercise of Congress’ Commerce Clause powers.

CONCLUSION

Based on the foregoing, Defendant’s motion is DENIED.

IT IS SO ORDERED.

JUDGE PATRICK CLIFFORD



DATED 1-9-01

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 South Potomac Street, Englewood, Colorado 80112	
Plaintiff(s)-Appellants: JOHN W. BAILEY and BARBARA BIRDSALL BAILEY	Filed in the Division JUL 06 2001
Defendant(s)-Appellee: COOKIES IN BLOOM, INC.	▲ COURT USE ONLY ▲
	Case Number: 01 CV 292 Div.: 4
JUDGMENT ON APPEAL	

Plaintiffs appeal a judgment of the Small Claims Division of the Arapahoe County Court dismissing their complaint. After a review of briefs and the record and without hearing argument, the Court reverses the judgment of the County Court.

The issue in the case is whether the small claims division of the county court has jurisdiction to hear a claim brought under the Telephone Consumer Protection Act ("TCPA"), 47 USCA § 227, for transmission of an unsolicited facsimile advertisement. The Small Claims Court concluded it did not have jurisdiction and dismissed the complaint. This Court reverses and remands the case to Small Claims Court for entry of judgment on the merits of the claim.

The TCPA prohibits using "any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 USCA §227(b)(1)(C). Section 227(b)(3) creates a private right of action. It provides that

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

- (A) an action based on a violation of this subsection ...,
- (B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or
- (C) both such actions.

The issue in this case is whether Colorado law permits the bringing of such action. More specifically, it is whether a state must affirmatively "opt-in" before a citizen may bring a private action, or whether the provision is permission for a state to "opt-out" of the act or an indication that the federal act does not preempt the field. (The federal act makes it clear that it does not preempt the regulatory field concerning facsimile transmissions. 47 USCA Section 227(e)(1)(A).)



On the point of whether the statute requires an “opt-in” or permits an “opt-out,” the statute is ambiguous. The legislative history provided in the briefs shows an intent to permit an action in state court even though a transmission might have originated in interstate commerce. Senator Hollings, 137 Cong.Rec. §16205-06 (Nov. 7, 1991). The same intent was recognized in *International Science and Technology Institute Inc. v. Inacom Communications, Inc.*, 106 F.3rd 1146, 1154 (4th Cir. 1997).

A cause of action created by federal legislation is a cause of action belonging to the citizens. It may be enforced in state court as well as federal court unless the terms of the legislation make it clear that the federal law excludes or preempts state action. See, e.g., *Tafflin v. Levitt*, 110 S.Ct. 792, 800 (1990). There is nothing in the TCPA which demonstrates a federal intent to exclude, preempt, or prohibit state action. Instead the reverse is true. The TCPA recognizes that states may refuse to permit jurisdiction over the cause of action created by the TCPA. *Murphey v. Lainer*, 204 F.3rd 911, 914 (9th Cir. 2000).

Defendant has argued that the provisions of the Colorado Consumer Protection Act (CCPA), Section 6-1-101, *et seq.*, C.R.S., show that Colorado law does not permit the bringing of a TCPA claim. Section 6-1-702(1)(b)(I), C.R.S. provides that

A person engages in a deceptive trade practice when, in the course of such person’s business, vocation, or occupation, such person:
(b) (I) Solicits a consumer residing in Colorado by a facsimile transmission without including in the facsimile message a toll-free telephone number that a recipient of the unsolicited transmission may use to notify the sender not to transmit to the recipient any further unsolicited transmissions.

This section of Colorado law has added an element to the federal TCPA, that of including a telephone number to notify the sender that any further fax would be unsolicited. Implicit in that provision is the understanding that if the telephone number is included and a consumer uses the number, no further unsolicited transmissions would occur, and that if such transmission does occur, it would be unsolicited. The federal act delineates what occurs if an unsolicited transmission does occur. Rather than being an exclusion, the Colorado provision further defines the nature of the action. If the telephone number has been provided, the consumer has clarified that further transmissions are unsolicited, and further transmissions occur, there is nothing in the Colorado CPA which would contradict or indicate an exclusion of the private right of action created by the federal TCPA.

Defendant has also argued that a small claims court has no jurisdiction to hear a claim brought under the TCPA. Section 13-6-403(1), C.R.S., gives the small claims court concurrent original jurisdiction with the district court over all civil actions in which the debt or damage does not exceed \$5,000. The debt or damage sought in this case is within the civil jurisdiction of the small claims court and it is not within the categories of cases specifically excluded from jurisdiction under 13-6-403(2).

The Court concludes that the Small Claims Division of the Arapahoe County Court has subject matter jurisdiction over the dispute in this case. The matter is remanded to the Small Claims Court to make such findings and enter such judgment as are supported by the evidence.

Done this 6th day of July, 2001.

BY THE COURT:



Kenneth K. Stuart

Judge

Certificate: Copies of the above order were mailed/ faxed to counsel of record this

7/9/01 by KJA.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

RYAN P. AGOSTINELLI)
)
Plaintiff(s),)
)
-versus-)
)
L.M. COMMUNICATIONS OF SOUTH)
CAROLINA, L.M. COMMUNICATIONS)
ii OF SOUTH CAROLINA, INC)
)
Defendant(s).)
_____)

IN THE SMALL CLAIMS COURT
CASE NO. 00-SC-86-2862

ORDER

This case was filed by the Plaintiff on June 14, 2000. It is an action against the Defendant for violation of the Telephone Consumer Protection Act (TCPA) 47 U.S.C. § 227 (1992). The Defendant made a motion for Summary Judgment which was denied by the Court August 22, 2000. The Defendant moved for reconsideration and Plaintiff filed a Motion for Summary Judgment. The Court Heard the opposing motions on April 16, 2001. Both parties stipulated there were no material questions of fact.

The Court finds the phone call in question to have been made using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party. The call was for commercial purposes and included the transmission of an unsolicited advertisement. There is no assertion of any prior relationship between the parties.

The Defendant asserts the Plaintiff gave permission to leave the message when his answering machine answered the phone. The message on the Plaintiffs answering machine invites callers to leave a message.

This argument is without merit. The statute in question says it is unlawful to initiate such

calls without the prior express permission of the called party. This clearly means the permission must be granted prior to the initiation of the call. It does not matter what happens after the call is made or how it is received regarding the issue of permission.

The Defendant argues the call was not made for a commercial purpose. The Court finds the call in question was designed to increase listenership to the radio station to maintain or increase its audience base which is the basis for selling advertising space to advertisers which presumably generates a profit. This is a commercial purpose in the truest sense of American free enterprise.

The Defendant argues the call in question did not include the transmission of any unsolicited advertisement. 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. Radio broadcast air time is a service provided to its listeners for their entertainment and paid for by advertisers. The listener receives the service in exchange for listening to the advertisements of third parties known as advertisers. This is not a charitable organization. The station would not broadcast unless it was paid by the advertisers. The advertisers would not pay the broadcasters unless there were listeners who were listening to their advertising. The listeners would not listen unless the station was broadcasting something entertaining the listeners wanted to hear. This is a commercial endeavor. The listener gives up his time and privacy by granting the station's advertisers access to his home, automobile or office in exchange for the entertainment provided by the broadcast. The advertiser pays for the broadcast and the station provides the broadcast for a profit. This call announced something entertaining was going to be happening the next day on their station. That announces the commercial availability and quality of the service they provide.

The Court finds there is no material issue of fact presented in this case and the Plaintiff is entitled to Judgment as a matter of law. The Court finds the Plaintiff is entitled to statutory damages of Five Hundred and no/100 (\$500.00) dollars. There is no allegation the call was made to the Plaintiff by accident. Since it was the intention of the Defendant to call the Plaintiff and the call did violate the TCPA the Court finds the Plaintiff is entitled to treble damages for a judgment in his favor in the amount of One Thousand Five Hundred and no/100 (\$1500.00) Dollars.

AND IT IS SO ORDERED!



Henry W. Guerard
Magistrate

February 14, 2002
Charleston, SC

COPY

THE MAGISTRATE COURT OF OHIO COUNTY, WEST VIRGINIA

DIANA MEY,

PLAINTIFF,

VS

01C-233

FEATURE FILMS FOR FAMILIES,

DEFENDANT,

ORDER

On February 13, 2002 came DIANA MEY, PRO SE, and FEATURE FILMS FOR FAMILIES, by their attorney, Russell Harris for a hearing on the above styled case.

FINDINGS OF THE COURT:

Plaintiff's claim #11 in amended complaint: date March 3, 2000.

The first call defense has no standing.

Defendant willfully, knowingly, recklessly and disrespectfully "hung up" on plaintiff to avoid or attempt to avoid having to fulfill requirements in 47 U.S.C. 64.1200(e)(2)(iv). Hang up occurred when plaintiff was attempting to speak.

The defendant through this action opened the trebled door. Every person called by the defendant has a right to be heard, ask questions and receive information.

Had this first call been handled in accordance with Federal Law, we would not be here.

ORDERS, judgment for the plaintiff for: \$1500.00.

Plaintiffs claim #12 in amended complaint: date September 12, 2000.

The defendant's automated calling system, with intent, does not comply with the intent of Federal Law.

The defendant's automated called system hangs up automatically and leaves no information, nor does it attempt to leave required information.

This court finds this practice or method willful and is done knowingly in an unsuccessful attempt to avoid complying with Federal Law.

This court also defines this practice as harassment. To repeatedly call and hang up over and over again is nothing less than harassment.

To argue the above would be to argue that a solicitation company can repeatedly call and hang up forever.

The trebled door is again opened.

ORDERS, judgment for the plaintiff for \$1,500.00.

Plaintiff's claim #13 in amended complaint: date September 20, 2000.

ORDERS, judgment for the plaintiff for \$1,500.00.

Plaintiff's claim #14 in amended complaint: date September 22, 2000.

ORDERS, judgment for the plaintiff for \$1,500.00.

In regard to the plaintiff's claims listed as #16, #17, #18, #19 and #20 in the amended complaint:

This court finds that the defendant did have a written do-not-call policy. As a matter of fact, the defendant had two such policies.

ORDERS, Judgment for the defendant on the above claims #16, #17, #18, #19 and #20.

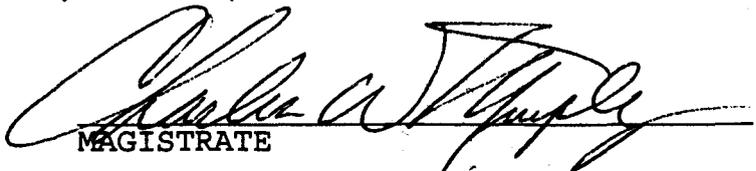
Plaintiff waives the excess of this award above this court's jurisdictional limit of \$5,000.00.

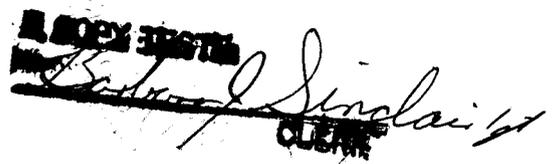
ACCORDINGLY, the Court does hereby,

ORDERS, judgment in the amount of \$5,000.00 plus court costs and interest from date of judgment.

ORDER that attested copies of this order be provided to the plaintiff and defendant and counsel.

ENTER this 21 day of March 2002.


MAGISTRATE


CLERK