

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
Rules and Regulations Implementing)	CG Docket No. 02-278
the Telephone Consumer Protection of)	
1991)	

**OPPOSITION TO REQUEST FOR STAY OF NATIONAL FEDERATION OF
INDEPENDENT BUSINESS.**

Robert Biggerstaff, who submitted substantive comments in this docket, files this opposition to the Request for Stay of National Federation of Independent Business.

Petitioner National Federal of Independent Business (“NFIB”) makes much noise claiming that its contacts with its members via fax are made with express consent. Many other membership groups have made similar arguments, claiming they send information related to their “mission” and information that members “expect” to receive.

If the Commission had the resources to look beneath the surface, it would find the facts to be quite different. Unfortunately, the Commission only gets to see the parts of the issue that these groups provide - and that view is limited to only the landscape that these groups want the Commission to see. However, in the case of NFIB, another window into their junk faxing practices was revealed in a TCPA lawsuit in Missouri. Documents and admissions revealed in that suit shows the picture painted by NFIB and other petitioners is quite different from reality.

The suit in Missouri was styled as Schumacher Fin. Svcs., Inc. v. Nat’l Fed’n of Ind.

Bus., No. 02AC-008228 (Mo. Cir. July 3, 2003). (A copy of the final order of that case is attached as an exhibit hereto). As part of that case, the parties stipulated to a number of facts. The plaintiff was a member of NFIB. NFIB asks its members for their fax number through a telemarketing script. (A copy of that script is attached as an exhibit hereto). NFIB admitted that “No other notice of the intended use of Plaintiff’s facsimile telephone number by Defendant was provided to Plaintiff other than the text of the documents titled ‘Sample Dialog for Telephone Survey’ and ‘Letter for Faxing to Members.’” NFIB also *admitted* that “No literature or other information provided by NFIB requested permission or gave any inkling that Plaintiff’s fax number would be used for sending faxes advertising commercial insurance products.”¹

The telemarketing script used by NFIB mentions only that NFIB wants a fax number it to keep the member informed about “legislation.” NFIB admitted that this script and their web site is the only information provided to the member when asked for their fax number about what NFIB will do with fax numbers. However, NFIB turned around and sent those very members junk faxes about insurance products and services that have nothing to do with “legislative information.”

NFIB fought this clear violation of both the spirit and the letter of the TCPA at every turn. In its briefs, NFIB argued that the five page fax was:

“an informational piece designed to communicate changes announced by certain insurance carriers in the commissions it may pay to brokers.”

¹ This admission was contained in the stipulated facts admitted by NFIB in that case.

Needless to say, faxes for insurance offerings are not “legislative information” which was the basis for NFIB acquiring its members’ fax numbers. NFIB also argued that membership in the organization gave them express permission to send any faxes they want to members (despite the deceptive way they acquired members’ fax numbers).

NFIB’s tactics are a prime example of why the Commission must take these recent comments by groups like NFIB with a hefty grain of salt. It also underscores the need for a bright line test to extinguish these bogus claims that simply joining an organization or subscribing to a publication gives carte blanche for sending of junk faxes. It is clearly demonstrated that such a situation has been, and will continue to be, abused by these groups.

I thank the Commission for its time in considering my comments. I remain,

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Biggerstaff", written in a cursive style.

Robert Biggerstaff
POB 614
Mt. Pleasant, SC 29465

August 18, 2003

Certificate of Service

The undersigned affirms and states that a copy of the foregoing was mailed via first class mail, with sufficient postage attached, on this the 18th day of August, 2003, to:

Counsel for Requestor, NFIB

John F. Kamp
Wiley, Rein, & Fielding, LLP
1776 K. Street, NW
Washington, DC 20006

Robert Biggerstaff

EXHIBIT B

Master Agreement No. 552100

Sample Dialogue for Telephone Survey

"Hello, could I speak to _____

We are calling on behalf of the National Federation of Independent Business to verify that our membership information is accurate and up to date so that we may better serve you. If I could have just a couple of minutes of your time to ask you a few short questions."

"We show this is _____ company

at _____ (address)

in _____ (city), _____ (state). Is that correct?"

"Do you have a fax number so that we can send you the latest information about legislation and other issues dealing with businesses" _____

"Do you have an e-mail address?" _____

"So that we know which Congressional district you live in for voting purposes, could I get your home address?"

"And could I get your home telephone number?" _____



00082

EXHIBIT C

Master Agreement No. 552100

Letter for faxing to members

Dear NFIB Member:

We are currently updating our member files in order to better serve you. Would you please take a moment and complete this short survey and then return by fax to the number below.

First, if any of the above information is incorrect, would you please make the necessary changes.

Do you have a fax number so that we can send you the latest information about legislation and other issues dealing with businesses _____

Do you have an e-mail address? _____

So that we know which Congressional district you live in for voting purposes, could we get your complete home address?

Street _____

City _____ State _____ Zip _____

And while we are updating our records, could we have your home telephone number?

Again, thank you, our valued member.



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Arnold



NFIB Service Unit
National Federation of Independent Business
P.O. Box 305289 Nashville, TN 37230-8286 Tel: 800-505-NFIB(6342) Fax: 600-808-1588

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X

October 23, 2001

To: Mr. Mark Schumacher 5734718433
SCHUMACHER FINANCIAL SERVICES
(Please distribute to all commercial producers in your agency.)

From: *J. Head* Tom Head, Agent Marketing Representative

COMMISSION CHANGES...

Our carriers have announced some commission changes that will impact our schedules for you, and we wanted to get them to you as soon as possible. Commissions for new General Liability business have increased to 15%, and commission on premium for renewals as of 1/1/02 has been reduced a point. The reduction reflects the service provided by The Hartford's Service Center. Your Hartford customers can request endorsements and certificates of insurance by calling 1-800-448-5462. It should also be noted that The Hartford accepts E&O liability for The Hartford renewals.

	CURRENT		Renewal Beginning 1/1/2002
	New Business	Renewal	
Business Owners Policies	15%	12%	11%
General Liability	15%	12%	11%
Commercial Auto	12%	12%	11%
Workers' Compensation	7%	7%	6%

Answers to Other Frequently Asked Questions ...

Q: With the hardening of the market, have there been changes to the target classes that can be written through the program?

Some, but we are pleased to announce that our target list is still largely intact. We continue to provide you with markets for the small and independent businesses with which you are working, including some contractors! Attached are updated target lists for the program.

Q: Can I submit on a regular ACORD form?
YES. Or you can use the NFIB Request for Quote forms.

Q: Do I have to commit to a minimum volume to write business through the NFIB program?

NO. There is no minimum volume requirement.

Q: How do I get updated materials?

Fill out the attached form and fax it back to us - or call me at 1-800-505-NFIB(6342).

Q: Can I still qualify for the 2% Bonus Opportunity?

YES. Any agency with total NEW business writings in 2001 exceeding \$50,000 will be paid an additional 2% on new workers compensation premium effective on or after May 1, 2001 and on all workers compensation policies renewing on or after August 1, 2001 with effective dates through December 31, 2001.

Q: What about Fidelity and Security Bonds?

Only insurance agents who are members of NFIB have access to the program. Your NFIB member number is your subagent code. Bonds can be requested by calling the NFIB RIGHT-NOW bond toll free number at The Hartford Bond Center 1-877-434-3495 or faxing your current Bond application to 1-888-731-8206. Commissions are 20% for commercial surety bonds and 15% for Fidelity Bonds for both new and renewing policies.

Note: NFIB's insurance programs are conducted through MSC Insurance Agency of Tennessee, LLC, which is qualified to do business in all of the states in which it operates.
California License DC73907

EXHIBIT B-1-1





NFIB Service Unit
National Federation of Independent Business
P.O. Box 306255 Nashville, TN 37235-6255 Tel: 800-506-NFIB Fax: 600-506-1058

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102301
FAXED

Account

FAX-BACK FORM - 1-800-505-1058

For your convenience we have included this form to help you communicate with us. If you have questions I can help you, please fax this form to me or contact me at 1-800-506-NFIB (6342).

Account

*Take care
for number
off your
fax*

FAX to: 1-800-505-1058 Tom Head, NFIB Service Unit

From: Mark Schumacher
Mr. Mark Schumacher 5734718433
SCHUMACHER FINANCIAL SERVICES

IF YOU WOULD PREFER WE NOT TO FAX NFIB COMMERCIAL INSURANCE PROGRAM UPDATES TO YOU, please check the box below and fax this form back to us.

DO NOT FAX ME PROGRAM UPDATES.

IF YOU NEED AN UPDATED KIT, PLEASE CHECK BELOW AND FAX THIS FORM TO US:

	YES	NO
Do you want us to send you an updated kit for NFIB Property & Casualty or Workers Comp insurance?		<input checked="" type="checkbox"/>
Do you need the RIGHT-NOW Bond Kit for writing commercial surety and fidelity bonds through the Hartford Bond Center (Must be an NFIB member-agent to participate)		

Insurance lines you currently handle:

Fidelity/Surety Bonds Commercial P&C/WC
 Life/Health Personal Lines

How many licensed producers do you have in your agency? _____

INFORMATION ABOUT THE ON-LINE INTERNET RATING PROGRAM

	YES	NO
1. Would you like to be part of the test group for internet rating?		<input checked="" type="checkbox"/>
2. After the internet rating system has been tested would you like to be able to submit applications over the dedicated internet site with rating, proposals, and binding communication capabilities included, and an e-mail confirmation that the proposal was available		<input checked="" type="checkbox"/>
3. Is your agency connected to the internet today?		
4. Do you have an email address and would you give us permission to use it in relationship to communications about the NFIB insurance programs? My email address is: _____		

Other: _____

EXHIBIT B-1-2

EXHIBIT
tabbles
A 2

NFIB Property & Casualty

NFIB Workers' Comp

(Handwritten initials)

Amundt

HARTFORD TARGET MARKETS

Experienced, well-managed businesses with a proven track record. Low-hazard operations. "Main Street" businesses, that operate during regular business hours.

NOTE: In CALIFORNIA, non-clerical payroll must not exceed \$500,000 to be eligible for coverage

OFFICES—Businesses that provide a personal service for their customers:

Accountants/Bookkeepers	Doctors/Medical Offices ²	Real Estate Agents (No WC)
Architects/Engineers ¹	Insurance Agents	Travel Agents
Consultants	Interior Designers/Decorators	Veterinarians
Dentists		
¹ No BOP in California	² No WC in California	

RETAIL/WHOLESALE—Typically, mercantile business found in malls and strip shopping centers:

Appliances	Cosmetics	Picture Frames
Bakeries	Crafts	Plumbing Supplies
Bath/Blanket/Bedspreads	Drug Stores	Radio & TV
Books/Magazines/Card Shops	Electrical Supplies	Shoes
Cameras & Supplies	Florists/Garden Shops	Sporting Goods
Candy/Nut & Confectionery	Gift Shops	T-Shirt Shops
Carpet	Hardware	Tobacco
Clocks	Health Food	Toys
Clothing	Hearing Aids	Trophies
Computers	Optical Goods	Yarn

SERVICE—Businesses that supply the public with services for a fee:

Appliance Repair	Glass Dealers/Glaziers	Photographic Studios
Barber/Beauty Shops	Locksmiths	Printing
Camera Repair	Musical Instrument Repair	Radio & TV Repair
Clothing Alteration/Tailors	Office Machine Repair	Shoe Repair
Dry Cleaners	Photocopying	Taxidermists
Funeral Directors	Photo Engraving	Watch/Clock Repair

CONTRACTORS—Independent contractors (cannot sub-out work) who specialize in a particular field. Not available in California, Colorado, or Nevada

SEE CONTRACTOR GUIDELINES PAGE FOR ELIGIBILITY AND AVAILABILITY.

MANUFACTURERS

Metal Working Job Shops	Tool, Die Patterns, and Mold Mfg.
Plastic Working Shops	Wire, Nail, Bolt, Door Mfg.

EXPOSURES TO AVOID (Hartford)

Aircraft	General Contractors/Framing	Roofers
Below Ground Transportation	Hazardous Chemicals	Temporary Agencies
24-Hour Stores & Restaurants	Heavy Construction	Transportation
Convenience Stores	Heights >15'	Uninsured Subcontractors
Frequent, Heavy Lifting	High Hazardous Occupations	Volunteer/Social Organizations
Gas Pumps	Property Management	Water/Watercraft
Employment Placement		

EXHIBIT B-1-3



NFIB Workers' Comp

Arnold

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AIG WORKERS' COMPENSATION INSURANCE

Experienced, well-managed businesses with a proven track record, Low-to-medium hazard operations.

Agriculture²

Farms; ¹ Except Cattle
Fish Hatcheries

Irrigation Works
Orchards and Groves²

Rendering Works¹
Sugarcane Plantations

Construction (\$6500 minimum premium. Cannot sub-out work)

SEE CONTRACTOR GUIDELINES PAGE FOR ELIGIBILITY AND AVAILABILITY.

Manufacturing

Abrasive Paper or Wheel Mfg.
Asphalt Works or Refining¹
Automobile Body / Parts Mfg.
Battery Mfg.¹
Box Mfg. (excluding code 2759)
Brick Mfg.
Brush or Broom Mfg./Assembly
Cathedral or Art Window Mfg.
Cement Mfg.
Cigar Mfg.
Die Casting Mfg.
Distillation - Wood
Door Mfg./Erection¹ (not overhead)
Drug, Medicine and Pharm, Prep
Emery Works
Fiber Goods Mfg.
Flint and Spar Grinding¹

Fur Mfg.
Galvanizing (Non Electrolytic)
Glass and Glassware Mfg.
Glove Mfg.
Knit Goods Mfg.
Lacquer or Spirits Mfg.
Leather Goods Mfg.
Mica Goods Mfg.
Mirror Mfg.
Mobile Home or Trailer Mfg.⁴
Motorcycle Mfg. or Assembly
Phosphate Works
Planing or Molding Mill¹
Plaster Board Mfg.¹
Plaster Statuary/Ornamnt Mfg.
Pottery Mfg.
Pulp Mfg.

Refractory Products Mfg.
Rubber Tire Mfg.¹
Salt, Borax, or Polash Production
Serum Mfg.¹
Sign Mfg.¹
Smelting, Sintering or Refining¹
Soap or Synthetic Detergent¹
Stone Cutting and Polishing¹
Tanning¹
Textile Fiber Mfg.
Type Foundries
Varnish Mfg.
Veneer Products Mfg.¹
Wooden Ware Mfg.
Yarn or Thread Mfg. - Cotton

Scrap and Salvage Operations

Automobile Dismantling¹
Wrecking
Bottle Dealer¹

Metal Scrap Dealer¹

Salvage Operation - No

Service

Building Operations¹
Hotels

Housing Authorities¹
Landscaping¹

Real Estate Appraisal Company

Transportation (\$10,000 minimum unmodified premium)

Bus Companies¹

Drivers and Chauffeurs

Trucking (No Long Haul)¹
(no moving/storage operations)

Other

Field Bonded Warehousing

Gas Companies⁴
(not natural gas)

Storage Warehouses¹

¹ Ineligible class in California
² Orchards, poultry and egg farms are not eligible in California.
³ Except in connection with bridges or culverts.
⁴ Not eligible in all states.

EXHIBIT B-1-4



Amend

NFIB PROGRAM CONTRACTOR GUIDELINES - REVISED 10/01/01

Check availability by state below.

Target: Amish contractors who do not sub-contract work. No General contractors, framers, roofers, or contractors dealing in heavy construction, high hazards or heights over 15 feet.

AY

GROUP A CONTRACTORS (Hartford program)

Cabinet Makers (No WC) Carpet Laying (No WC) Drywall	Electrical ¹ Fence Installation (No WC) HVAC	Interior Carpentry (No WC) Interior Painting (No WC) Janitorial (Commercial)	Lawn Care (No WC) Paperhanging (No WC) Plumbing
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¹\$7500 minimum premium for electrical contractors in Florida

GROUP B CONTRACTORS (AIG only, \$8500 minimum premium)

Appliance Installation Cabinet Makers Carpet Laying Concrete Construction ² Drywall Electrical	Excavation Fence Installation ³ HVAC Interior Carpentry Irrigation System Construction Janitorial Commercial	Painting - Shop Only Paperhanging Plumbing Sewer Construction ⁴ Sheet Metal Work ² Sign Painting and Lettering (interior only)	Street or Road Construction ² Street or Road Maintenance ⁴ Swimming Pool Construction ⁴ Telephonal Cable Line Install ⁴ (no overhead or underground)
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²ineligible class in California. ³Except in connection with bridges or culverts. ⁴Not eligible in all states.

AVAILABILITY BY STATE

Alabama	Groups A & B for WC Group A only for P&C.
Alaska	Group B WC only.
Arizona	State Fund WC. No contractor P&C.
Arkansas	Groups A & B for WC. Group A only for P&C.
California	No contractors
Colorado	Group B WC only.
Connecticut	Groups A & B for WC. Group A only for P&C
Delaware	Group A only for P&C.
Florida	Groups A & B for WC. Group A only for GL. \$7500 minimum premium for electricians.
Georgia	Groups A & B for WC. Group A only for P&C.
Hawaii	None.
Idaho	Group A only for WC and P&C.
Illinois	Groups A & B for WC Group A only for P&C.
Indiana	Groups A & B for WC. Group A only for P&C.
Iowa	Groups A & B for WC. Group A only for P&C.
Kansas	Groups A & B for WC Group A only for P&C.
Kentucky	Group A only for WC and P&C. Work Comp must be written with BOP.
Louisiana	Groups A & B for WC. Group A only for GL.
Maine	Group A only for WC and P&C.
Maryland	Group A only for WC and P&C.
Massachusetts	Group A only for WC and P&C. Only plumbers, electricians & HVAC for WC.
Michigan	Groups A & B for WC. Group A only for P&C.
Minnesota	Groups A & B for WC. Group A only for P&C.
Mississippi	Groups A & B for WC. Group A only for P&C.
Missouri	Groups A & B for WC. Group A only for P&C.

Montana	Group A - P&C only. State Fund WC
Nebraska	Groups A & B for WC. Group A only for P&C.
Nevada	None.
New Hampshire	Groups A & B for WC. Group A only for P&C.
New Jersey	Groups A & B for WC. Group A only for P&C.
New Mexico	Groups A & B for WC. Group A only for P&C.
New York *except NYC	Groups A & B for WC. Group A only for P&C. Hartford will not write monoline WC.
N. Carolina	Groups A & B for WC. Group A only for P&C
N. Dakota	Group A - P&C only.
Ohio	State Fund WC only.
Oklahoma	Groups A & B for WC. Group A only for P&C.
Oregon	Groups A & B for WC. Group A only for P&C. Call for special restrictions on contractors
Pennsylvania	Groups B for WC. Group A for WC and P&C. Hartford WC must be written with BOP.
Rhode Island	Group A only for WC and P&C.
S. Carolina	Groups A & B for WC. Group A only for P&C.
S. Dakota	Group A only for WC and P&C.
Tennessee	Groups A & B for WC. Group A only for P&C.
Texas	State Fund WC.
Utah	Group A only for WC and P&C.
Vermont	Groups A & B for WC. Group A only for P&C.
Virginia	Groups A & B for WC. Group A only for P&C.
Washington	Group A - P&C only.
West Virginia	Group A - P&C only.
Wisconsin	Group A only for WC and P&C.
Wyoming	Group A - P&C only

EXHIBIT *B-1-5*



Unpublished

Consult the rules of the applicable jurisdiction regarding use and citation of unpublished decisions.

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

SCHUMACHER FINANCIAL SERVICES, INC., Plaintiff,

v.

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, Defendant.

**Cause No. 02AC-008228 N CV
Division 43
Decided July 3, 2003**

DISPOSITION:

Defendant's motion for summary judgment DENIED.
Plaintiff's motion for summary judgment GRANTED as modified.

SYNOPSIS:

Plaintiff received a fax transmission from Defendant consisting of five pages, 4 of which regarded insurance services offered by Defendant. Plaintiff brought suit under 47 U.S.C. § 227, alleging 4 violations of that statute (one for each page containing advertising material). Both parties moved for summary judgment on stipulated facts. Defendant raised a constitutional challenge under First Amendment speech rights and other defenses including failure to mitigate, existence of an established business relationship with Plaintiff, prior express permission or invitation, and that the faxes were not covered by the statute as "unsolicited advertisements." The court rejected these defenses, and granted summary judgment to Plaintiff but ruling that the 5 page fax constituted only a single violation of the statute, following *Harjoe v. Herz Fin.*, SC 84858 (July 1, 2003).

SUBSEQUENT HISTORY:

none

PRIOR HISTORY:

none

CITED BY:

none

APPEARANCES:

Max Margulis, Margulis Law Group, Chesterfield

Missouri for plaintiff.

Robert Sears, Lathrop and Gage, St. Louis Missouri, for defendant

JUDGES:

Michael T. Jameson

HOLDINGS:

[1] Constitution: First Amendment

The unsolicited fax provisions of the TCPA do not violate First Amendment speech rights.

[2] Multiple violations per fax

Multiple pages sent in the same facsimile transmission are only a single "advertisement" and thus a single violation of the statute.

[3] EBR (faxes)

An "Established Business Relationship" is not an exemption to the prohibition on sending unsolicited advertisements by fax.

[4] Express permission or invitation (construction)

Express permission or invitation requires affirmative notice that subsequent materials will consist of advertising and will be sent specifically via fax.

[5] Unsolicited Advertisement

Insurance advertising falls within the statute's definition of "material advertising the commercial availability of

any property, goods or services.”

[6] **Remedial Nature**

The TCPA is a remedial statute.

[7] **Mitigation of Damages / Laches**

Plaintiff is not barred from recovery if he did not object to previous faxes.

[8] **Mitigation of Damages / Laches**

Failure to mitigate is not a valid defense to a claim under the TCPA.

OPINION:

[*1] REVISED ORDER

This matter came before the Court on May 20, 2003 on the parties' cross-motions 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, Defendant's motion is denied and Plaintiff's motion is granted except as modified herein. In light of the Missouri Supreme Court's decision in *David L. Harjoe v. Herz Fin.*, SC 84858 (July 1, 2003) this court issues this revised order.

STANDARD OF REVIEW

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 Company*, 606 S.W.2d 477, 479 (Mo.App. 1980). *ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). All facts are [*2] construed in the light most favorable to the nonmoving party. Once the moving party sets out competent evidence establishing sufficient facts to entitle him to judgment, the nonmoving party must come forth with competent evidence to demonstrate the existence of a material factual dispute. The non-moving party has the burden of refuting the facts asserted under oath by the movant. *ITT Commercial Fin. Corp. v. Mid-America Marine*, 854 S.W.2d 371, 376 (1993).

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 Plaintiff material via facsimile without prior express permission or invitation, and for the purposes of summary judgment, the parties have stipulated to the relevant facts, which are undisputed. They differ, however, on the interpretation of the statute and its application to the undisputed facts. Defendant admits it sent the faxes, and that they were not sent by accident or mistake, but contends that 1) Defendant has an “established business relationship” with the Plaintiff, that relationship exempts faxes sent to Plaintiff from the statute; 2) the materials in the faxes at issue are not “advertisements” within the purview of the statute; 3) that the multi-page transmission to Plaintiff can only be a single violation of the statute, and not a separate violation for each page; and 4) the statute is unconstitutional.

The elements of a claim under the TCPA consist 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 [*3] 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).

1. Constitutionality of the TCPA.

[1] This question has been recently raised and now answered by the Missouri Supreme Court in *Harjoe v. Herz*, *supra*. [FN1] The Court in its July 1, 2003 decision held that the TCPA did not violate the first (fifth, eighth or fourteenth) amendment(s) to the United State's Constitution. [FN2] This Court holds that the unsolicited fax restrictions in the TCPA present no First Amendment, Due Process, or Vagueness infirmity.

[FN1] Defendant here declined the opportunity to post a bond to stay these proceedings until a ruling in *Herz*.

[FN2] The Missouri Supreme Court also held that the TCPA's statutory penalty did not violate the due process guarantee and the eighth amendment prohibition against excessive fines and punishments. Furthermore, the Court held the TCPA did not violate the fifth and fourteenth amendments on the basis of vagueness. The Court relied, on the Eighth Circuit Court of Appeals ruling in *Nixon v.*

ABF, 323 F. 3d 649 (8th Cir. 2003) as well as other cases.

2. The multi-page transmission in this case constitutes a single violation.

[2] Plaintiff argues that each page of facsimile transmission containing “material advertising the commercial availability, or quality of any property goods or services” sent without “prior express permission or invitation” constitutes a separate violation of the statute. Defendant argues that the multi-page transmission at issue here, can only constitute a single violation of the statute.

In light of the Missouri Supreme Court’s decision in *Harioe v. Hertz*, the multi-page transmission at issue in this case constitutes a single violation of the statute.

3. Existence of an Established Business Relationship.

The regulations promulgated under the TCPA define “established business relationship” as “a prior or existing relationship formed by a voluntary two-way communication between a [*4] person or entity and a residential subscriber with or without an exchange of consideration,” 47 C.F.R. 64.1200(f)(4). Such a relationship existed between Defendant and Plaintiff by their membership in National Federation of Independent Business (NFIB).

[3] The significance of the existence of an Established Business Relationship (“EBR”) under the statute is clear in the context of telemarketing calls. In the portion of the statute dealing with telemarketing calls, an EBR is expressly listed as one of three exemptions to the statute. 47 U.S.C. § 227(a)(3). However, its significance in the context of unsolicited faxes is not so clear. An EBR is not included as an exemption in the portion of the statute dealing with faxes. 47 U.S.C. § 224(a)(4). Defendant argues that such a relationship nevertheless constitutes consent to receive advertising faxes, and cites an FCC memorandum *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Memorandum Opinion and Order*, 10 FCC Red. 12391 para. 37 (July 26, 1995) on that issue. Plaintiff argues that the statute provides for no such exemption, and in fact, that exemption was considered and expressly rejected by Congress, so that any construction by the FCC that recognizes such an additional exemption, is invalid as contrary to Congressional intent.

Plaintiff demonstrated that the “established business relationship” exemption for fax advertisements was included in the version of the statute initially passed by the

House of Representatives, and that exemption was deleted from the facsimile restrictions while remaining in another portion of the TCPA addressing telemarketing calls in the Senate version of the bill. The Senate version is the one that was passed by the conference committee. The exclusion of this exemption from the facsimile portion of the TCPA is dispositive. “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is [*5] generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Rodriguez v. United States*, 480 U.S. 522, 525 (1987). Neither a court, nor the FCC can read back into a statute an exemption that was intentionally removed. There is no ambiguity here to open the door for an administrative agency’s construction. *See Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984). As a matter of law, there is no “established business relationship” exemption to the broad prohibition for unsolicited fax advertisements.” Telemarketing call restrictions in the TCPA include an exemption for a business relationship. The only exemption that is recognized for faxes, is a fax sent with the “prior express permission or invitation” of the recipient. This finding is supported by at least three trial court decisions provided by Plaintiff. *Girards v. Inter-Continental Hotels Corp.*, No. 01-3456-K (Tex. Dist. Ct., Apr. 20, 2002); *Kondos v. Lincoln Property Co.*, No. 00-08709-H (D.C. Tex., July 12, 2001); *Biggerstaff v. Websiteuniversity.com, Inc.*, No. 00-SC-86-4271 (S.C. Mag. Ct., March 20, 2001).

An EBR is not an exemption. The sender must obtain “prior express permission or invitation” from the recipient in order to avoid the statute’s proscriptions.

4. Prior Express Permission or Invitation.

[4] The St. Louis courts have already held that the only way Defendant can claim express permission to send faxes, is if Defendant expressly informed Plaintiff that advertisements would be sent to Plaintiff’s fax machine:

But even assuming that the records indicate the people called by Defendant did actually request marketing information be sent to them, nowhere is it recorded in the records, nor is it even alleged by Defendant’s witness, Mr. Conley, that such information was requested to be sent *via fax*. This is critical, as the statute clearly requires “express” permission or invitation. Congress is presumed not to use words in its statutes without purpose, or without understanding of their effect.

One can not expressly consent to receive marketing materials **via fax**, unless they [*6] are expressly advised that such materials are marketing materials, and will be sent **by fax**. Congressional intent is found in the words of the statute, and in this case Congress chose statutory language such that indicates mere passive or implied consent is insufficient. This Court, having heard a number of TCPA cases, has been well educated on the need and purpose of this statute, and the cumulative effect that billions of junk faxes can have on American businesses. It is clear that Congress made a policy choice that permission or invitation to send advertising faxes must be made expressly.

Schumacher v. Metropark, No. 02AC-015005 E CV (Div 39) (St. Louis County Cir. Ct., Feb. 14, 2003) (emphasis in original). This reasoning is sound and is grounded in the well accepted definition of “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.).

The only contact between the parties where any possible consent for faxes could have been requested, is set forth in the stipulated facts. See Stip. Facts at ¶7. The “Sample Dialog for Telephone Survey” and “Letter for Faxing to Members” are the only such contacts, and nowhere in these documents is any **express** permission or invitation obtained. As the St. Louis courts have held, “implied” consent is insufficient as a matter of law.

5. The faxes at issue contain “material advertising the commercial availability of NFIB Insurance services.”

[*5] [*7] A simple reading of pages A1, A3, A4, and A5 show they promote and announce the availability of NFIB insurance services.[FN3] Indeed, the first page notes that it is from “NFIB Services Unit.” The St. Louis courts have had ample opportunity to apply the TCPA to various types of faxes, and have employed the simple “duck test.” *Harjoe v. Colonial Life & Accident Ins. Co.*,

No 01AC-11555 (Div. 35) (Mo. Cir. Ct., May 2, 2002). As stated in *Davis, Keller, Wiggins, LLC. v. JTH Tax, Inc.*, No. 00AC-023289 (Mo. Cir. Ct., Aug. 28, 2001):

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.

Id. This case is no different. These faxes are not exempt from the TCPA. [*6] This 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.’” *Davis, supra*, citing *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 [*8] Cir. 1994).” See, also, [RSMo. § 1.010](#), requiring that “all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.”

[FN3] The parties agreed that page A2 did not contain material regulated by the statute.

6. Plaintiff is not barred from recovery in any way by the fact that he did not object to previous faxes of the same nature from Defendant.

[*7] [*8] This amounts to a laches or “failure to mitigate” defense that has been patently rejected in TCPA actions as a matter of law. See, *National Educational*

Acceptance, Inc., v. Smartforce, Inc., No. 01AC-2849 (Div. 41) (Mo. Cir. Ct., Jun. 21, 2002):

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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.

Id. This reasoning is sound.

In fact, the law in Missouri generally does not permit mitigation to be asserted as a defense to intentional conduct, such as an intentional trespass. *Fletcher v. City of Independence*, 708 S.W.2d 158 (Mo. App. W.D. 1986). 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. The law so roundly condemns such conduct as to refuse to allow such a tortfeasor to assert the simple neglect of the victim to allay the damages so flagrantly incurred. Prosser and Keeton, *THE LAW OF TORTS* § 65, p. 462; § 67, p. 467 (5th ed. 1984); *RESTATEMENT (SECOND) OF TORTS* § 918(2) (1977).

[*9] Plaintiff has a right to conduct business and join a business organization, and expect that business organization to comport itself to the law. The fact that similar faxes were received in the past does not mean that Plaintiff must anticipate future violations of a federal law by Defendant will occur and take steps to demand Defendant stop violating the law. That is not the law of mitigation of damages.

CONCLUSION

For the reasons stated herein, Defendant's Motion is DENIED. Plaintiff's Motion for Summary Judgment is GRANTED except as modified. Judgment shall issue forth separately.

It is **SO ORDERED**, this the 3rd day of July, 2003.

/S/ Judge Michael T. Jamison, Division 43