328-329 (1989); Gilligan v. Jamco Develop. Corp., 108 F.3d 246, 249 (9th Cir. 1997)

A. Plaintiff Has Sufficiently Alleged That Cox Had Both a "High Degree of Involvement" In Fax.Com's Fax-Spamming Operations and "Actual Notice of an Illegal Use" Of Its Services By Fax.Com.

As Cox acknowledges, a common carrier like Cox may be held liable for violating the TCPA if it exhibits "a high degree of involvement *or* actual notice of an illegal use and failure to take steps to pi-even1 such transmissions." Rules and Regulations Implementing the Telephone Consumei Protection Act of 1991, Report and Ordei-, 7 F.C.C.R. 8752, 8780 (1992) ("FCC TCPA Order") (emphasis added). Hei-e, Plaintiff has alleged facts sufficient to constitute both a "high degree of involvement" by **Cox** in Fax.com's violations of the TCPA, and Cox's "actual knowledge of an illegal use" of its services by Fax.com – fax broadcasting in violation of the TCPA Cox's *own statements* on its website establish that it knew that: (1) Fax.com's "core" business was fax broadcasting advertisements for goods and services ("marketing"): and (2) these advertisements were broadcast to "one of the largest fax databases in the world" (Compl.¶ 35), negating any reasonable inference that recipients had given their "prior express invitation or permission" to receive these transmissions, which is necessary to make them lawful under the TCPA. No more is required to establish knowledge of an "illegal use" in violation of the TCPA. See 47 U.S.C.§ 227(a)(4) ("Thetcim '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."). At a minimum, Plaintiff has alleged sufficient facts, including "reasonable inferences" therefrom, Enesco Corp., 146 F.3d at 1085, to entitle Plaintiff to take discovery on the issue.

Not only does Plaintiff allege facts giving rise to a reasonable inference that Cox was aware of Fax.com's "illegal use" of its services; Plaintiff alleges – again in the words of Cox and Fax.com -- that Cox knowingly and deliberately provided Fax.com with **all** of the custom-tailored infrastructure necessary to engage in its massive and unlawful fax-spamming operation. See Compl. ¶¶ 35-38; Notice of Apparent Liability of Fax.com, ¶19 ("Fax.com's primary business activity itself constitutes a massive on-going violation *of* section 227(b)(1)(C) of the [TCPA] and section 64.1200(a)(3) of the Commission's rules, and. . . Fax.com is well aware of

this fact."). Cox did not simply provide some "reliable" phone service to Fax.com. Nor did Cox simply offer a standard service to any subscriber willing to agree to its terms of contract. Rather, Cox determined exactly what Fax.com's business needs were – i.e., fax broadcasting over 3 million unsolicited direct fax advertisements per day, nationwide – and specifically customized its services to enable Fax.com to send those faxes. Plaintiff's allegations satisfy the alternative test for common carrier liability under the TCPA, i.e., "a high degree if involvement." At a minimum, Plaintiff's allegations, including reasonable inferences therefrom, are sufficient to withstand a motion to dismiss, and entitle Plaintiff to conduct discovery on the issue.

B. Fax.com's Activities Need Not Be Adjudicated Unlawful Before Liability May Be Imposed on Cox or Before Cox May Terminate Fax.com's Services.

Cox asserts that Plaintiff's Complaint fails to allege that Cox had actual notice of illegal conduct and failed to take proper steps to prevent it, and that the phrase "actual notice of illegal conduct" requires a prior adjudication that the conduct is illegal and a basis to know that the conduct will continue in the future. See Cox MPA at 16. Cox's assertion is based on the FCC TCPA Order, the FCC's order in Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Memorandum Opinion, Declaratory Ruling and Order, 2 F.C.C.R. 2819, 2820 (1987) ("FCC Obscenity Order"), and Sable Communications of Ca., Inc. v. Pacific Tel. & Tel. Co., Nos. 84-469, 8-549, U.S. Dist. LEXIS 19524 (C.D. Cal. Feb. 13, 1984), at *7-8. The FCC TCPA Order borrows the language for TCPA common carrier liability – "a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions," – from the FCC Obscenity Order, which relies heavily on Sable. Cox's characterization of Sable, however, is simply wrong, and the FCC Obscenity Order protects only a narrow class of common carriers to which Cox does not belong.

In Sable, Sable Communications ("Sable") had applied for and received a 976 Information Access Service ("976 IAS") from Pacific Bell. The 976 IAS allowed a subscriber – i.e. Sable – to disseminate, for a fee, pre-recorded "sexually suggestive" messages to telephone users who desired access to such messages. Under the terms of the 976 IAS agreement, Pacific Bell reserved the right to terminate such service "upon receipt of an order of a court so

directing[.]" Id. at *2-3. Sable's 976 IAS was later discontinued by Pacific Bell, however, for "at best . . . one obscene pre-recorded message" that allegedly violated federal and state laws. Pacific Bell sought to preliminary enjoin Sable from transmitting any "obscene" messages in the future.

In denying Pacific Bell's request, the court held that based on the content of "at best" a single pre-recorded "obscene" message, enjoining Sable's further transmissions would amount to an unlawful prior restraint. See id. at *6. Although Pacific Bell argued that Sable's future acts would expose it to potential liability under the Communications Act, the Court held that Pacific Bell's "hasty" termination of the allegedly "obscene" transmission precluded an inference of "knowing involvement" in the transmission of those messages. See id. at *7-8. "Like the Court, at this stage, Pacific Bell can do no more than guess at what the content of any future message will be." Id. The court further held that an adjudication of illegal conduct was necessary only *under the terms of the agreement* between Sable and Pacific Bell, before Pacific Bell could terminate Sable's 976 IAS. See id. at *10 ("[U]nder [Sable's and Pacific Bell's 976 IAS agreement], it appears that the service may not be terminated on the basis of message content without a court order authorizing Pacific Bell to do so.")

In this case, Cox does not have to guess what Fax.com's future transmissions will be. Cox specifically customized its services to meet all of Fax.com's fax broadcasting needs to enable its on-going violations of the TCPA. See Compl. ¶¶ 35-38.

In addition, Cox is not under a legal duty to wait for an adjudication of Fax.com's violations of the TCPA before canceling Fax.com's service. Compare e.g., Sable Communications, 1984 U.S. Dist. LEXIS 19524, at *7-8. As noted by the FCC, "telephone common carriers are already permitted to deny the use of their facilities for an illegal purpose. . . . . Such a prohibition is not inconsistent with its status as a common carrier under our [FCC] rules or the provisions of the Communications Act." FCC Obscenity Order, 2 F.C.C.R. at 2820. Thus, contrary to Cox's protestations, Cox may at any time, can, and should terminate its services to Fax.com due to its ongoing violations of the TCPA. See id.; Sable Communications, 1984 U.S. Dist. LEXIS 19524, at *7-8.

The fact that Cox has waited this long before taking any action against Fax.com

also argues for Cox's "knowing involvement" in Fax.com's illegal fax broadcasting activities. See id. at *7-8. In contrast to the situation in Sable where the FCC determined that no finding of "knowing involvement" could be ascribed to the common carrier due to its "hasty" termination of only a single alleged obscene phone call; here, Cox has knowingly assisted Fax.com to transmit millions of unsolicited advertisements for years, in blatant violation of the TCPA. See Compl. ¶¶ 18, 20, 22, 35-38, 75-79. Cox has failed to prove "beyond a doubt" that Plaintiff can prove no set of facts that would entitle it to relief. See Morley, 175 F.3d at 759; Conley, 355 U.S. at 45-46.

Cox also overreaches in its attempt to apply the "adjudicated obscene" requirement of the FCC Obscenity Order in the context of the TCPA. In that Order, the FCC, after reviewing the rationale of the Sable court's holding, limited its holding to only administrative decisions by the FCC regarding Multipoint Distribution Service ("MDS") common carriers. As stated by the FCC:

> Thus, for administrative purposes, in interpreting whether MDS common carriers are "knowingly involved" in transmitting obscene material, we will focus upon whether the carrier is passive. Unless an MDS common carrier has actual notice that a program has been adjudicated obscene, to the extent an MDS common carrier confines itself to operation under section 21.903(b)(1) of the Commission's rules [governing MDS common carriers only], it will not be subject to adverse agency action.

FCC Obscenity Order, 2 F.C.C.R. at 2820; see also at 2819 ("This portion of our proceeding examines whether multipoint distribution service (MDS) common carriers may, consistent with the Communications Act (Act), Commission regulations and policies, deny customers the use of their facilities for the transmission of materials which would violate federal, state or local law, including obscene material.").

Thus, although the FCC TCPA Order borrows the common carrier liability language of the FCC Obscenity Order, the clear impact of the FCC's decision appears only directly applicable only to Multipoint Distribution Service ("MDS") common carriers in administrative hearings by the FCC. See id. Cox, however, is not and cannot establish that it is acting as a MDS carrier to Fax.com. An MDS common carrier is a common carrier who provides MDS, or "wireless cable," using over-the-air microwave facilities to transmit video programming.

See Warner, Lisa A., "*Wireless Technologies Creating Competition in the Local Exchange Market: How Will Local Exchange Carriers Compete?*", THE CATHOLIC UNIVERSITY OF AMERICA, 4 CommLaw Conspectus 51, 56 (1996). Here, Cox is only alleged to have acted as Fax.com's telephone common carrier, not as an MDS common carrier. See Compl. ¶¶ 18, 35-38.

The FCC also noted the differences in potential liability for MDS common carriers compared to telephone common carriers if their facilities are used for an illegal purpose, and adopted a higher threshold of actual awareness for MDS common carriers. See FCC Obscenity Order, 2 F.C.C.R. at 2820.

> MDS common carriers may be at greater risk than telephone common carriers since they can view programming and be placed on actual notice if the program is to be repeated. We are reluctant to place MDS common carriers in the uncertain predicament of watching all programming and assessing, in each instance whether to engage the legal machinery for interpretative rulings . . . . Thus, for administrative purposes, in interpreting whether MDS common carriers are "knowingly involved" in transmitting obscene material, we will focus upon whether the carrier is passive. Unless an MDS common carrier has actual notice that a program has been adjudicated obscene, to the extent an MDS common carrier confines itself to operation under section 21.903(b)(1)[13] of the Commission's rules [governing MDS common carriers only], it will not be subject to adverse agency action.

Id.; see also 47 C.F.R. §§ 21.900-21.961 (which separately regulates the actions of MDS common carriers and not telephone common carriers).

Despite this higher level of protection for MDS common carriers, the FCC held that even MDS common carriers are under an affirmative obligation to terminate the services of those persons that would violate the law:

> Upon consideration of our analysis of the principles of law and policy set forth herein, we find that MDS common carriers can and in certain circumstances, should take action to ensure that their facilities are not used to transmit material which would violate 18 U.S.C. § 1464 or any other valid provision of federal, state or local law.

FCC Obscenity Order, 2 FCC Rcd at 2820; see also at 2820 (question of MDS common carrier liability centers on the "degree of awareness or involvement present").

[13] 47 C.F.R. § 21.903(b)(1) states: "Unless service is rendered on a non-common carrier basis, the common carrier controls the operation of all receiving facilities (e.g., including any equipment necessary to convert the signal to a standard television channel, but excluding the television receiver); and"

Thus, Cox's contentions that a prior adjudication of an illegal act is required before a *telephone* common carrier – such as Cox – has a duty to terminate its services, is simply incorrect. See FCC Obscenity Order, 2 F.C.C.R. at 2820. A prior adjudication is *only* required for an *MDS* common carrier because they are "at greater risk than telephone common carriers" of being placed on actual notice of an illegal use of their services. See id. Telephone common carriers – such as Cox – are not required to wait until the conduct at issue has been adjudicated illegal. See FCC Obscenity Order, 2 FCC Rcd at 2820 (no prior adjudication of illegal conduct required for telephone common carriers); see also FCC TCPA Order, 7 F.C.C.R. at 8780 (same). Contrary to Cox's assertions, neither Sable, the FCC Obscenity Order, nor the FCC's TCPA Orders discussing the TCPA require an adjudication of illegal conduct before a common carrier such as Cox is required to act.

Cox's remaining cases are distinguishable on their facts or in their legal application.[14] Cox's conclusion – that absent a statutory requirement, court order, or legal adjudication of illegal conduct, a common carrier has no legal basis or duty to terminate common carrier services to a customer – is wholly without support and mischaracterizes the authorities it relies upon. For instance, 18 U.S.C. § 1084(d) does not mandate that "a carrier can *only* refuse service after official notification";[15] but states only that when a common carrier is notified in writing by a law enforcement official that a facility being furnished by it is being used in violation of the law, it shall discontinue such common carrier services after reasonable notice to the subscriber.

[14] See e.g., Sprint Corp. v. Evans, 818 F.Supp. 1447, 1457 (M.D. Ala. 1993) (court cites to FCC Obscenity Order, but fails to distinguish between MDS and telephone common carriers and the differing application of federal law; also no indication that common carrier in that case offered anything but a standard service that was not specifically customized to facilitate unlawful activity such as Cox); Howard v. America Online Inc., 208 F.3d 741, 752 (9th Cir.) (fails to note that a telephone common carrier must discriminate among clients when it has "a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions[.]"; see FCC Obscenity Order, 2 F.C.C.R. at 2820 (which also notes that telephone common carriers are free to terminate services based upon notice of alleged illegal use, no legal adjudication required); People v. Brophy, 120 P.2d 946, 956 (Cal. Ct. App. 1950) (no indication common carrier in that case offered anything more than a standard service to paying subscribers, unlike Cox who specifically designed its services to meet Fax.com's business needs of sending millions of unsolicited faxes in violation of the TCPA; also fails to note or distinguish cases where telephone common carrier has a "a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions").

[15] Cox MPA at 17:15, 24-25.

Likewise, a court order is not required – as discussed above – before a telephone common carrier may terminate a customer's services. See FCC Obscenity Order, 2 F.C.C.R. at 2820 (no prior adjudication of illegal conduct required for telephone common carriers); see also FCC TCPA Order, 7 F.C.C.R. at 8780 (same). Nor does California law or the California Public Utilities Commission ("PUC") require a common carrier to "*only* disconnect service for alleged illegal conduct upon written notification from a law enforcement agency."[16] The rule states only that "any communications utility operating under the jurisdiction of the [PUC] shall disconnect existing service to a customer upon receipt [of a written finding] from any authorized official of a law enforcement agency[.]" Cox MPA at 18 n.25. The PUC rule does not limit or circumscribe a common carrier's ability to decline or withdraw its services from a customer.

Cox's citation to Goldin v. Public Utilities Comm'n, 23 Cal.3d 638 (1979) for the proposition that a common carrier may not discontinue services without good cause is also unavailing. Here, Plaintiff's Complaint adequately alleges "good cause" for Cox to discontinue providing services to Fax.com, namely Fax.com's on-going illegal transmission of unsolicited advertisements to millions of consumers nationwide in violation of the TCPA.

Plaintiff's Complaint adequately states a claim against Cox for injuries arising under the Communications Act and TCPA. Cox's motion fails to show beyond doubt that Plaintiff can prove no set of facts that would entitle it to relief. See Morley v. Walker, 175 F.3d at 759; Conley, 355 U.S. at 45-46. Accordingly, Cox's motion to dismiss should be denied.

IV. THE DOCTRINE OF PRIMARY JURISDICTION IS INAPPLICABLE.

Cox argues that if this Court finds that federal jurisdiction exists, and does not otherwise dismiss Plaintiff's claims against it, the FCC's rulemaking proceedings provide the proper forum for addressing certain issues raised by Plaintiff's claims. Specifically, Cox argues that the FCC's proceedings may render Plaintiff's case moot by determining whether in fact Cox or Fax.com have violated the TCPA as common carriers. Cox requests that this Court dismiss, rather than stay, Plaintiff's claims.

Cox's suggestion should be rejected for a number of reasons. First, ordinarily, the

[16]Cox MPA at 18:1, 21-23.

FCC has no authority to adjudicate private TCPA claims. Second, two days after the Notice of Proposed Rulemaking was issued, the FCC was enjoined by a lone federal judge from taking any action to enforce the TCPA, which presumably includes the proposed rulemaking proceedings, and the FCC has stated that it is "abiding by the judge's ruling." Third, the "proposed rulemaking" proceeding to which Cox would have this Court defer is little more than a gleam in a regulator's eye, and may be many years from fruition. Fourth, dismissal under the doctrine of primary jurisdiction is not permitted where, as here, Plaintiff asserts a damages claim, which is subject to a statute of limitations.

A. The Doctrine of Primary Jurisdiction.

The doctrine of primary jurisdiction is "a prudential doctrine under which courts *may*, under appropriate circumstances, determine that the initial decision-making responsibility should be performed by the relevant agency rather than the courts." Syntek Semiconductor Co., Ltd. v. Microchip Technology Inc., 307 F.3d 775, 2002 U.S. App. LEXIS 20746, *9 (9th Cir. 2002), amended, 2002 U.S. App. LEXIS 16531 (emphasis added). "Primary jurisdiction is not a doctrine that implicates the subject matter jurisdiction of the federal courts." Syntek Semiconductor, 2002 U.S. App. LEXIS 20746, *9. Nor is the doctrine an equivalent to the requirement of exhaustion of administrative remedies. Id. at *10.

As most recently emphasized by the Ninth Circuit, primary jurisdiction is not a doctrine that "requires that all claims within an agency's purview be decided by the agency." Brown v. MCI WorldCom Network Servs., Inc., 277 F.3d 1166, 1172 (9th Cir. 2002); Syntek Semiconductor, 2002 U.S. App. LEXIS 20746, *9. "Nor is it intended to 'secure expert advice' for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's ambit." Syntek Semiconductor, 2002 U.S. App. LEXIS 20746, *9 (quoting Brown, 277 F.3d at 1172); accord United States v. General Dynamics Corp., 828 F.2d 1356, 1365 (9th Cir. 1987).

B. The FCC Cannot Ordinarily Decide Private TCPA Claims.

In this case, neither the language of the TCPA, nor its legislative history, demonstrate any intent by Congress to grant the FCC primary jurisdiction to hear or determine

private TCPA claims. Rather, both the TCPA's language and legislative history show that Congress intended to allow TCPA claims to be heard both in federal[17] and state courts.[18] Perhaps most importantly, *no provision of the TCPA allows the FCC to hear private TCPA claims*, although the FCC may intervene as a matter of right in actions brought by the Attorney General of a State. See 47 U.S.C. § 227(f)(3).

Here, it would be inconsistent with the TCPA's scheme to require the FCC to resolve the issues in question. Nothing in the TCPA's provisions or Congressional record indicates a Congressional preference for allowing the FCC to hear private TCPA claims such as Plaintiff's. Because this particular division of power was not one intended by Congress, the doctrine of primary jurisdiction is not applicable in this context.

C. The FCC is Unable to Take Any Action With Respect to TCPA Claims Involving Fax.com.

This Court should not dismiss or stay Plaintiff's TCPA claims against Cox and Fax.com in favor of proceeding before the FCC, because the FCC has been enjoined from taking any action with respect to such claims. In an order issued September 20, 2002, the Hon. Stephen N. Limbaugh of the Eastern District of Missouri ordered the FCC to stay "any and all proceedings under the Telephone Consumer Protection Act (TCPA) dealing with unsolicited advertisements transmitted by facsimile, 47 U.S.C. § 227, or related regulations against Fax.com and/or any customer, client or party in privity with Fax.com; . . . ." pursuant to his earlier decision finding that the TCPA violated the First Amendment by infringing on commercial speech. See Docket Sheet, Nixon v. American Blast Fax, No. 00-CV-933 (E.D. Mo.) (Order entered Sept. 20, 2002) (attached hereto as Exhibit B); Missouri v. American Blast Fax, 196 F.Supp. 920 (E.D. Mo. 2002), appeal pending Nos. 02-2705, 02-2707 (8th Cir.).

This order directly contradicts the Ninth Circuit's decision in Destination Ventures v. FCC, 46 F.3d 54, 55-57 (9th Cir. 1995), where the Court determined that enforcement of the

[17] A State Attorney may bring a TCPA claim in federal court pursuant to 47 U.S.C. § 227(f)(2) ("Exclusive jurisdiction of Federal courts").

[18] See 137 Cong. Rec. at S 16205 (Nov. 7, 1991) (statement of Sen. Hollings, sponsor of the TCPA) ("The [TCPA] would allow consumers to bring an action in State court against any entity that violates the bill."); 47 U.S.C. § 227 (b)(3) ("A person or entity may . . . bring in an appropriate court of that State . . . .").

TCPA does *not* interfere with commercial speech in violation of the First Amendment. See also Kenro, Inc. v. Fax Daily, Inc., 962 F.Supp. 1162, 1167-1169 (S.D. Ind. 1997) (ban on unsolicited fax advertisements is narrowly tailored to achieve the government's intended purpose and does not violate the First Amendment guarantee of commercial free speech); Texas American Blast Fax, 121 F.Supp.2d 1085, 1091-1092 (W.D. Tex. 2000) (same). Although Judge Limbaugh's decision is not binding on *this* Court – which is obliged to adhere to the Ninth Circuit's contrary decision -- the FCC has publicly stated that it is "abiding by the judge's ruling." DM News, Judge Orders FCC to Stop Pursuit of Fax.com (Oct. 3, 2002) (attached hereto as Exhibit C). Accordingly, the FCC does not provide a viable forum for the airing of Plaintiff's claims.

D. A Stay or Dismissal In Favor of a Nascent Rulemaking Proceeding is Unwarranted.

The "proposed rulemaking" proceeding to which Cox would have this Court defer is little more than a gleam in a regulator's eye, and is likely years from fruition. The FCC has merely requested public "comment on *whether* to revise or clarify our rules governing . . . the use of . . . telephone facsimile machines." In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket Nos. 02-278, 92-90, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 02-250, 2002 WL 31084939 (F.C.C. Sept. 8, 2002) ("Notice of Proposed Rulemaking"). The FCC has not decided *whether* it will revise the rules; *when* it will decide whether to revise the rules; *what* rules it will revise; or, if it decides to revise any pertinent rules, how many months (or likely years) it will take to issue *proposed* rules, and how many additional months (or years) it will take for those rules to become law (absent court challenges, of course). It would unfairly prejudice Plaintiff and the class to hold their claims hostage to such an open-ended rulemaking proceeding, which, in the end, may not produce anything dispositive of the claims asserted here.

E. Dismissal Under the Doctrine of Primary Jurisdiction Is Inappropriate Where, As Here, Plaintiff Asserts Damages Claims Subject to a Running Statute of Limitations.

Finally, dismissal under the doctrine of primary jurisdiction is inappropriate where, as here, the plaintiff has asserted damages claims subject to a running statute of

limitations. Syntek, 307 F.2d at 782. While the faxes received by Plaintiff were sent well within the applicable limitations periods, the putative class includes claims going back to the full limit of those periods, i.e., four years before the action was filed. Compl. ¶ 49. Accordingly, dismissal, even without prejudice, would unfairly prejudice absent class members by effectively barring a sizeable portion of their claims.

CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim should be denied.

Dated: November 26, 2002

Respectfully submitted,

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Exhibit A

Service. Gel by LEXSEE®
Citation: 7 F.C.C.R. 8780

*7 FCC Rcd 8752, *; 1992 FCC LEXIS 7019, **;*
57 FR 48333; 71 Rad. Reg. *2d (P & F) 445*

In the Matter of RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991

CC Docket No. 92-90

FEDERAL COMMUNICATIONS COMMISSION

7 FCC Rcd 8752; 1992 FCC LEXIS 7019; 57 FR 48333; 71 Rad. Reg. 2d (P & F) 445

RELEASE-NUMBER. FCC 92-443

September 17, 1992 Released; Adopted October 16, 1992

ACTION: [1]**

REPORT AND ORDER

JUDGES:
By the Commission: Commissioner Barrett issuing a statement.

OPINION:
[*8753] [10:227] Implementation of Telephone Consumer Protection Act of 1991; restrictions on telephone solicitations.

The Rules are amended to implement the Telephone Consumer Protection Act of 1991. In order to protect residential telephone subscriber privacy, telemarketers will be required to place a consumer on a "do-not-call" list if the consumer requests not to receive further solicitations. Calls made by automated telephone dialing systems and artificial or prerecorded voice messages to emergency lines, health care facilities, radio common carriers or any number for which the called party is charged for the call will be prohibited in the absence of an emergency or the prior express consent of the called party. Artificial or prerecorded voice messages to residences, the transmission of unsolicited advertisements by telephone facsimile machines, and calls which simultaneously engage two or more lines of a multi-line business will be prohibited as well. Telephone facsimile machines and artificial or prerecorded voice messages will be required to identify the sender of the transmission. **[**2]** Finally, artificial or prerecorded voice messages will be required to release the line of the called party within five seconds of notification that the called party has hung up. Telephone Soiicitations, 71 RR 2d 445 [1992].

[79:12001 Restrictions on telephone solicitations; company-specific do-not-call lists.

In order to protect residential telephone subscriber privacy, any person or entity engaged in telephone solicitation, as defined in the Telephone Consumer Protection Act of 1991, will be required to maintain a list of residential telephone subscribers who request not to be called by the telemarketer. Each person or entity making a telephone solicitation, or on whose behalf a telephone solicitation is made, will be held responsible for maintenance of its do-not-call list and will be fully accountable for any problems arising in the maintenance and accuracy of the list. Telemarketers will be required to maintain do-not-call lists on a permanent basis so that consumers will not be burdened with periodic calls to renew a do-not-call request. In the absence of a specific request to the contrary, a residential

EXHIBIT P

when the called party's hang-up signal reaches the dialing system of the caller. Commenters generally do not indicate that they anticipate problems in complying with this requirement. n86

n86 Commenters point out that the proposed rules, in the prohibition against line seizure, § 68.318, refer to "automatic dialing devices," a term not employed elsewhere in the rules or the TCPA. Reading § 227(d) as a whole, it is clear that the requirement refers only to automatic telephone dialing systems. The title and language of that section will thus be revised to read "automatic telephone dialing systems." **[**68]**

[*8779] 2. Identification Requirements for Artificial or Prerecorded Voice Systems.

53. The TCPA mandates that all artificial or prerecorded telephone messages delivered by an autodialer state clearly the identity of the caller at the beginning of the message and the caller's telephone number or address during or after the message, § 227(d)(3)(A), and we adopt this requirement in our rules, 64.1200(d). A number of commenters request that prerecorded messages be required to state the identity of the caller and the caller's telephone number (other than that of any autodialing system used to place the call) or address within 30 seconds after the message begins, so that the called party would not have to listen to the entire message before deciding whether to hang up. We reject the proposal to require that a telephone number or address be stated within 30 seconds of the beginning of an artificial or prerecorded message, because the TCPA requires only that the caller's identity be stated at the beginning of the message. See § 227(d)(3)(B). We have been presented with no evidence to persuade us to request additional authority to adopt such a restriction. Finally, as suggested **[**69]** by several commenters, we will require callers leaving a telephone number to provide a number other than that of the autodialer or prerecorded message player which placed the call because the autodialer or message player number may be in constant use and not available to receive calls from the called party. § 64.1200(e)(4).

3. Facsimile Machines.

54. The TCPA requires that identifying information be placed on all telephone facsimile transmissions, and that telephone facsimile machines be capable of placing such information on all transmissions. § 227(d). The TCPA further prohibits the use of telephone facsimile machines to send unsolicited advertisements. n87 § 227(b)(1)(C). Parties commenting on the facsimile **[*8780]** requirements for senders of facsimile messages urge the Commission to clarify that carriers who simply provide transmission facilities that are used to transmit others' unsolicited facsimile advertisements may not be held liable for any violations of § 64.1200(a)(3). n88 We concur with these commenters. In the absence of "a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions," common carriers **[**70]** will not be held liable for the transmission of a prohibited facsimile message. Use of Common Carriers, 2 FCC Rcd 2819, 2820 (1987).

n87 Mr. Fax and National Faxlist urged the Commission not to impose a ban on unsolicited telephone facsimile advertisements; National Faxlist suggested that a telephone facsimile do-not-call list be created in lieu of a complete prohibition on such unsolicited advertisements. GTE requested clarification that the identification requirement does not apply to each page of messages transmitted through imaging systems.

In banning telephone facsimile advertisements, the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition (see § 227(b)(1)(C); thus, such transmissions are banned in our rules as they are in the TCPA. § 64.1200(a)(3). We note, however, that facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient. See para. **34,** supra. Furthermore, the term "telephone facsimile machine" as defined in the TCPA and identically in our rules, § 64.1200(f) clearly includes imaging

systems. The rules state that the first page or each page of a transmission to a facsimile machine must include identifying information.

n88 See comments of SNET, Sprint, and reply comments of AT&T. [**71]

E. Enforcement

1. Private Right of Action.

55. The TCPA provides consumers with a private right of action, if otherwise permitted by state law or court rules, for any violation of the autodialer or prerecorded voice message prohibitions and for any violation of the guidelines for telephone solicitations. § 227(c)(5). 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. § 227(b)(3). A consumer may also file suit in state court if he or she has received more than one telephone call within any 12-month period by or on behalf of the same company in violation of the guidelines for making telephone solicitations. § 227(c)(5). Telemarketers who have established and implemented reasonable practices and procedures in compliance with the latter section may present such compliance as an affirmative defense to any action for violation of telephone solicitation guidelines. § 227 (c)(5). The TCPA also permits states to initiate a civil action in federal district court against a telemarketer who engages in a pattern [**72] or practice of violations of the TCPA. §§ 227 (f)(1) and (2). States retain the power to initiate action in state court for violations of state telemarketing statutes. § 227(f)(6). Finally, consumers may request that the Commission take enforcement action regarding violations of § 227, consistent with the Commission's existing complaint procedures. n89

n89 Pacific Bell asserts that complaint proceedings brought under § 208 of the Communications Act, 47 U.S.C. § 208, and based on violations of § 227 of the Act, 47 U.S.C. § 227, could only be instituted against common carriers. Pacific Bell is correct with respect to complaints filed under Section 208 of the Act. In addition to the private right of action noted above, aggrieved persons or entities may report violations of the TCPA to the Commission and request action on such violations through the informal procedures set forth in Section 1.41 of the rules, 47 C.F.R. § 1.41. See, e.g., 47 U.S.C. 66 312 and 503(b).

2. State Law Preemption.

56. The TCPA, in § 227(e), sets forth a standard for preemption of state [**73] [*8781] law on autodialing, artificial or prerecorded voice messages, and telephone solicitations. The TCPA does not preempt state law which imposes more restrictive intrastate requirements or regulations regarding: the use of facsimile machines to send unsolicited advertisements; the use of automatic telephone dialing systems; the use of artificial or prerecorded voice messages; or the making of telephone solicitations. However, the TCPA specifically preempts state law where it conflicts with the technical and procedural requirements for identification of senders of telephone facsimile messages *or* autodialed artificial or prerecorded voice messages. § 227(e).

3. Other Matters

57. A number of commenters urge the Commission to request additional authority from Congress to protect consumer privacy interests, arguing that the NPRM errs on the side of protecting commercial speech and does not adequately protect telephone subscribers from invasions of privacy by telemarketers. These commenters point out that telephone subscribers must receive at least one unwanted solicitation before making a claim under the rules. The National Consumers League urges the Commission to withdraw [**74] the NPRM and begin the rulemaking process anew, stating that the Commission failed to make

E L

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Judge Orders FCC to Stop Pursuit of Fax.com

Oct 03 2002

By Scott Hovanyetz
Senior Reporter
scotth@dmnews.com

A federal judge in Missouri ordered the Federal Communications Commission to back off its pursuit of $5.38 million in fines against Fax.com. a company it accused of sending unsolicited commercial or "junk" faxes on 489 occasions.

U.S. District Coun Judge Stephen Limbaugh's court order said that the FCC no longer had the right to pursue charges against Fax.com under the TCPA after Lirnbaugh declared its junk-fax ban provisions unconstitutional in March. The writ. filed Sepl. **20.** could weaken the FCC's ability to enforce anti-junk fax rules while the constitutionality question remains in the air.

A FCC spokesman would say only that the agency is "abiding by the judge's ruling." He declined further comment.

Fax.com was named along with American Blast Fax in 2000 by the Missouri attorney general's office in a lawsuit alleging TCPA violations due to junk faxing. The FCC later became party to the lawsuit because the constitutionality of the junk-fax ban was under challenge

American Blast Fax since has gone out of business, leaving Fax.com the sole defendant. In March **2002.** Limbaugh ruled that the FCC and Missouri attorney general had **failed** to prove a substantial interest in regulating fax advertising and failed to show evidence that unsolicited commercial faxes unfairly place the cost of advertising on recipients.

Limbaugh's decision is not binding outside of his jurisdiction, which is based in St. Louis and covers the eastern half of Missouri. The Missouri attorney general and the FCC are appealing the decision in the U.S. 8th Circuit Court of Appeals.

In August, the FCC began its own proceedings against Fax.com. saying the company had continued violating the TCPA despite repeated warnings and seeking $11,000 per violation. The FCC also issued letters to 100 Fax.com clients warning them that they faced similar penalties if they continued sending unsolicited commercial faxes **through** Fax.com

EXHIBIT B

At that point, Fax.com asked Limbaugh to intervene. Limbaugh issued a temporary slay in late August, which was made permanent with the writ in September.

"We were like, 'How can you do this? You've lost.'" Mary Anne Wymore, an attorney for St. Louis law firm Creensfelder. Hemker & Gale, which is representing Fax.com in the case. said of the FCC. "Wc've argued this case already."

The broader implications of Limbaugh's decision have yet to be seen. Prior to his ruling. three other federal judges in Oregon. Texas and Indiana ruled that the junk-fax ban is constitutional.

Wymore acknowledged that many see Lirnbaugh's opinion as an aberration. However. Limbaugh has noted what might be flawed thinking by the other federal judges who have considered the constitutionality issue, she said.

"Limbaugh was the first to say, Wail a minute, this analysis is wrong,' " she said

Fax.com also faces a trillion-dollar civil suit under the TCPA and state law in California tiled by Silicon Valley entrepreneur Steve Kirsch. While Limbaugh's decision may nor be binding on that case. or any other junk-fax case in court now or to come, other federal judges will consider it, and state judges often defer to federal court rulings on matters of federal law. Wyrnore said.

Fax.com's legal briefs in the pending appeal of Limbaugh's decision were due Oct. 7, and the government was scheduled to reply no later than Oct. 21. A hearing likely will follow two to three months later, and a decision may be released in the spring, Wymore said.

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Docket as of November 22, 2002 8 13 pm Web PACER (v2.3)

U.S. District Court

Eastern District of Missouri (Eastern)

CIVIL DOCKET FOR CASE #: 00-CV-933

Nixon v. American Blast Fax

Filed: 06/08/00
Assigned to: Honorable Stephen N. Limbaugh
Demand: $0,000
Nature of Suit: 890
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court None
Cause: 47:0227 Telephone Consumer Protection Act

JEREMIAH W. NIXON, Attory General. State of Missouri, ex rel plaintiff	J. Robert Sears 314-G13-2550 €ax [COR LD NTC] LATHROP AND GAGE 10 S. Broadway Suite 1300 St. Louis, MO 63102-1708 314-613-2500 FTS 613-2550 Jill C. LaHue 573-751-7948 fax [COR LD NTC] ATTORNEY GENERAL OF MISSOURI Assistant Attorney General 221 W. High Street P.O. Box 899 Jefferson City, MO 65102-0899 573-751-3321 FTS 751-3825
UNITED STATES OF AMERICA intervenor	Deborah L. Golemon 314-539-2777 fax [COR LD NTC] OFFICE OF U.S. ATTORNEY 111 S. Tenth Street 20th Floor St. Louis, MO 63102 314-539-2200 FTS 539-7695 Lisa A. Olson 202-616-8470 fax

EXHIBIT C

[4:00cv933]

9/11/02 101 MOTION by movant Fax.Com, Inc. in 4:00-cv-00933 for leave to tile its Reply to the Brief in Opposition to Fax.com's Emergency Motion for Writ of Mandamus Pursuant to 28 USC Sec. 1651 and €or injunctive Relief pursuant to Fed.R.Civ. P. 62(c), filed on 9/6/02 by Intervenor/Appellant the FCC, in excess of this Court's 15 page limitation (arl) [Entry date 09/17/02] [Edit date 09/17/02] [4:00cv933]

9/16/02 102 RULED DOCUMENT by Honorable Stephen N. Lirnbaugh granting motion for leave to file its Reply to the Brief in Opposition to Fax.com's Emergency Motion for Writ of Mandamus Pursuant to 28 USC Sec. 1651 and for Injunctive Relief pursuant to Fed.R.Civ. P. 62(c), filed on 9/6/02 by Intervenor/Appellant the FCC, in excess of this Court's 15 page limitation [101-1] LEAVE TO FILE GRANTED (cc: all counsel) (arl) [Entry date 09/17/02] [4:00cv933]

9/16/02 103 REPLY TO THE FCC'S 9/6/02 BRIEF IN OPPOSITION TO FAX.COM'S EMERGENCY MOTION FOR WRIT OF MANDAMUS PURSUANT TO 28 USC SEC. 1651 AND FOR INJUNCTIVE RELIEF PURSUANT TO FED.R.CIV.P. 62(c) by movant Fax.Com. Inc. in 4:00-cv-00933 re [91-1] (arl) [Entry date 09/17/02] [4:00cv933]

9/20/02 104 ORDER by Honorable Stephen N. Limbaugh - IT IS THEREFORE ORDERED that having determined it has jurisdiction, this Court's preliminary order of August 29, 2002 restricting certain actions of the Federal Communcations Commission. Nos. A-E, is made permanent. IT IS FURTHER ORDERED that. pending the issuance of a mandate at the conclusion of the appeal ot this Court's order of March 13, 2002 before the United States Court of Appeals for the Eighth Circuit. (a) The Federal Communication Commission is hereby ordered to stay any and all proceedings under the Telephone Consumer Protection Act (TCPA) dealing with unsolicited advertisements transmitted by facsimile. 47 U.S.C. Sec. 227. or related regulations against Fax.com and/or any customr, client or party in privity with Fax.com; (b) to cease and desist from enforcing, or attempting to enforce. those provisions of the TCPA dealing with unsolicited advertisements transmitted by facsimile, 47 U.S.C. Sec. 227, or related regulations against Fax.com and/or any customer. client or party in privity with Fax.com; (c) to cease and desist from requiring any response and/or payment from Fax.com with regard to the Notice of Apparent Liability for Forfeiture that is the subject of Fax.com's Motion, File No. EB-02-TC-120, NAL/Acct. NO. 200232170004. FRN 0007-2970-47, or in any way proceeding under said Notice; (d) to identify by Sept. 4, 2002 any and all parties and/or entities agains twhom it plans to proceed in connection with the Notice of Apparent Liability for Forfeiture against Fax.com and/or its announcement of Aug. 7, 2002 of its intent to issue Citations and Letters of Inquiry: (e) to provide notice by Sept. 9, 2002 to any and all parties and/or entities identified in accordance with paragraph d of this Order: specifically advising them of this Order. IT IS FINALLY ORDERED that this Court shall retain jurisdiction over this matter for purposes of enforcing this Order and its provisions. terminating case

(4:00-cv-01265) (cc: all counsel) (lah)
[Entry date 09/20/02] [4:00cv933]

11/18/02 105 NOTICE OF APPEAL filed by intervenor USA re: the District Court decision ; [104-2] fee: $ no **fee** paid (lah)
[Entry date 11/19/02] [4:00cv933]

11/22/02 -- DELIVERED TO USCA - 1 Civil Appeal Cover Sheet, 2 Certified Copies of Notice of Appeal, 2 Certified Copies of Clerk's Docket entries and Writ of Mandamus(SNL) **filed** on 09/20/02. cc: NOA to Hon. SNL. cc: NOH and Clerk's docket entries to parties. (cf) [Entry **date** 11/22/02] [4:00cv933]

Case **Flags:**
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PROOF OF SERVICE BY FACSIMILE AND COURIER

I, Rizalino Altares, declare:

I am a citizen of the United States and employed in San Francisco County, Calitomia. I am over the age of eighteen years and not a pany to the within-entitled action. My business address is Embarcadero Center West, 275 Battery Street, 30th Floor, San Francisco, California 94111-3339. On November 26. 2002, I served a copy of the within document(s):

1. PLAINTIFF'S CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, FAILURE TO STATE A CLAIM AND BASED ON PRIMARY JURISDICTION, and

2. PROOF OF SERVICE BY FACSIMILE AND COURIER.

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☐ by placing the document(s) listed above in a sealed envelope and causing the envelope to be delivered to a point-to-point courier for delivery.

Forrest Booth, Esq. Cynthia L. Mitchell, Esq. COZEN O'CONNOR 425 California Street, Suite 1800 San Francisco, CA 94104 FAX: (415) 617-6101	Richard R. Patch, Esq Julia D. Greer, Esq. COBLENTZ. PATCH, DUFFY & BASS, LLP 222 Kearney Street. 7th Floor San Francisco, CA 94108-4510 FAX: (415) 989-1663

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the patty served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit

I declare under penalty of perjury under the laws of the State of California that the above is true and correct

Executed on November 26, 2002, at San Francisco, California.

Rizalino Altares

159205 I