February 7, 2004

Robert Biggerstaff
POB 614
Mt. Pleasant, SC 29465

re: CG Docket 02-278

To the Commission:

On February 4, 2003, I submitted into the record in this proceeding a number of court decisions on the TCPA, regarding issues currently before the Commission. Since that time, a number of additional court decisions have issued, which give further guidance on application and construction of the TCPA as decided by the courts.

Please find enclosed my submission for the record in this proceeding, a table of recently decided court cases on the TCPA which are available in various reporters such as Westlaw and TCPA Reports (TCPA Reports is a permanent topical slip reporter service for TCPA decisions with free subscriptions for courts and government enforcement agencies). In addition, I have included copies of selected decisions of importance that are not in Westlaw or other traditional reporters. I remain,

Sincerely,

/s/ Robert Biggerstaff
Robert Biggerstaff

enclosures

Table of TCPA cases decided since February 4, 2003
Reported in TCPA Reports
http://www.TCPALaw.com

Singo v. Statewide Fin. Svcs., 2004 TCPA Rep. 1258 (Ohio Mun. Jan. 29, 2004)

Singo v. Sniper Security, 2004 TCPA Rep. 1257 (Ohio Mun. Jan 29, 2004)

Univ. Underwriters Ins. Co. v. Lou Fusz Automotive Network, Inc., 2004 TCPA Rep. 1256, 2004 WL 117508 (D.Mo. Jan 21, 2004)

Kopff v. World Research Group LLC, 2003 TCPA Rep. 1250 (D. D.C. Dec. 24, 2003)

Morris v. Fax.com, Inc., 2003 TCPA Rep. 1251 (D.C. Super. Dec. 22, 2003)

Metro Kirby Co. v. Hines, 2003 TCPA Rep. 1255 (Ill. Cir. Dec 16, 2003)

Bonime v. DirecTV, Inc., 2003 TCPA Rep. 1253 (Cal. App. Dec. 12, 2003)

Jemiola v. XYZ Corp., 2003 TCPA Rep 1252, _ Ohio Misc.2d _, 2003 WL 23010146 (Ohio C.P. Dec. 11, 2003)

Am. States Ins. Co. v. Capital Assoc. of Jackson County, Inc., 2003 TCPA Rep. 1259 (S.D.Ill. Dec 9, 2003)

Mey v. Herbalife Int'l, Inc., 2003 TCPA Rep. 1249 (N.D. W.Va. Nov. 19, 2003)

Margulis v. P&M Consulting, Inc., 121 S.W.3d 246, 2003 TCPA Rep 1248 (Mo. App. E.D. Nov. 18, 2003)

Lee v. Club Resort Interval, LLC, 2003 TCPA Rep. 1254 (Tex. County Ct., Nov. 13, 2003)

Charvat v. Crawford, 155 Ohio App.3d 161, 2003 TCPA Rep. 1244 (Ohio App. 2003)

Lary v. Tom Taylor Agency, -- So.2d --, 2003 TCPA Rep. 1245, 2003 WL 22463950 (Ala. App., Oct 31, 2003)

Lary v. Flasch Bus. Consulting, Inc., -- So.2d --, 2003 TCPA Rep. 1239, 2003 WL 22463948 (Ala. App. 2003)

Stonecrafters, Inc. v. CM Sys., Inc., 2003 TCPA Rep. 1246, 2003 WL 22415976, (N.D.Ill., Oct 21, 2003)

Schumacher Fin. Svcs., Inc. v. Steckleberg, 2003 TCPA Rep. 1236 (Mo. Cir. Oct. 14, 2003)

Coontz v. Nextel Comm., Inc., 2003 TCPA Rep. 1237 (Tex. Dist. Oct. 10, 2003)

Mainstream Mktng. Svcs., Inc. v. FTC, 2003 TCPA Rep. 1229 (10th Cir. Oct 7, 2003)

Charvat v. Direct Connect Digital, Inc., 2003 TCPA Rep. 1238 (Ohio C.P. Oct. 6, 2003)

ESI Ergonomic Solns., LLC v. United Artists Theatre Circuit, Inc., 2003 TCPA Rep. 1230

Betor v. Quantalytics, Inc., 2003 TCPA Rep. 1243, 2003 WL 22407121 (Ohio C.P. Oct. 3, 2003)

Mainstream Mktng. Svcs., Inc. v. FCC, -- F.3d --, 2003 TCPA Rep. 1227 (10th Cir. Sep 25,

2003)

Mainstream Mktng. Svcs., Inc. v. FTC, -- F.Supp. --, 2003 TCPA Rep. 1225 (D.Colo. Sep. 24, 2003)

U.S. Security v. FTC, -- F.Supp. --, 2003 TCPA Rep. 1226, 2003 WL 22203719 (W.D. Okla. Sep 23, 2003)

Whiting Corp. v. JIT Human Resource Solutions, Inc., 2003 TCPA 1234 (Ill. Cir. Sep 9, 2003)

Accounting Outsourcing, LLC v. Verizon Wireless Personal Comm. L.P., 2003 TCPA Rep. 1219, 2003 U.S. Dist. LEXIS 15251 (M.D.La. Sep. 4, 2003)

Girards v. Inter-Continental Hotels Corp., 2003 TCPA Rep. 1220 (Tex. Dist. Sep. 2, 2003)

Condon v. Office Depot, Inc., 855 So.2d 644, 2003 TCPA Rep. 1210 (Fla. App. 2003)

Syrett v. Allstate Ins. Co., 2003 TCPA Rep. 1215 (S.C.C.P. Aug. 6, 2003)

Travel 100 Group, Inc. v. Mediterranean Shipping Co., (USA), Inc., 2003 TCPA Rep. 1185 (Ill. Cir. Aug. 3, 2003)

Americom Imaging Sys., Inc. v. Texas Computer Resale, LLC,, 2003 TCPA Rep. 1184 (Mo. Cir. Aug. 1, 2003)

Omnibus Int'l, Inc. v. AT&T, Inc., 111 S.W.3d 818, 2003 TCPA Rep. 1187 (Tex. App. July 31, 2003)

Nat'l Ed. Acceptance, Inc. v. The Mars Corp. d/b/a Heavenly Ham, 2003 TCPA Rep. 1089 (Mo. Cir, June 27, 2003)

Accounting Outsourcing, LLC v. Verizon Wireless Personal Comm. L.P., 2003 TCPA Rep. 1221 (M.D.La. July 25, 2003)

Hooters of Augusta, Inc. v. Am. Global Ins. Co., 272 F.Supp.2d 1365, 2003 TCPA Rep. 1165, 2003 U.S. Dist. LEXIS 12681 (S.D.Ga. July 23, 2003)

Kondos v. Lincoln Property Co., 110 S.W.3d 716, 2003 TCPA Rep. 1152 (Tex. App. July 22, 2003)

Kaufman v. ACS Systems, Inc., 110 Cal.App.4th 886, 2 Cal.Rptr.3d 296, 2003 TCPA Rep. 1151 (Cal. App. 2003) cert denied -- Cal. 4th -- (10/15/03)

Core Funding Group, LLC. v. Young, 792 N.E.2d 547, 2003 TCPA Rep. 1145 (Ind. App. July 22, 2003)

Younes v. Capital Research Group, Inc., 2003 TCPA Rep 1231 (Ill. Cir. Jul. 11, 2003)

ESI Ergonomic Solns., LLC. v. United Artists Theatre Circuit, Inc., 2003 TCPA Rep. 1086 (Ariz. Super. July 11, 2003)

Harjoe v. Herz, 108 S.W.3d 653, 2003 TCPA Rep. 1205 (Mo. banc 2003)

Compoli v. Weisberg, 2003 TCPA Rep. 1163 (Ohio C.P. June 4, 2003)

Schumacher Fin. Svcs., Inc. v. Nat'l Fed'n of Ind. Bus., 2003 TCPA Rep. 1088 (Mo. Cir. July 3,

2003)

Accounting Outsourcing, LLC v. Verizon Wireless Personal Comm. L.P., 2003 TCPA Rep. 1222 (M.D.La. July 1, 2003)

Lipscomb v. Wal-Mart Stores, Inc., 2003 TCPA Rep. 1183 (S.C.C.P. June 26, 2003)

Western Rim Inv. Advisors, Inc. v. Gulf Ins. Co., 269 F.Supp.2d 836, 2003 TCPA Rep. 1189 (N.D.Tex. June 17, 2003)

Morris v. Fax.com, Inc., 2003 TCPA Rep. 1136 (D.C. Super. June 13, 2003)

Gold Seal Termite and Pest Control Co., v. DirecTV, Inc., 2003 TCPA Rep. 1190, 2003 WL 21508177, 2003 U.S. Dist. LEXIS 11205 (S.D.Ind. June 10, 2003)

Economus v. Providence, 2003 TCPA Rep. 1133 (Oh. Mun. June 26, 2003)

Acuity Mut. Ins. Co. v. Sup. Mktg. Sys., Inc., 2002 TCPA Rep. 1242 ((Ill. Cir. May 30, 2003)

Spectracom, Inc. v. CellDirect Corp., 2003 TCPA Rep. 1137 (N.J. Super. May 30, 2003)

Aronson v. Bright-Teeth Now, LLC, 824 A.2d 320, 2003 TCPA Rep. 1209 (Pa. App. 2003)

Micro Eng., Inc., v. Hotel Reservations Network, Inc., 2003 TCPA Rep. 1091 (Mo. Cir. Apr. 30, 2003)

Strang v. Bridge Capital Corp., 2003 TCPA Rep. 1156 (Cal. Small Claims, Apr. 17, 2003)

Charvat v. Voice Power Telecom., Inc., 2003 TCPA Rep. 1155 (Ohio C.P. Apr. 17, 2003)

Covington & Burling v. Int'l Mktng. & Research, Inc., 2003 TCPA Rep. 1164, 2003 WL 21384825 (D.C. Super. Apr. 16, 2003)

Whiting Corp. v. MSI Mktg., Inc., 2003 TCPA Rep. 1232 (Ill. Cir. Apr. 7, 2003)

Kondos v. Am. Blast Fax, Inc., 2003 TCPA Rep. 1216 (Tex. Dist. Apr. 3, 2003)

Penzer v. MSI Mktng., Inc., d/b/a Y2Marketing, 2003 TCPA Rep. 1142 (Fla. Cir. Apr. 2, 2003)

Whiting Corp. v. MSI Mktg., Inc., 2003 TCPA Rep. 1141 (Ill. Cir. Apr. 3, 2003)

State of Missouri v. Am. Blast Fax, Inc., 323 F.3d 649, 2003 TCPA Rep. 1188 (8th Cir. 2003)

Dallas Basketball, LTD v. TIG Ins. Co., 2003 TCPA Rep. 1154 (Tex. Dist. Mar. 18, 2003)

Schneider v. Susquehanna Radio Corp., 581 S.E.2d 603, 2003 TCPA Rep. 1203 (Ga. App. 2003)

Vertex Chem. Corp. v. Starbeam Supply Co., Inc., 2003 TCPA Rep. 1139 (Mo. Cir. Mar 31, 2003)

Wal-Mart Stores, Inc. v. Lipscomb d/b/a Am. Amusements, 2003 TCPA Rep. 1212 (D.S.C. Mar. 10, 2003)

Redefining Progress v. Fax.com, Inc., 2003 TCPA Rep. 1191, 2003 U.S. Dist. LEXIS 3339 (D. Cal. March 3, 2003)

Strang v. Shorewood Realtors, Inc., 2003 TCPA Rep. 1157 (Ca. Small Claims, Feb. 28, 2003)

Grady v. St. Cloud Mtg., 2003 TCPA Rep. 1138, 2003 WL 21190993 (Ohio C.P. Feb. 27, 2003)

Gans, v. Leiserv, Inc. d/b/a Brunswick Four Seasons Bowl, 2003 TCPA Rep. 1092 (E.D.Mo. Feb 26, 2003)

Schumacher Fin. Svcs., Inc. v. Metropark Comm., 2003 TCPA Rep. 1093 (Mo. Cir. Feb. 14, 2003) (order granting pl. MSJ)

Suggs & Suggs & Assoc., P.C., v. Apartment Inv. and Mgmt. Co., 2003 TCPA Rep. 1127 (Tex. Dist. Feb. 13, 2003)

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

SCHUMACHER FINANCIAL SERVICES, INC., Plaintiff,

v.

DAVID STECKELBERG, Defendant

Cause No.: 03AC-008706 Y CV

Division 39

NOTICE: The rules of some jurisdictions may impose limitations on the use of materials not designated for publication in certain officially sanctioned reporters. Consult the rules of the applicable jurisdiction regarding use and citation of this opinion.

DISPOSITION:

Defendant's motion to dismiss denied.

SYNOPSIS:

Defendant sought to dismiss plaintiff's claims under the TCPA for an unsolicited fax sent into Missouri, arguing that the Missouri court lacked personal jurisdiction over defendant, and that the fax in question was not covered by the state. The court held that sending a facsimile advertisement into Missouri satisfied the "transaction of any business" and the "tortious act" prongs of the Missouri long arm statute so that the Missouri court has specific jurisdiction over the out-of-state sender of the fax for a cause of action under the TCPA. The court also found that the "offer of a free report" in the fax was material advertising the commercial availability of any property, goods, or services so as to be subject to the TCPA.

SUBSEQUENT HISTORY:

none

PRIOR HISTORY:

none

CITED BY:

none

APPEARANCES:

Max Margulis, margulis Law Group, Chesterfield Missouri for Plaintiff.

David Steckelberg, *pro se* for defendant.

JUDGES:

Judge Patrick Clifford

HOLDINGS:

[☛1] **Personal Jurisdiction**

A TCPA cause of action arises directly out of the contact Defendant directed to Plaintiff

[☛2] **Unsolicited Advertisement**

The statute does not require that a price must be associated with the products, goods, or services mentioned – only that the fax advertise their "commercial availability" or their "quality."

[☛3] **Unsolicited Advertisement**

To be subject to the TCPA, a fax need only make known to, or notify, someone about the commercial availability or the quality of any property, goods or services.

[☛4] **Unsolicited Advertisement**

"Commercial" is defined by Webster's to mean: "1) of or relating to commerce; engaged in commerce; involved in work that is intended for the mass market." It is clear from the fax that the report being mentioned is intended for the mass market.

[☛5] **Unsolicited Advertisement**

Whether a fee is or is not charged for the property, goods, or services mentioned in an unsolicited fax, is irrelevant for purposes of the TCPA.

OPINION:

ORDER

[***1**] This matter came before the Court for argument on October 14, 2003 on Defendant's Motion to Dismiss. The parties have filed memoranda of law and the Court has heard the arguments of both parties.

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 [FN1] facsimile containing an unsolicited advertisement to Plaintiff's fax

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machine in Missouri, and that this fax violates the TCPA and subjects Defendant to the personal jurisdiction of the Missouri Courts.

> [FN1] 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.")

1. Standard of Review

On a motion to dismiss, "we accept as true the facts properly pleaded, giving the averments a [***2**] liberal construction, and making those reasonable inferences fairly deducible from the facts stated." *Concerned Parents v. Caruthersville School Dist. 18*, 548 S.W.2d 554, 558 (Mo. 1977). The facts as pleaded, claim that Defendant sent the fax in question to Plaintiff on or about July 11, 2002. These facts are assumed true for the purposes of this motion. A Motion to dismiss tests only the sufficiency of the pleadings.

2. 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 RSMo.; 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;
>
> [***3**] (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).

The most recent Missouri case on long arm jurisdiction is *Products Plus Inc. v. Clean Green, Inc.* decided August 13, 2003 (Case No. 25352 S.D.) which explained that:

> [I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are " purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

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 sent or made to Missouri residents 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*

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& Cooling, Inc. v. Maio Success Sys., Inc., 2001 TCPA Rep. [***4**] 1038, No. 01AC11568 (Div. 39, Mo. Cir. Ct. Aug. 14, 2001); *Brentwood Travel, Inc. v. Lancer, Ltd.*, 2001 TCPA Rep. 1018, 01CC-000042 (Div. 45, Mo. Cir. Ct. Feb. 21, 2001) (unsolicited faxes); *Margulis v. VoicePower Telecom., Inc.*, 2001 TCPA Rep. 1023, . 00AC-013017 (Div. 39, Mo. Cir. Ct. March 22, 2001) (telemarketing calls). Defendant has presented nothing to challenge the analysis presented in those cases.

Defendant relies on *FDIC v. Malmo*, 939 F.2d 535 (8th Cir. 1991) and *CPC-Rexcell, Inc. v. La Corona Foods, Inc.*, 912 F.2d 241 (8th Cir. 1990), in support of his motion. These cases however are distinguishable. [☛1] In the case at bar, the TCPA cause of action arises *directly* out of the contact Defendant directed to Plaintiff – much like the typical law school example of a of shooting a gun across state lines. A Missouri court will have personal jurisdiction over the shooter for a cause of action arising out of the gunshot across the border, but not for some other cause of action such as a contract dispute. *FDIC* was a legal malpractice action against an out of state attorney who solicited a client in Missouri via a letter sent into Missouri. The malpractice cause of action did not arise out of the letter itself. *CPC-Rexcell* is similarly distinguishable in that the cause of action was not based on an injury arising from the communications themselves.

3. Is the fax covered by the statute?

It is not disputed that Defendant sent the fax at issue to Plaintiff's fax machine without prior express permission or invitation. In essence, the only question before the Court is whether or not the fax at issue is an "unsolicited advertisement" as defined by the TCPA. "Unsolicited advertisement" is defined 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.

[***5**] 47 U.S.C. § 227(a)(4). Defendant claims that the fax at issue as "an offer of a 'free report'" and argues that "'[c]ommercial availability' also implies that a cost or price would be associated with the offer."

The Court does not agree with Defendant's restrictive interpretation of "commercial availability." [☛2] The statute does not require that a price must be associated with the products, goods, or services mentioned – only that the fax advertise their "commercial availability" or their "quality." Applying the plain language of the term "advertise" (defined by Webster's dictionary as "to make something known; to notify") [☛3] the fax need only make known to, or notify, someone about the commercial availability or the quality of any property, goods or services. [☛4] "Commercial" is defined by Webster's to mean: "1) of or relating to commerce; engaged in commerce; involved in work that is intended for the mass market." *Id.* It is clear from the fax that the report being mentioned is intended for the mass market.

It is hard to miss the numerous solicitations any professional or businessperson receives for similar industry reports in business areas such as tax planning, marketing assistance, and general business advice. While many are fee-based, some are also offered at no charge as in the fax at issue here. [☛5] The Court concludes that whether a fee is or is not charged is irrelevant for purposes of the TCPA. Indeed, a report such as this may be offered for free in one location on one day, and then the very same report may be offered for a fee in a different location on a different date, much like a new hardware store may give away items such as a garden hose during a grand opening sale, and then charge for the same garden hose the next day. This does not change the character of the item and make it a "product" on one day, and not on the other.

Further support for this conclusion is found in the fact that the FCC, which is the administrative [***6**] agency with authority to implement the TCPA, has interpreted the TCPA's definition of materials "advertising the commercial availability or quality of any property, goods, or services" as including materials offering items free of charge. In this regard, the FCC aptly noted:

> The TCPA's definition does not require a sale to be made [by the solicitation] in order for the message to be considered an advertisement. Offers for free goods or services that are part of an overall marketing campaign to sell property, goods, or services constitute "advertising the commercial availability or quality of any property, goods, or services."

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 68 FR 44144-01 at ¶ 140. The interpretation of any statute by the administrative agency overseeing that statute 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." *Id.*, 467 U.S. at 843, n 11 (additional citations omitted). [FN2]

> [FN2] 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).

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The fax in this case does "notify" the recipients about both the existence of the report and Defendant's business. Thus the question is reduced to whether the report or any portion thereof constitutes "property, goods or services." The Court holds that the report is a product offered by Defendant.

A very similar question with respect to the TCPA has been decided by this very Court. In *Micro Engineering, Inc. v. St. Louis Assoc. of Credit Management, Inc.*, 2002 TCPA Rep. 1080, 02AC-0082338 (Mo. Cir. Aug 13, 2002), this Court held that a facsimile advertising a "free" seminar was in fact an "unsolicited advertisement" under the TCPA. "These faxes clearly do 'announce' the [***7**] luncheons Defendant offers. It is clear that such professional functions are offered as a service, albeit ostensibly a free service." *Id.*, at 4. Both *Micro Engineering, supra*, and *Harjoe v. Colonial Life & Accident Ins. Co.*, 2002 TCPA Rep. 1065, 02AC-001983 (Div. 45, Mo. Cir. Ct. Aug. 29, 2002) noted the appropriateness of a remedial construction of the TCPA:

> While a court can not adopt a construction of a statue 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 Statues, 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.

Micro Engineering, at *4. These canons of construction reinforce the inescapable conclusion that the fax at issue in this case lies within the purview of the statute.

CONCLUSION

The Petition sets out that 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 jurisdiction of the Missouri courts based on that contact. Accordingly, sending an unsolicited fax advertisement into Missouri in violation of the prohibitions of 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.

[***8**] Defendant has "transacted business" in this state by his advertising contact, and the cause of action has arisen out of that specific contact, giving rise to specific jurisdiction. 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 and the court holds that the fax in question is subject to the provisions of the TCPA. Defendant's Motion is DENIED on both grounds raised.

IT IS SO ORDERED.

This the 14th day of October, 2003.

/s/ Patrick Clifford

Judge Patrick Clifford, Division 39

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IN THE DISTRICT COURT OF JOHNSON COUNTY, TEXAS

249th JUDICIAL DISTRICT

J. GREG COONTZ, PAUL G. BELEW BELEW, BROCK & BELEW, L.L.P., Individually, and on behalf of all others similarly situated, Plaintiffs,

v.

NEXTEL COMMUNICATIONS, INC., NEXTEL OF TEXAS, INC. and AMERICAN BLAST FAX, INC. Defendants.

CASE NO. C200100349

Decided Oct 10, 2003

NOTICE: The rules of some jurisdictions may impose limitations on the use of materials not designated for publication in certain officially sanctioned reporters. Consult the rules of the applicable jurisdiction regarding use and citation of this opinion.

DISPOSITION:

Plaintiffs' motion for amended class certification granted.

SYNOPSIS:

Plaintiff moved the court to amend its October 15, 2002 order granting class certification of plaintiffs' unsolicited fax claims in light of the Texas Court of Appeals issued ruling in *Kondos v. Lincoln Property Co.*, 110 S.W.3d 716, 2003 TCPA Rep. 1152 (Tex. App. July 22, 2003) which addressed similar issues. The court granted the motion, holding that all the elements of class certification were met, and that common issues predominated over individualized issues. In reaching that holding the court found that 1) there is no established business relationship exemption for unsolicited faxes under the TCPA; 2) there is no requirement in the TCPA that a recipient of an unsolicited fax ad attempt to get the violators of the TCPA to not break the law a second time; 3) there is no prior "implied" invitation or permission defense, exemption from TCPA liability for sending an unsolicited fax; 4) the natural use of the word "equipment" is plural, so a PDA, cell phone, computer with a fax modem, etc., are all fax machines under the statute, 5) absent some showing of evidence from defendant that express permission to send fax advertisements was obtained from some recipients class-wide evidence of lack of permission would render the issue common to all class members and not individualized. The court also certified the class under Tex. R. Civ. P. 42(b)(2) holding that defendant had acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

SUBSEQUENT HISTORY:

none

PRIOR HISTORY:

none

CITED BY:

none

APPEARANCES:

Keith M. Jensen, Fort Worth Texas, for plaintiffs.

JUDGES:

Wayne Bridewell

HOLDINGS:

[☛1] **Class certification**

Holding a number on a date that the ABF confirmation logs confirm receipt of a Nextel dealer fax ad, identifying yourself though a declaration provided to counsel and the Court, or requiring such proof from a class member post-trial does not require an inquiry into the merits to ascertain whether someone is a class member or not.

[☛2] **Class certification**

It is not necessary to be able to identify the names and addresses of the class members at the time of certification to define a class for which membership or lack of membership is presently ascertainable by reference to objective criteria.

[☛3] **EBR (fax)**

The Court holds and declares that there is no established business relationship exemption, exception or defense to unsolicited fax advertising under the TCPA.

[☛4] **Mitigation of Damages / Laches**

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There is no requirement in the TCPA that a recipient of an unsolicited fax ad attempt to get the violators of the TCPA to not break the law a second time.

[☛5] **Express Invitation or Permission (construction)**

There is no prior "implied" invitation or permission defense, exception to or exemption from TCPA liability for sending an unsolicited fax ad.

[☛6] **Class certification**

Defendant's expert testified at the certification hearing that every device that can receive a fax can print it together with a printer and a computer command; therefore, such equipment is a "telephone facsimile machine" under both the FCC's construction and this Court's construction of the TCPA.

[☛7] **Class certification**

The number, if any, of defendant Nextel's fax ads which were received on devices other than "stand-alone fax machines" (including without limitation, computers, Palm Pilots and other PDA's, cell phones, fax servers, fax modems and intelligent fax boards), is irrelevant to how this case will likely be tried.

[☛8] **Express Invitation or Permission (construction)**

The question of the scope of "prior express invitation or permission" is likely a question of law for the Court.

[☛9] **Express Invitation or Permission (construction)**

As Nextel Texas has not identified a single person who it asserts might have provided "prior express invitation or permission" to date, there is no present basis to conclude that handling this issue, if at all, will arise to become a predominating individual issue.

[☛10] **Express Invitation or Permission (proof)**

Here, the class-wide evidence in the record is unequivocal; it would have been impossible for Nextel or the Nextel dealers to obtain "prior express invitation or permission" from any single class member to send them a Nextel fax ad.

[☛11] **Express Invitation or Permission (proof)**

The class-wide evidence of defendant ABF's unchallenged testimony and defendant Nextel's discovery responses demonstrate that plaintiffs can meet their burden of proof [that no one gave express permission to receive the faxes in question] in such a way that common issues predominate over individual ones.

[☛12] **Class certification**

The TCPA contains no language indicating that the federal legislature intended to exclude the TCPA from the ability to be certified, and the Court concludes that TCPA actions like this one can be appropriate class actions.

OPINION:

AMENDED ORDER GRANTING CLASS CERTIFICATION

[***1**] On August 1, 2002, came on for consideration Plaintiffs' First Amended Motion for Class Certification. The Court has considered the contents of the file, the motion, the response, reply and arguments of counsel. The Court has also considered the evidence and other materials submitted by the parties at the certification hearing as well as the post-hearing briefs and other submissions of the parties. The Court has also considered the applicable law including three cases handed down on July 22, 2003; *Lincoln Property Co. v. Kondos*, 2003 WL 21693666 (Tex. App. - Dallas July 22, 2003, no pet. h.), *Kaufman v. ACS Systems, Inc.*, 2003 WL 21693644 (Ca. App. July 22, 2003) and *Core Funding Group, LLC v. Young*, 2003 WL 21693652 (Ind. App. July 22, 2003). This order constitutes the Court's findings of fact and conclusions of law in relation to class certification. Since the certification hearing, the Court considered Plaintiffs' Motion for Entry of Amended Certification Order, and, upon consideration of same, the applicable law and arguments of counsel, amends the October 15, 2002, Order Granting [***2**] Class Certification as set forth herein.

Adequacy of Representation

The class representatives are J. Greg Coontz, Paul G. Belew and the law firm in which Mr. Belew is a principal, Belew, Brock & Belew, L.L.P. The Court finds that Mr. Coontz, Mr. Belew and Mr. Belew's firm constitute adequate class representatives. Class counsel are Keith M. Jensen, Dan M. Boulware, Curtis Pritchard and John W. MacPete, who the Court finds to be adequate class counsel more than capable of vigorously prosecuting this case and protecting the interests of the absent class members herein. Rule 42(a)(4)'s adequacy of representation requirement, as to both the representatives and their counsel, is, therefore, met in this case.

The defendants and third party defendants

Nextel Communications, Inc. ("NCI") was non-suited, without prejudice to refiling, prior to the commencement of the certification hearing. Nextel of Texas, Inc. (hereinafter "Nextel Texas") is the indirect wholly owned subsidiary of NCI. Nextel Texas is a common carrier in the business of selling mobile and cellular phones. Nextel Texas has contracts with Nextel independent authorized dealers throughout Texas. Nextel Texas does not own or control the Nextel dealers.

In 2000, Nextel Texas pre-approved and paid for at least fourteen (14) different Nextel dealers' fax advertisements. Nextel produced approximately 130 "Nextel Pre-Approval

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and Reimbursement Forms" in relation to fax advertising. The fax advertisements that Nextel Texas pre-approved promoted the commercial availability of Nextel phones and Nextel phone contracts for purchase and activation, respectively, for sale at the location of the Nextel Dealers.

The Plaintiffs' claims in this case are limited to the Nextel fax advertising allegedly [***3**] conducted by three of these Nextel dealers; Can Am Communications, Inc. ("Can Am"), Dos Hijos, Inc. d/b/a Constant Communications ("Constant") and Direct Net Communications, Inc. ("Direct Net")(collectively the "Nextel Dealers"). Nextel Texas filed third party claims against the Nextel Dealers the day before the certification hearing.

Defendant and cross claim defendant American Blast Fax, Inc. ("ABF") is the entity that was hired by the three Nextel Dealers to send fax advertisements. ABF has not filed an answer. Nextel Texas pre-approved the ads of and paid monies to the Nextel Dealers for fax advertising through Co Ams, Inc., Nextel's cooperative advertising administrator ("CoAms"). Nextel employees specifically pre-approved Direct Net fax advertising twice and instructed payment by Nextel to Constant for fax advertising. The Court makes no finding as to whether Nextel Texas paid for the same fax ads allegedly received by the named plaintiffs or the proposed class. Such determination, if relevant, will involve evidence which is common to the class.

Nextel Texas also produced approximately 48 ABF blast fax invoices and 10 ABF fax advertising agreements. The invoices were generally directed to Nextel dealers and the agreements were entered by the dealers and in turn provided by the Nextel dealers to CoAms. Again, these documents cover solely an approximate 12 month period in 2000 and were solely for Texas Nextel fax advertising. Nextel Texas filed a third party claim against Co Ams the day before the certification hearing.

The classes and their definitions

The Court hereby grants Plaintiffs' First Amended Motion for Class Certification as follows. The TCPA claims of 1) the holders of telephone numbers on the date they are confirmed to have received Direct Net, Constant or Can Am fax ads by ABF's fax confirmation [***4**] logs (the "Confirmation Class"); and 2) such claims of persons or entities who have retained such fax ads and serve same on counsel along with a class member declaration in the form of Plaintiffs' certification Exhibit "22A" within 30 days of the dissemination of class notice (the "Declaration Class").

First off, the Court does not certify the Plaintiffs' 47 U.S.C. § 217 claims *per se*, as this statute does not create an independent cause of action. Rather, section 217 may potentially create an additional or alternative way to impose liability against a common carrier for another person's violation of Chapter 5 of the 1934 Telecommunications Act. Chapter 5 of the 1934 Act includes the 1991 Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* ("TCPA").

Second, the Court notes that the Class Certification Order signed by Judge Godbey in *Kondos, et al. v. Lincoln Property Co., et al.*, did not include a time element for when the holder of the telephone number needed to hold same. As Plaintiffs herein concede that the holders of such numbers could not have a TCPA claim unless they held such a number when the fax ad was confirmed as received, the addition of such time element is included in the definition. [FN2] If the Plaintiffs prevail, the Confirmation Class members can submit proofs of claim establishing they held such a number on the date in 2000 that the ABF records show the faxes were received. Likewise if the Plaintiffs prevail, the Declaration Class members, who will have fully identified themselves long before any trial of the case, will likely have to submit nothing additional after trial as they will likely prevail or lose at trial.

> [FN2] Of course, Judge Godbey's inclusion of the phrase "the TCPA claims of ..." in his definition presumably establishes that the holder of the number must have held it on the confirmation date. If so, the definition used by this Court now establishes this proposition twice.

The class definitions are precise. The class members are presently ascertainable by [***5**] reference to objective criteria, which means that the class should not be defined by criteria that are subjective or that require an analysis of the merits of the case. [☛1] Holding a number on a date that the ABF confirmation logs confirm receipt of a Nextel Dealer fax ad, identifying yourself though a declaration provided to counsel and the Court, or requiring such proof from a class member post-trial does not require an inquiry into the merits to ascertain whether someone is a class member or not. This will allow for objective ascertainment of class members and it does not severely compromise or unduly restrict the defendants ability to present any viable defense.

[☛2] The Court concludes that it is not necessary to be able to identify the names and addresses of the Confirmation Class members at the time of certification to define a class for which membership or lack of membership is presently ascertainable by reference to objective criteria. Likewise the Court concludes that the Declaration Class does not fail under this criteria because the identity of these persons is not ascertainable as of signing this order when all such class member identities

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will be known withing 30 days of the dissemination of class notice. These definitions not only facilitate the identification, at the outset, of the individuals affected by the litigation, but allow for objectivity as to whose interests need be protected.

Support for these conclusions comes from the four cases cited by the Court in *Intratex* for the sufficiency-of-definition standard it pronounced. *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398, 403, HN 7 (Tex. 2000). None of these four cases used the word presently in a discussion of a class definition. [FN2] Also in one of the two cases that certified a class, ascertainment of the class [***6**] members could not possibly have occurred "presently" or concurrent with certification. *Id*. & 117 F.R.D. at 397. Next, the case that *Intratex* at 404, cites in support of the statement "that a class definition will not fail merely because every potential class member cannot be identified", held "[i]t is not necessary that the members of the class be so clearly identified that any member can be presently ascertained". *Carpenter v. Davis*, 424 F.2d 257, 260 (5th Cir.1970).

> [FN1] *See, Gomez v. Illinois State Bd. of Educ.*, 117 F.R.D. 394, 397 (N.D.Ill.1987)(trial court redefined Plaintiffs' definition and certified a class of "[a]ll Spanish-speaking children who are *or will be enrolled* in Illinois public schools, or who are eligible *or will be eligible to be enrolled* in Illinois public schools, *and who should have been, should be*, or who have been, assessed as limited English proficient")(em. added); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970)(vacating a class defined as "residents of this State active in the 'peace movement' who have been harassed and intimidated as well as those who fear harassment and intimidation in exercising their First Amendment right of free expression in the form of passing out leaflets in furtherance of their cause."); *Newton v. Southern Wood Piedmont Co.*, 163 F.R.D. 625, 632 (S.D.Ga.1995), *aff'd*, 95 F.3d 59 (11th Cir.1996)(denying certification to class of "people who have been exposed to chemicals released from the Southern Wood Piedmont plant site and who 'have specifically evidenced a keratosis.'"); *Joseph v. General Motors Corp.*, 109 F.R.D. 635, 637 (D.Colo.1986) (granting certification to class of "all Colorado residents who are current or former owners or lessees of 1981 Cadillacs equipped with the V8-6-4 engine which was designed, manufactured, marketed, and distributed by defendant G[M]".)

The class action rules also recognize the propriety of certification without ascertainment of identities at the time of certification. Both Fed.R.Civ.P. 23(c)(2) and Tex.R.Civ.P. 42(c)(2) state that after certification the court is required to direct to class members "the best notice practicable under the circumstances including individual notice to all members *who can be identified* through reasonable effort." Individual notice in this case can potentially be made to the Confirmation Class directed to the same numbers confirmed to have received Nextel Dealer fax ads. Of course, notice by publication can additionally be employed. Here, published notice can be targeted to the specific areas where the Nextel Dealer's targeted their fax advertising. Of course, just as if notice was sent by mail, some persons will have changed numbers, just like some people change addresses. Notice by publication in the same geographic areas where these numbers are located in addition to faxed notice to the Confirmation Class will meet the dictates of Rule 42 and the requirements of due process.

[***7**] As to both the Confirmation Class and the Declaration Class, if Nextel Texas prevails it will presumably have *res judicata* over all class member claims. Restated, the proposed definitions are not "fail safe".

Numerosity, typicality and commonality

The record strongly suggests that over 308,000 facsimile numbers received Nextel Dealer fax ads, it would be impracticable to join such claims in one proceeding absent certification.

Nextel Texas has not brought a special exception or summary judgment directed at the claims of either Paul G. Belew or his limited liability professional partnership, nonetheless, only one of them has a TCPA claim and standing. Regardless of whether Mr. Belew or his partnership held the line and therefore have the TCPA claim Plaintiffs' assert, that claim is substantively identical to the claim asserted by all Confirmation Class members herein. J. Greg Coontz is the holder of the line connected to his fax machine and asserts a claim which is substantively identical to the claim asserted by all Declaration Class members herein. Likewise, the defenses that will be asserted to all such claims are virtually the same as those that will be asserted to all class members' claims. The requirements of numerosity and typicality are met. Tex.R.Civ.P. 42(a)(1) & (3).

The question of commonality is subsumed by the predominance analysis. Nonetheless common questions of law and fact include: 1) whether American Blast Fax' daily fax confirmation logs prove that the facsimile numbers to which the Nextel's fax ads were sent received same when ABF's computers would record a confirmation code which allegedly resulted from the receipt of a signal from each Confirmation Class members receiving equipment to the effect that the fax had been received; 2)

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whether the Nextel Dealer faxes were [***8**] "advertisements" under the TCPA; 3) whether intrastate transmissions are within the scope of the TCPA; 4) whether the Nextel Dealers were persons "acting for" Nextel Texas pursuant to 47 U.S.C. § 217; 5) whether 47 U.S.C. § 217 only creates liability for common carriers under the TCPA when persons acting for it are also "acting within the scope of [the common carrier's] employment"; 6) whether an advertiser can avoid TCPA liability by paying others to fax advertise its corporate name; 7) whether an advertiser can avoid TCPA liability by not physically using a fax machine or by having authorized dealers hire so-called independent contractors to use it on their behalf; 8) which party bears the burden of showing the absence of prior express permission; 9) if there is TCPA liability at all, did the defendant violate the TCPA willfully or knowingly; 10) whether the TCPA is unconstitutional on its face or as applied to defendants' blast faxing; and 11) statutory damages. The commonality requirement is met. Tex.R.Civ.P. 42(a)(2).

The asserted established business relationship defense or exception

The Court has considered the motion for summary and declaratory judgment brought by Plaintiffs in conjunction with and as a supplement to their certification motions. The Court has considered Nextel Texas' response, the applicable law and arguments of counsel. Having done so the Court grants the motion. [☛3] Accordingly, the Court holds and declares that there is no established business relationship exemption, exception or defense to unsolicited fax advertising under the TCPA.

An indication of how the case will likely be tried, predominance and superiority

In its certification analysis this Court has gone beyond the pleadings and understands the claims, defenses, relevant facts and applicable substantive law pertaining to this case and sets [***9**] forth the following indication of how the class' claims will likely be tried. Assuming, without deciding, this means a trial plan needs to be set forth, the plan set forth below allows a meaningful evaluation of conformance with the requirements of Rule 42, specifically, Rule 42(b)(4).

The TCPA makes it "unlawful for any person ... to use a facsimile machine ... to send an unsolicited advertisement...". 47 U.S.C. § 227(b)(1) & (b)(1)(A). An "'unsolicited advertisement' means any material advertising the commercial availability or quality of ... which is transmitted to any person without that person's prior express invitation or permission". 47 U.S.C. § 227(a)(4).

Since 1934, section 47 U.S.C. § 217 has provided:

> [i]n construing and enforcing the provisions of this chapter [of which the TCPA is a part], the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case by also deemed to be the act, omission, or failure of such carrier or user as well as that of the person.

Both the TCPA (Section 227) and this 69 year old law expanding common carrier liability for the acts of others (Section 217) are contained in Chapter 5, Subchapter II, Part I "Common Carrier Regulation" of the 1934 Telecommunications Act. As noted, Section 217 does not create an independent cause of action. The analysis of any liability which may arise pursuant to this section presents a question which will be resolved by common evidence, specifically, whether Nextel Dealers were acting for Nextel Texas when they received payments from Nextel Texas for hundreds of thousands of Nextel fax ads. Conversely stated, this determination will have nothing to do with individual evidence based on the action, inaction or state of mind of any class member. This distinction between common and individualized evidence holds true for the analysis of every other [***10**] substantive issue that will control the outcome of this case.

If a fax advertiser's established business relationship ("EBR") with the recipient of such an ad absolves the advertiser of TCPA liability, then one might conclude that a fax advertiser has a right to inquire as to whether it has an EBR with each class member. If both these propositions were correct, it would significantly impact the predominance analysis in this case as well as the analysis of whether the advertiser is being severely prejudiced in its presentation of a viable defense. These assertions though, and the nature and extent of Nextel Texas', the Nextel Dealers, CoAms or ABF's EBR's, are irrelevant to how this case will likely be tried. As stated above, this Court held and declared that an EBR is not a defense, exemption or exception to liability for sending unsolicited fax ads under the TCPA. This ruling drastically narrows what will likely be relevant facts at the trial of this case. With this ruling there is only one exception to TCPA liability for sending an unsolicited fax ad that remains, the recipient having given, presumably because someone has asked for the recipients, "prior express invitation or permission". Whether this "exception" is a defense on which defendants' bear the burden of proof or an element of the Plaintiffs' case, this Court finds that this case meets the predominance requirement.

An indication of how the case will likely be "tried" or a "trial plan" necessarily includes an analysis of whether it need be tried at all.

Without predicting what any ruling on any issue may

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be, it is clear that many of the predominating issues in this case are questions of law or will be questions of law arising from facts on which there is no material dispute. Whether the Nextel Dealer fax images were "ads" under the TCPA, whether the application of 47 U.S.C. § 217 is limited by a course and scope requirement, the intrastate applicability of the TCPA, the "no use" defense, the authorized dealer defenses, the [***11**] "independent contractor" defense, who bears the burden of proof on prior express invitation or permission and whether the TCPA is unconstitutional, are all questions of law that can be resolved before any trial in summary judgment proceedings.

Further, the Court does not find that any affirmative or other defense, counterclaim, cross claim or third party claim as plead by Nextel Texas the day before the certification hearing give rise to a predominating individual issue. Nextel Texas plead: 1) failure to mitigate; 2) damages, if any, were caused by third persons not within Nextel Texas' control; 3) Plaintiffs' claims under the TCPA are unconstitutional as they allegedly violate numerous amendments to the United States Constitution and sections of the Texas Constitution; 4) Plaintiffs' claims are barred because of Nextel Texas' assertion that it did not originate the fax ads; 5) the TCPA and Tex.Bus.Com. Code § 35.47 allegedly create an unconstitutional vagueness; 6) the assertion that the TCPA does not apply to intrastate faxes; 8) accord and satisfaction, *res judicata*, contribution and settlement set-off; 9) the EBR's of Nextel Texas, Nextel Dealers, ABF or any other Nextel dealer with the fax ad targets; and 10) prior express *or implied* invitation or permission.

[☛4] There is no requirement in the TCPA that a recipient of an unsolicited fax ad attempt to get the violators of the TCPA to not break the law a second time. There will, therefore, likely be no mitigation evidence permitted at trial. Any defendant or third party defendant may make an offer of proof to preserve error. The Court does not conclude that such offer creates an individual issue.

All of the constitutional allegations, including alleged vagueness are common questions of law which will probably be disposed of, favorably or unfavorably, in summary judgment proceedings. The Court finds that there is no evidence, material or assertion before the Court that any defendant or third party defendant is entitled to *res judicata* against, any settlement set-off or [***12**] accord and satisfaction defense as to any class member other than three who Nextel Texas identified. Ann Erwin is a Declaration Class member who sued Nextel Communications, Inc. in Waco after receiving a CanAm Nextel fax ad there (yet there is no assertion that a judgment was rendered). Omnibus International, Inc. and Blakely-Witt & Associates, Inc. would be Confirmation Class members having received 5 Can Am Nextel unsolicited fax ads in Dallas, but Nextel Texas prevailed against them. This demonstrates what is self apparent. If the mere assertion of the defense of settlement or judgment defenses defeated predominance it would potentially usurp Rule 42 itself. As shown, the defendants will be able to identify any such persons and doing so does not give rise to a predominating individual issue.

Nextel Texas' third party claims against its Nextel Dealers and CoAms and cross claims against ABF do not give rise to any predominating individual issue. To the contrary, such claims involve evidence which is classic common evidence. No assertion, material or evidentiary submission demonstrates that these claims will have anything to do with any action, inaction or state of mind of any class member. Who pre-approved, who paid for, who originated, and who was acting for Nextel Texas, if anyone, in relation to the allegedly unlawful fax ads as well as who may be entitled to contribution or indemnity between Nextel Texas, the Nextel Dealers, CoAms and ABF, assuming *arguendo* without deciding the relevance of each of these issues, will be determined solely by common evidence. Based on the record at hand no such issues will give rise to a predominating individual issue at any trial.

Damages for a violation of the TCPA are statutorily set and need not be individually proved. Any additional award is an issue for the Court. The TCPA states: "[i]f the court finds that the defendant willfully or knowingly violated... the court may, in its discretion, increase the amount of [***13**] the award". 47 U.S.C. § 227(b)(3). The answer will likely be determined by the common evidence of the defendants' conduct. Depending on whether a factual dispute exists over this conduct there may be no need for a bench trial on this issue either.

As stated above, the EBR's of Nextel Texas, Nextel Dealers, CoAms, ABF or any other Nextel dealer with the fax ad targets of the Nextel fax ads at issue are irrelevant to the causes of action and any viable defense before this Court. [☛5] Likewise, there is no prior *implied* invitation or permission defense, exception to or exemption from TCPA liability for sending an unsolicited fax ad.

This Court has had the opportunity to analyze Nextel's contention that if the device receiving an unlawful fax ad is something other than a "stand-alone fax machine" that such recipient has no TCPA cause of action both at the certification hearing and in relation to an FCC ruling addressing this issue. If a blast fax advertiser could demonstrate that some of their unsolicited fax ads were randomly received by a computer, personal digital assistant ("PDA") or cell phone and absolve themselves from liability as a result – for those otherwise unlawful transmissions – then one might conclude that a fax

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advertiser has a right to inquire as to the nature of the devices at the receiving end of their fax ads. The FCC ruled:

> The TCPA's definition of "telephone facsimile machine" *broadly applies to any equipment that has the capacity to send or receive text or images. The purpose of the requirement* that a "telephone facsimile machine" have the "capacity to transcribe text or images" *is to ensure that the prohibition on unsolicited faxing not be circumvented.* Congress could not have intended to allow easy circumvention of its prohibition when faxes are (intentionally or not) transmitted to personal computers and fax servers, rather than to traditional stand-alone fax machines.

Report and Order; *In the Matter of the Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC, CG Docket No. 02-278, ¶¶ 201-02 (July 3, 2003) (em. [***14**] added)

The FCC also ruled:

> *We conclude that faxes sent to personal computers equipped with, or attached to, modems and to computerized fax servers are subject to the TCPA's prohibition on unsolicited faxes.* However, we clarify that the prohibition does not extend to *facsimile messages sent as email* over the Internet. The record confirms that *a conventional stand-alone telephone facsimile machine is just one device* used for this purpose; that developing technologies permit one to send and receive facsimile messages in a myriad of ways. Today, *a modem attached to a personal computer allows one to transmit and receive electronic documents as faxes. "Fax servers" enable multiple desktops to send and receive faxes* from the same or shared telephony lines.

[***15**] *Id.* at ¶ 200 (em. added). All of the contracts giving rise to the claims in this case were "for the express purpose of Fax Advertising … to send ... fax ad[]s for advertiser to active fax reception devices". None of these fax ads, therefore, were "sent as email over the Internet." There was no material or evidence presented at the certification hearing that any of the faxes in question were received by anything other than a stand-alone fax machine. Yet Nextel's expert testified it was possible that some of them could have been sent as faxes by ABF and received through a service such as "Right Fax", "Legal Fax" or "efax". In each example, he testified, that the faxes would be received by a modem, a modem bank or a fax server. In each hypothetical instance the fax ad was, therefore, sent as a facsimile and received by equipment which constitutes a telephone facsimile machine under the FCC's construction of the TCPA. The continued fact that the TCPA does not apply to messages sent as e-mail does not affect the claims, defenses or create an individual which will affect how this case will likely be tried. The FCC also held that:

> because a sender of a facsimile message has no way to determine whether it is being sent to a number associated with a stand-alone fax machine or to one associated with a personal computer or fax server, it would make little sense to apply different rules based on the device that ultimately received it.

Id. ¶ 202. The Court agrees.

The Court believes that the FCC's construction of the TCPA in this regard is further supported by the plain meaning of the word "equipment" in the definition of the term "telephone facsimile machine" in the TCPA. For receiving equipment that term "means equipment which has the capacity ... (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper." 47 U.S.C. § 227 (a)(2) & (a)(2)(B). "When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228-29 (1993) (quoting *Webster's*). Ordinarily and naturally, "equipment" is almost exclusively used in the plural. This means that a "telephone facsimile machine", under the TCPA, can include more than the initial device which receives a fax ad and can include peripheral or affiliated receiving equipment which together with that device have the capacity to print the fax ad. [☛6] Nextel's expert testified at the certification hearing that every device that can receive a fax can print it together with a printer and a computer command; therefore, such equipment is a "telephone facsimile machine" under both the FCC's construction and this Court's construction of the TCPA.

[☛7] Consequently, the number, if any, of Nextel's fax ads which were received on devices other than "stand-alone fax machines" (including without limitation, computers, Palm Pilots and other PDA's, cell phones, fax servers, fax modems and intelligent fax boards), is irrelevant to how this case will likely be tried.

Without prejudging the admissibility of any "evidence" offered, Plaintiffs' will likely present evidence which they assert establishes the following at trial:

1. Nextel Texas pre-approved and paid for the Nextel fax advertising conducted by no less than 14 Nextel dealers in Texas alone in or about the year 2000 [***16**] alone.

2. Nextel Texas knew its Nextel dealers in Texas were contracting with ABF and that they were paying their Nextel dealers in Texas to use ABF's blast fax services. Nextel specifically approved of

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Nextel fax advertising for each of the three Nextel Dealers at issue.

3. ABF's daily fax confirmation logs confirm that 308,391 numbers received Nextel Dealer fax ads in the year 2000.

4. Belew, Brock & Belew, L.L.P. was confirmed to have received a Nextel Dealer fax ad on April 17, 2000.

5. J. Greg Coontz received a Nextel Dealer fax ad on his fax machine and he retained a copy of same.

6. Neither Belew, Brock & Belew, L.L.P., Paul G. Belew or J. Greg Coontz gave prior express invitation or permission to receive any fax ad including any Nextel fax ad.

7. Defendants do not have any evidence that Belew, Brock & Belew, L.L.P., Paul G. Belew or J. Greg Coontz or anyone on their respective behalves gave prior express invitation or permission to receive any fax ad including the Nextel Dealer fax ads.

8. Nextel Texas took no action at any time to obtain prior express permission including before pre-approving, after pre-approving or before or after paying for any Nextel Dealer fax ad, and did not know to whom the faxes were being sent.

9. No Nextel Dealer, CoAms or ABF took any action at any time to obtain prior express permission and did not know to whom the faxes were being sent.

10. Belew, Brock & Belew, L.L.P., Paul G. Belew and J. Greg Coontz did not give prior express invitation or permission to receive any fax ad including any Nextel fax ad.

11. Defendants do not have any evidence that Belew, Brock & Belew, L.L.P., Paul G. Belew or J. Greg Coontz or anyone on their respective behalves gave prior express invitation or permission to receive any fax ad including the Nextel Dealer fax ads.

12. Neither Nextel Texas nor the Nextel Dealers can show that anyone gave their prior express invitation or permission before the faxes were sent and cannot [***17**] identify anyone who gave their prior express invitation or permission.

13. Defendants do not have any evidence that any class member gave prior express invitation or permission to receive any Nextel Dealer fax ad.

14. Neither Nextel Texas nor anyone else ever provided a single Texas Nextel dealer the contents of the Nextel Communications, Inc. August 1999 Legal Department Inter-Office Memorandum regarding the TCPA until in or about October 2000.

15. Neither Nextel Texas nor anyone else ever provided its co-operative advertising administrator, CoAms, the contents of the Nextel Communications, Inc. August 1999 Legal Department Inter-Office Memorandum regarding the TCPA prior to the termination of CoAms for reasons unrelated to fax advertising.

16. No Nextel dealer was ever terminated or lost its ability to profit from selling Nextel phones as a result of fax advertising.

17. Neither Nextel Texas nor anyone on its behalf ever attempted to publicly renounce the fax advertising it pre-approved and paid for.

Again, without prejudging the admissibility of any "evidence" offered, Defendants' will likely present evidence which they assert establishes the following at trial:

(1) ABF's Greg Horne testified that some people would call ABF and request fax ads in general.

(2) Nextel Texas specifically forbade the Nextel Dealers from conducting Nextel fax advertising.

(3) The Nextel Dealers were independent contractors of Nextel Texas who were supposed to and agreed to comply with the law.

(4) The Nextel Dealers hired ABF to fax the Nextel advertisements believing ABF would comply with the law, and that they did not conspire with ABF to violate the TCPA.

(5) ABF was an independent contractor of the Nextel Dealers who left the details of the work up to ABF.

(6) All of Nextel Dealer fax ads were sent from and received in Texas. [***18**]

(7) Neither Nextel Texas nor its Nextel Dealers physically used a fax machine or pressed the send button.

(8) If Nextel Texas, the Nextel Dealers, CoAms or ABF identify anyone that provided their prior express invitation or permission to receive a Nextel Dealer fax ad they may put on such evidence.

None of the plaintiff or defense evidence listed above will result in a predominating individual issue.

[☛8] The question of the scope of "prior express invitation or permission" is likely a question of law for the

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Court. Whether this Court rules that to constitute same a person must communicate that it is willing to receive a Nextel fax ad by a definite, explicit or direct *invitation*, that is not left to inference, or must provide definite, explicit or direct *permission*, that is not left to inference – or whether prior "general consent" to fax ads in general meets this standard – is also likely a question of law which can be addressed pre-trial or at any trial. With or without a trial, this case meets the predominance requirement. Tex. R. Civ. P. 42(b)(4).

If Nextel Texas, a Nextel Dealer, CoAms or ABF submitted evidence that one or more persons provided their prior express invitation or permission for something more general than what was advertised (eg. the commercial availability of Nextel phones) the Court would likely make a ruling at trial as to whether evidence of prior consent of a more general nature (eg. a person calling ABF and asking for fax ads) would be relevant to a showing that such a fax was "transmitted to any person without that person's prior express invitation or permission" under the TCPA. If the Court rules in favor of the Plaintiffs such "general consent" evidence will be excluded and an offer of proof would likely be made to preserve error. If the Court rules in favor of the Defendants the Court would likely grant Nextel Texas' directed verdicts or a judgment against such persons or consider its request to have such person excluded from the class upon [***19**] such evidentiary showings. [☛9] As Nextel Texas has not identified a single person who it asserts might have provided "prior express invitation or permission" to date, there is no present basis to conclude that handling this issue, if at all, will arise to become a predominating individual issue. This issue too involves a question of law which can likely be resolved without a trial.

Whether the prior express invitation or permission "exception" to liability for unsolicited fax advertising is a defense on which Nextel bears the burden of proof or an element of the class' case, this Court finds that this case meets the predominance requirement. Tex.R.Civ.P. 42(b). While no party has sought a summary or declaratory ruling on who bears this burden, the Court has heard argument and received authorities on the issue. Without deciding either the burden issue or whether making such a ruling before trial is appropriate, the Court has concluded that under the facts of this case, no such ruling is necessary at this time to make a rigorous certification analysis.

Regardless of who bears this burden the evidence on this question is not presently in dispute. Nextel and the Nextel Dealers did not know the names, addresses, phone or fax numbers of anyone whom ABF was sending Nextel faxes to on their behalf, and, therefore, no attempt to obtain prior express invitation or permission was made – nor was any such attempt made for them by ABF. If at trial this Court rules that the class has met their prima facia burden, if any, on this issue and their case withstands a likely defense motion for directed verdict, the defendants would then have the burden of proof on who they claim provided such prior express consent. If the Court rules that the class bears the burden on this issue and the evidence generally applicable to all class members in this regard is insufficient to meet that burden, a directed verdict and judgment would likely be granted against the class in favor of the defendants. [***20**] Therefore, either way this Court eventually comes down on this issue, before or at trial, the handling of same will likely not result in an individual issue, let alone a predominating one.

The Court has considered *Kondos v. Lincoln Property Co.*, 2003 WL 21693666 (Tex. App. - Dallas July 22, 2003, no pet. h.) in relation to the facts in this case. "[C]lass-wide proof is possible when class-wide evidence exists." *Schein v. Stromboe*, 102 S.W.3d 675, 693 (Tex. 2002). [☛10] Here, the class-wide evidence in the record is unequivocal; it would have been impossible for Nextel or the Nextel Dealers to obtain "prior express invitation or permission" from any single class member to send them a Nextel fax ad. This conclusion is demonstrated from testimony and discovery responses from ABF and Nextel. Greg Horne, the president and owner of American Blast Fax, Inc. testified that all of ABF's faxes that it sends on behalf of its customers are "unsolicited" defining that term as to the best of his knowledge "no one's attempted to get their prior express invitation or permission to send them a fax". Mr. Horne also testified:

> "Q: Do any of your employees or staff have access to this information [the names, addresses or phone numbers of ABF's fax number targets]?
>
> A: No, they do not. We go to great lengths to make sure they do not.
>
> Q: Does anybody outside your business have access to this information? A: No. We've had customers want to buy it before, and we've refused to sell it because it is so important to us.
>
> Q: Other than this Court and people you mentioned and your lawyers, have you ever given this information to anyone else? A: No, absolutely not."

Interrogatory 11 inquired whether Nextel ever had in its possession a database of fax numbers that were utilized by any distributor of Nextel's products or services for Nextel fax advertising – from which Nextel or its dealers might have attempted to obtain prior express invitation or permission. In pertinent part Nextel responded that it "has never had such a database in its [***21**] possession, custody or control".

The *Lincoln Property v. Kondos*, opinion states:

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> even if only a relatively small number of the class members gave express permission to receive the faxes in question, either a jury or the trial court (by summary judgment or otherwise) must still ascertain whether each class member gave or did not give express permission to receive the faxes in question. [TCPA cite] The individualized issues of whether each of the 63,760 class members gave or did not give express permission is not likely to be a "relatively easy" task for a single jury or the trial court to resolve, and clearly "will be the object of most of the litigants' efforts."

2003 WL 21693666, *3.

Here, the record establishes there will not be a "relatively small number" who gave such prior consent as that number is zero. Therefore, it will not be a "relatively easy" task as Judge Godbey stated to determine who gave such consent, as here, it will not be a task at all. If its not a task, the issue, by definition, can not predominate or be any object of the litigants or courts efforts.

The *Lincoln v. Kondos* opinion stated agreement with the conclusion in *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400 (Ed. Pa. 1995), that the issue of permission will be the object of most of the litigants efforts and will, therefore, predominate. *Id.* at *4. This Court agrees that this conclusion applies in a TCPA class action where the plaintiffs have not demonstrated the class members could not have possibly provided such prior consent. Judge Godbey's order did not address such impossibility which plainly exists in this case. The *Lincoln v. Kondos* opinion also assumed for purposes of its analysis that "express permission is required", as opposed to implied permission from an EBR. *Id.* However, the opinion did not expressly state whether it was adopting or concluding from *Forman*, or on its own, that the TCPA claimants as opposed to TCPA defendants bear the burden of proving whether faxes are "transmitted to any person [***22**] without that person's prior express invitation or permission."

This Court continues to conclude that a ruling on this burden of proof issue is not necessary to find that the stringent predominance requirement is met, because, even when one presumes that burden lies with the TCPA Plaintiff - as the *Forman* Court did with no analysis of why - Plaintiffs here have demonstrated that they can meet that burden.

Presuming that the law is or will be that Plaintiffs bear the burden to prove a lack of "prior express invitation or permission" the record before this Court demonstrates that no individual issue will result from the potential application of the *LPC v. Kondos* standard that "the trial court (by summary judgment or otherwise) must still ascertain whether each class member gave or did not give express permission to receive the faxes in question" – because not a single class member gave such consent to receive the faxes in question. [☛11] The class-wide evidence of ABF's unchallenged testimony and Nextel's discovery responses demonstrate that Plaintiffs "can meet their burden of proof [that no one gave express permission to receive the faxes in question] in such a way that common issues predominate over individual ones." *Schein v. Stromboe*, 102 S.W.3d 675, 694 (Tex. 2002).

A number of the common questions presented by this case are questions of law. See eg., *LPC v. Kondos* at *3. The common questions which will be the [***23**] object of most of the efforts of the litigants and the court, however, are likely not questions of law. The questions of whether ABF's fax confirmation logs prove receipt when they record a confirmation code as a result of a signal allegedly transmitted by each Confirmation Class members receiving equipment, whether the Nextel Dealers were persons "acting for" Nextel Texas pursuant to 47 U.S.C. § 217 and whether the TCPA was violated willfully or knowingly are questions which will likely "be the object of most of the efforts of the litigants and the court." These efforts when considered together with the often complex legal issues requiring resolution, will as a near certainty "be the object of most of the efforts of the litigants and the court", especially, when contrasted to the likely complete absence of any individual issue, let alone one which could compete to be the main object of the efforts of the litigants and the court.

The Texas Supreme Court's test for predominance is:

> Courts determine if common issues predominate by [1] identifying the substantive issues of the case that will control the outcome of the litigation, [2] assessing which issues will predominate, and [3] determining if the predominating issues are, in fact, those common to the class. The test for predominance is not whether common issues outnumber individual issues, but, as one court stated, 'whether common or individual issues will be the object of most of the efforts of the litigants and the court.'

Southwestern Refining Co., Inc. v. Bernal, 22 S.W.3d 425, 434 (Tex. 2000).

The substantive issues which will control the outcome of this case are the eleven common issues identified above. As discussed, the three of those eleven issues which will most likely predominate above all others pertain to what ABF's confirmation logs prove, if anything, whether or not the Nextel Dealers were "acting for" Nextel Texas pursuant to 47 U.S.C. § 217 and whether or not the defendants violated the TCPA willfully or knowingly. Each of these issues are common to the class. Restated, the question of whether or not ABF's logs

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demonstrate the complete receipt by all Confirmation Class members of a Nextel fax ad will stand or fall upon evidence which is common to the entire class. Likewise, absent agreement as to all material fact issues, the answer to the common questions of whether the Nextel Dealers were acting for Nextel Texas and whether the TCPA was violated willfully or knowingly will likely be determined by evidence of the conduct of the Nextel Dealers and Nextel Texas, which is [***24**] common to the entire class.

The holdings in *Kenro, Inc. v. Fax Daily, Inc.*, 962 F.Supp. 1162 (S.D. Ind. 1997) and *Livingston v. U.S. Bank*, 58 P.3d 1088 (Colo. App. 2002), have no effect on the analysis of whether predominance is met in this case. The *Kenro* plaintiffs defined a fail-safe class substantively identical to the fail-safe definition proposed by the *Forman* plaintiffs but "simply incorporat[ed] the language of the statutory prohibition into its class definition". *Id*. at 1169. Likewise, the *Livingston* plaintiffs defined another fail safe class which required an inquiry into the merits to determine its members by including "[a]ll persons who *received*", *Id*. at 1090, as opposed to those who hold numbers confirmed to have received. Finally, there is no mention that the *Forman*, *Kenro* or *Livingston* plaintiffs' met their burden, like the Coontz' plaintiffs did here, of demonstrating that no one attempted or could possibly have attempted to obtain "prior express invitation or permission" to send the faxes in question.

Accordingly, the substantive issues that will control the outcome of this case (whether before or at a trial) are the common issues the Court identified above and to a lesser extent, based on the record at hand, any individual issues which might result from evidence of prior consent yet to be identified by Nextel Texas. Consequently, it is the common issues that will predominate, as it will be they, not any individual issues which may arise, that will be the object of most of the efforts of the litigants and the court. While the Court does not know if this case can be tried in three days like a different TCPA class action reflected in the record, this Court does not anticipate a prolonged trial. Further, the court does not believe the evidence will overwhelm or confuse any jury nor does it anticipate any difficulties in the management of this case. Tex. R. Civ. P. 42(b)(4)(D).

[***25**] Here, as stated, a judgment in favor of Nextel Texas should provide them *res judicata* over all class member claims. Alternatively, a judgment in favor of the class members should decisively settle this entire case and all that should remain is for Confirmation Class members to file proof of their claim – that they held one of the fax numbers confirmed to have received a Nextel Dealer fax on the appropriate date(s) in 2000.

A class action is the superior mechanism for resolving the claims of the absent class members herein for the reasons discussed above as well as below.

The Texas Attorney General, the Federal Communications Commission and a number of other states attorneys general have taken action to attempt to enforce the TCPA's ten (10) year old ban on unsolicited fax advertising. The amount and recency of these actions alone evidence their inability, on their own, to effectively enforce this federal law. Perhaps private TCPA class actions have not and will not create sufficient deterrence either, yet without them, the result is obvious, TCPA abuses will continue.

In a prior session, the Texas House of Representatives debated and did not pass a provision to a telemarketing bill which would have purported to prevent the certification of this case as well as the Dallas Cowboys TCPA settlement class action recently approved by Dallas' 192nd District Court. Presumably this provision would have prevailed, at least for future suits, if the Texas legislature concluded that TCPA cases should not be maintained as class actions. [☛12] Rather, the TCPA contains no language indicating that the federal legislature intended to exclude the TCPA from the ability to be certified, see, eg., *Califano v. Yamasaki*, 442 U.S. 682, 698- 701 (1979), and the Court concludes that TCPA actions like this one can be appropriate class actions. See also, *Kaufman v. ACS Systems, Inc.*, 2003 WL 21693644, * 28-30 (Ca. App. July 22, [***26**] 2003) (ruling in accord with the United States of America, who appeared as *amicus curiae*, that TCPA cases can be brought as class actions and can be superior to individual suits).

A TCPA suit is a "negative value" suit, in that it will usually if not always cost more to litigate an individual claim than the claim is worth. Hence, the interest of class members in controlling individual actions is small, favoring certification. See, Tex. R. Civ. P. 42(b)(4)(A). The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A TCPA class solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

No one has asserted that any other class litigation is presently pending against Nextel Texas in relation to the claims in this case. Nextel Texas pointed out that J. Greg Coontz has brought other class litigation in Johnson County, where he offices and holds a fax line. The record also reflects that some of the class counsel have filed the vast majority of their TCPA suits in Dallas and Tarrant Counties. Nextel Texas has not challenged venue as to any claim or as to any party. This forum is just as appropriate as any other. See, Tex. R. Civ. P. 42(b)(4)(B)

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& (C). The superiority requirement is met. Tex. R. Civ. P. 42(b)(4).

Certification under 42(b)(2).

A "(b)(2) class" is appropriate here because Nextel Texas has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole. Tex. R. Civ. P. 42(b)(2). Plaintiffs by virtue of this order have already obtained declaratory relief in this suit (the EBR declaration). Plaintiffs additionally seek to enjoin Nextel Texas from further fax advertising. [***27**] Nextel Texas responds that it has no intention to do so and that Plaintiffs, therefore, can not meet the common law requirements necessary to be entitled to injunctive relief.

The TCPA expressly allows a suit for an injunction, damages, or both. 47 U.S.C. § 227(b)(3)(A), (B) & (C). Plaintiffs cite authority for the proposition that they need prove no further entitlement to injunctive relief than the violation of the TCPA to be afforded injunctive relief as "the express statutory language supersedes common law requirements." See, eg., *McNeilus Companies, Inc. v. Sams*, 971 S.W.2d 507, 511 n. 3 (Tex.App. - Dallas 1997, no writ). The Court agrees.

Based on the foregoing it is hereby **ORDERED, ADJUDGED AND DECREED** that this case is certified to proceed as a class action pursuant to subsections (b)(2) and (b)(4) of Rule 42 of the Texas Rules of Civil Procedure; absent further order of this Court, J. Greg Coontz, Paul G. Belew and his firm shall be the class representatives and Keith M. Jensen, Dan M. Boulware, Curtis Pritchard and John W. MacPete, shall be the class counsel.

SIGNED this the 10th day of October, 2003.

/s/ Wayne Bridewell

Judge Presiding

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

WHITING CORPORATION, Plaintiff

v.

JIT HUMAN RESOURCE SOLUTIONS, INC., Defendant

No. 02 CH 6332

Consolidated with No. 02 CH 9417

NOTICE: The rules of some jurisdictions may impose limitations on the use of materials not designated for publication in certain officially sanctioned reporters. Consult the rules of the applicable jurisdiction regarding use and citation of this opinion.

DISPOSITION:

Defendant's motion to dismiss denied.

SYNOPSIS:

Defendant sought to dismiss plaintiff's TCPA claims for unsolicited faxes arguing the fax transmission did not offer property or goods for sale. The court found that the services of defendant were implicitly mentioned by the fax, and therefore the fax was covered by the TCPA.

SUBSEQUENT HISTORY:

none

PRIOR HISTORY:

none

CITED BY:

none

APPEARANCES:

not recorded

JUDGES:

Patrick McGann

HOLDINGS:

[☛1] **Unsolicited Advertisement**

There can be little difference between the suggestion that a person's services be engaged to give investment advice, deliver plumbing services or provide employment resources.

OPINION:

MEMORANDUM OPINION AND ORDER

[***1**] This matter comes on for hearing on the Motion of JIT Human Resources, Inc., ("JIT") to dismiss the complaint filed by Whiting Corporation ("Whiting") pursuant to 735 ILCS 5/2-615.

I. Legal Standard

A section 2-615 motion attacks the legal sufficiency of the Plaintiff's claim. The motion does not raise affirmative factual defenses, but rather alleges defects only on the face of the complaint. The question presented by a section 2-61 5 motion to dismiss is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. A cause of action will not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover. *Vernon v,,Schuster*, 173 Ill. 2d 338, 344 (1997); *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 86-87 (1996).

II. Facts

The well-pled facts yield that on two occasions the defendant sent unsolicited telephone facsimile messages fo the plaintiff. Each of the messages related to a candidate for employment in an available position as a production supervisor. Each of the transmissions attached the candidate's resume and furnished the name of presumably an employee of the defendant who could furnish additional information.

[***2**] **III. Discussion**

The Telephone Consumer Protection Act of I991 ("TCPA"), 47 U.S.C. 227, creates a private cause of action in favor of any person who receives an unsolicited telephone facsimile message advertising the commercial availability or quality of any property, goods Or services. The defendant correctly points out that the message did not offer property or goods for sale, The plaintiffs suggestion that an individual can be goods or property is nothing more than a misapprehension charged to over-aggressive argument.

The defendant also draws this Court's attention to the

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decision of *Lutz Appellate Services v. Curry*, 859 F. Supp. 180 (ED. Pa. 1994) which held that the chutzpah shown by two former law firm associates in advertising employment opportunities to friends left behind was not a violation of the TCPA. Even though the medium for the message was an unsolicited telephone facsimile, the Court reasoned that the TCPA was clear in its prohibitions. These areas did not include the advertising of employment opportunities.

The defendant reasons that these situations are analogous. There is the potential for such a result, but not in this context. As this is a Section 2-615 motion, in addition to the well-pled fads, the Court must also construe all reasonable inferences in the pleader‘s favor. From a plain reading of the faxed messages appears to this Court to contain not only the announcement of the availability and credentials of a candidate for an available position, but also the suggestions that the services of the defendant would be required in order to gain an interview, if one were desired. [☛1] Setting aside the unstated question of how the defendant became aware of the opening, there can be little difference between the suggestion that a person’s services be engaged to give investment advice, deliver plumbing services or provide employment resources. All appear to be the type of engagement that cannot be arranged by the use of unsolicited telephone facsimile messaging .

[***3**] **IV. Order**

A. The Motion to Dismiss is Denied;

B. The Defendant is ordered to answer the Complaint in accordance with any similar order that may be entered upon resolution of the Master Motion to Dismiss the Consumer Fraud Claims.

Sep. 9 2003

Judge Patrick McGann

.

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

AMERICOM IMAGING SYSTEMS, INC., Plaintiff,

v.

TEXAS COMPUTER RESALE, LLC d/b/a TEXAS COMPUTER RESALE HOLDINGS, L.L.C., Defendant.

Cause No. 03AC-000366 E CV
Division 39
Decided August 1, 2003

DISPOSITION:

Defendant's motion to dismiss denies.

SYNOPSIS:

Plaintiff brought suit against out of state vendor for unsolicited fax advertisements. Defendant moved to dismiss arguing that the state court lacked personal jurisdiction. The court held that sending faxes into the forum state satisfied both the transaction of business (§ 506.500(1)) and commission of a tortious act (§ 506.500(3)) prongs of the Missouri Long Arm statute, Section 506.500, RSMo 1994.

SUBSEQUENT HISTORY:

none

PRIOR HISTORY:

none

CITED BY:

none

APPEARANCES:

Max Margulis, Margulis Law Group, Chesterfield Missouri for plaintiff.

Thomas A. Federer and Ian C. Simmons of Federer & Federer, P.C., 201 South Fifth St., St. Charles, Missouri for defendant.

JUDGES:

Patrick Clifford

HOLDINGS:

[☛1] **Personal Jurisdiction**

Sending advertising faxes into a state will subject the sender to personal jurisdiction for a cause of action under the TCPA for those faxes.

OPINION:

[*1] ORDER

This matter came before the Court on July 29,2003 on Defendant's Motion to Dismiss. This is an action originally brought by Plaintiffs against Texas Computer Resale LLC d/b/a Texas

Computer Resale Holdings, LLC alleging unsolicited facsimile advertisements sent in violation of the Telephone Consumer Protection Act ("TCPA") 47 U.S.C. § 227. Defendant argues this Court lacks personal jurisdiction over it.

The issue of whether faxes or telemarketing calls made into Missouri will subject the sender to the personal jurisdiction of Missouri courts for a suit brought under the TCPA is not new to St. Louis courts. *See Nat'l. Ed. Acceptance, Inc. v. Expiry Corp.*, No 01AC-011562 S (Div 39, Mo. Cir. Dec. 19, 2002) (unsolicited faxes); *Brentwood Travel, Inc. v. Lancer, Ltd.*, No. 01CC-000042 (Div. 45, Mo. Cir. Feb 21, 2001) (unsolicited faxes); *Margulis v. VoicePower Telecom., Inc.*, No. 00AC-013017 (Div. 39, Mo. Cir. Mar. 22, 2001) (telemarketing calls); *R.F. Schraut Heating & Cooling, Inc. v. Maio Success Systems, Inc.*, No. 01AC11568 (Div. 39, Mo. Cir. Aug. 14, 2001) (unsolicited faxes); *I Dream*

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Solutions, Inc. v. Ellsworth, Inc., No. 01AC-014959 (Div. 39. Mo. Cir. Nov. 12, 2002). The same relevant facts are presented here, and the same result is appropriate.

When a state exercises jurisdiction over a nonresident defendant in a suit "arising out of or related to" the defendant's contacts with the forum, the state is exercising specific jurisdiction. *Davis v. Baylor University*, 976 S.W.2d 5, 8 (Mo.App. W.D.1998) (citations omitted). In this case, the cause of action arises directly out of Defendant's purposeful contacts with Missouri - the sending of illegal junk fax advertisements into this state. [☛1] For the reasons set forth in *I Dream Solutions, Inc.*, *supra*, this Court holds the it has personal jurisdiction over Defendant under both the transaction of business (§ 506.500(1)) and commission of a tortious act (§ 506.500(3)) prongs of the Missouri Long Arm statute, Section 506.500, RSMo 1994.

The question of unsolicited faxes satisfying the Missouri Long Arm Statute for a TCPA cause of action has now been repeatedly addressed by several St. Louis Courts, and this Court considers the matter well settled. Any future litigants that which to revisit this question should be prepared to present compelling arguments not addressed in the cases mentioned *supra* or demonstrate a sincere need to preserve the question for appeal.

CONCLUSION

For the reasons stated above, Defendant's motion to Dismiss is DENIED.

IT IS SO ORDERED.

This the 1st day of August, 2003.

/s/

Judge Patrick Clifford, Division 39

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FILED

JUN 27 2003

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

STATE OF MISSOURI)
)
COUNTY OF ST. LOUIS)

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

NATIONAL EDUCATIONAL ACCEPTANCE CORP. and SAUL DIEN, Plaintiffs, v. THE MARS CORPORATION d/b/a HEAVENLY HAM, Defendant, Third-Party Plaintiff, v. 2SendIt.com, Third Party Defendant.	Cause No. 02AC-013259 A CV Division 39 - Tuesday

ORDER

This matter came before the Court on May 27, 2003 on Plaintiff's Motion for Summary Judgment. This is an action originally brought by Plaintiff against the Mars Corporation ("Mars") alleging transmissions of unsolicited advertisements via facsimile in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227.

As a preliminary matter, Defendant's response to Plaintiff's motion is insufficient to satisfy Missouri Rules of Civil Procedure Rule 74.04(c)(2). The moving party must set forth the facts on which summary judgment is sought, and support those facts by citation to the pleadings and evidence. Missouri Rules of Civil Procedure Rule 74.04(c)(1). The nonmoving party must admit

or deny each fact set out by the movant. Missouri Rules of Civil Procedure Rule 74.04(c)(2). The nonmoving party must set forth by affidavit or other evidence sufficient evidence to support the denial, or else the facts alleged by the movant are deemed admitted. Missouri Rules of Civil Procedure Rule 74.04(c)(2).

Defendant has failed to support its denials to comport to the rule. Therefore the facts as set forth in Plaintiff's motion are admitted as a matter of law. These include the relevant facts necessary to establish liability under the TCPA and knowledge by Defendant of the acts taken by its agents.

Defendant essentially argues that while it retained another entity (impled as Third-Party Defendant) to send fax advertisements on Defendant's behalf, "[a]t no time did Defendant request, much less require, Third-Party Defendant to violate any federal or state statutes with regard to such solicitation." Def. Memo at 2. Even if true, such a scenario does not relieve Defendant of liability to Plaintiff. While Defendant claims it did not request the third party to violate the law, it did retain that party to do the acts that were a violation of the law.

It is not disputed that Defendant retained a third party, 2Sendit.com, to send the faxes on its behalf. In its implementing regulations under the TCPA, the FCC has established that strict vicarious liability lies with Defendant: "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. The FCC's interpretation 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). This issue was dealt with exhaustively in a recent case before Div 32. St Louis County Circuit court. See Coleman, et al.v. American Blast Fax, Inc., et al., No. 00AC-005196

(March 15, 2001). The court found that strict vicarious liability was proper under the TCPA.

The doctrine of respondeat superior and agency law also establishes that liability. "The doctrine of respondeat superior imposes upon an employer vicarious liability for negligent acts or omissions of his employee or agent that are committed within the course and scope of his employment or agency." Studebaker v. Nettie's Flower Garden, Inc., 842 S.W.2d 227, 229 (Mo. App. E.D. 1992). Defendant retained an agent to send fax advertisements and the liability to Plaintiff flows ***directly*** from that specific act. This is clearly liability arising within the scope of the acts Defendant requested its agent engage in.

Even without the doctrine of respondeat superior, the federal law and implementing regulations does impose liability on the advertiser, and those specific regulations set out federal policy that controls in the face of differing state common law doctrines. "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.)

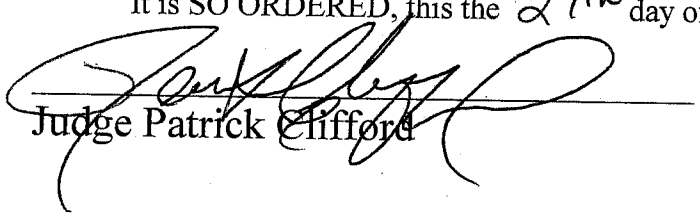
By hiring 2Sendit.com to send faxes for them, Defendant knew 2Sendit.com was sending fax advertising on its behalf. Under respondeat superior the advertiser is responsible for the acts 2Sendit.com undertook on the advertiser's behalf. The Supreme Court has noted when an agent causes harms within the scope of his 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).

CONCLUSION

Defendant's remedy, if any, lies in its third party claim against 2Sendit.com. It does not lie in denying relief to Plaintiff when the facts establishing Plaintiff's right to judgment as a matter of law stand undenied. Plaintiff's Motion is GRANTED. Judgment shall issue forth separately.

It is SO ORDERED, this the 27th day of June, 2003.



Judge Patrick Clifford

MUNICIPAL COURT OF
2003 JUN 26 P 2: 29
CUYAHOGA FALLS, OHIO

IN THE CUYAHOGA FALLS MUNICIPAL COURT

SUMMIT COUNTY, OHIO

DALE S. ECONOMUS, et al.	)	CASE NO. 02 CVF 2647
PLAINTIFFS	)	
vs	)	JUDGE LISA L. COATES
PROVIDENCE	)	
DEFENDANT	)	ORDER

****

This matter came before the Court on Objection of the Defendant to the Magistrate's Decision filed December 18, 2002. A hearing was held on April 7, 2003. The Court has further reviewed Defendant's Objection, Plaintiff's Reply, the Magistrate's Decision, the pleadings, exhibits and applicable law.

Plaintiffs alleged in the first claim of their Complaint a violation of the Federal Telephone Consumer Protection Act (hereinafter referred to as "TCPA") and in the second claim a violation of the Ohio Consumer Sales Practices Act (hereinafter referred to as "OCSPA"). Plaintiffs subsequently dismissed the second claim of their Complaint. Plaintiff, Dale Economus, also voluntarily dismissed all of his claims. The only remaining Plaintiff is Eric Moore. The only remaining claim is a violation of the TCPA.

Defendant filed a Motion to Dismiss on the basis that the TCPA only involves restrictions to residential consumers. Plaintiff filed a Response to the Motion to Dismiss. The Defendant followed with a Reply and the Plaintiff with a Surreply. The

Magistrate in his Decision determined that the limitation to residences does not apply to facsimile transmissions and that businesses are included in that prohibition under 47 U.S.C. (b)(1)(C).

The sole issue before this Court is whether the restrictions set forth in the TCPA pursuant 47 U.S.C. §227 as it pertains to facsimile transmissions is only to residences or includes businesses as well.

The Court first goes to the plain language of the statute. The statute in 47 U.S.C. §227 states in pertinent part:

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

47 U.S.C. §227(b)(1)(B) & (C) (emphasis added).

Further, 47 U.S.C. §227(a)(3) defines a "telephone solicitation" as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person ..." (emphasis added). An "unsolicited advertisement" is defined 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) (emphasis added). "Person" as defined under O.R.C. §1.59 includes "an individual, corporation, business, trust, estate, trust partnership and association."

The Defendant argues that the prohibition under the TCPA is limited only to residential consumers. However, upon reading the plain language of the Act, the Court finds that it is not so limiting. In 47 U.S.C. §227(b)(1)(D) it specifically addresses multiple telephone lines of a business. The Court believes it was the intent of the drafters of this Act include businesses. By not mentioning the word "residential" in 47 U.S.C. §227(b)(1)(C) tells this Court that it is not restricted solely to residential unsolicited advertisements via facsimile transmission.

The Defendant argues that legislative history confirms that it was the intent of the legislature to only prohibit solicitations to the home. The Defendant cites to the Congressional Statement of Findings to support its argument. The Defendant refers to the words "residential", "consumers", and "telephone calls to home" in paragraphs ten through twelve of the Congressional Statement of Findings. *See* Defendant's Objections to Magistrate's Decision, p. 6. However, in each of those three paragraphs it only referred to automated or prerecorded telephone calls. These paragraphs make no mention of unsolicited advertisements via a telephone facsimile machine.

Further, in the Congressional Statement of Findings, in paragraphs fourteen and fifteen, the Court notes the following:

> (14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.
>
> (15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home,

consistent with the constitutional protections of free speech.

The Congressional Statement of Findings discuss the need for restrictions on automated or prerecorded calls to businesses as well as residential consumers. However, it makes no mention as to facsimile transmissions. Based on the plain language of the statute in conjunction with the notes following, it appears that when it comes to facsimile transmissions the Act includes restrictions to both residences and businesses.

Further, the Defendant argues that the purpose of the TCPA is to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile machines and automated dialers." See Defendant's Objections to Magistrate's Decision, p. 6-7 *citing* S. Rep. No. 178, 102nd Cong., 1st Sess. 1, 1 (1991). The first part of the purpose of the TCPA involves telephone calls to the home. The second purpose is to facilitate interstate commerce by restricting certain uses of the fax machine. The second purpose is not limited only to residences. In fact, it discusses the need to facilitate interstate commerce, i.e. businesses. That facilitate is for businesses. The legislative history confirms that as to telephone calls it is restricted only to residential telephone lines. But as to facsimile transmissions it was broadened to include businesses.

It also makes sense practically to restrict unsolicited advertisements to businesses via the fax machine. Businesses rely on their facsimile machines as part of doing business. They cannot afford their fax lines being tied up by unsolicited advertisements. Further, it is the business that assumes the wear and tear on the

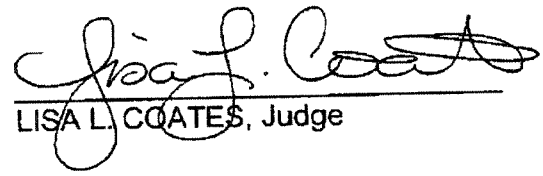
machine and use and cost of the fax paper. These were concerns raised by Representative Markey and Senator Hollings. *See* Plaintiff's Objections to Defendants' Motion to Dismiss, p. 3-4 *citing* 137 Congressional Record E793, daily ed March 6, 1991 (Statement of Rep. Markey) and 137 Congressional Record S9840, daily ed., July 11, 1991 (Statement of Sen. Hollings).

The Defendant relies on Adamo v. AT&T (Nov. 8, 2001), Cuyahoga App. No. 79002, unreported, 2001 Ohio App. LEXIS 4989, in support of its proposition that businesses are not included in the TCPA. It is true that the Court in Adamo noted that the "TCPA does not extend to business customers." Id. However, the Adamo case is distinguished from the present case. In Adamo, AT&T called a residential telephone line. Further, it was a telephone call not a fax that was placed by AT&T. The Court never addressed the issue of a facsimile transmission. The Court made a broad statement referring to telephone solicitations under the TCPA.

The Plaintiff cites to Reynolds v. Diamond Foods, (Feb. 5, 2002), Mo. App. No. ED 79488, 2002 Mo. App. LEXIS 231. This case although not controlling is directly on point. The Reynolds case involved a facsimile transmission to a restaurant. The motion to dismiss on behalf of the Defendant raised the issue "that the TCPA only applied to 'persons' and, therefore, Reynolds Barbecue could not recover under the TCPA because it is an 'entity' and not a 'person'." Id. In footnote 2 to the decision, the Appeals Court held that the trial court was in error as "Congress has defined 'person' to include 'corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.'" Id. at footnote 2 *citing* 1 U.S.C. §1.

Based on the above, the Court does not believe that it was the legislature's intent to restrict unsolicited advertisements via facsimile transmissions only to residential consumers. The Magistrate's Decision is affirmed. Defendant's Motion to Dismiss is denied. This case is to be set for trial forthwith before the Magistrate.

SO ORDERED.



LISA L. COATES, Judge

cc: James C. Watson, Attorney for Plaintiffs
Rajko Radonjich, Attorney for Defendant
File

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

WHITING CORPORATION, Plaintiff

v.

MSI MARKETING, INC., Defendant

No. 02 CH 6332

PAUL BERNSTEIN, Plaintiff

v.

AMERICAN FAMILY INSURANCE CO. and STEVEN BEZANIS, Defendants

No. 02 CH 06905

CONSTRUCTION CONSULTING GRP. Plaintiff

v.

GERSTEIN FINANCIAL & INSURANCE, INC., Defendant

No. 02 CH 7745

Decided April 7, 2003

NOTICE: The rules of some jurisdictions may impose limitations on the use of materials not designated for publication in certain officially sanctioned reporters. Consult the rules of the applicable jurisdiction regarding use and citation of this opinion.

DISPOSITION:

Defendants' motion to dismiss denied.

SYNOPSIS:

Defendants sought to dismiss Plaintiffs' TCPA claims as preempted by certain sections of the Illinois Insurance Code and the Illinois Administrative Code, pursuant to the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq*. The court denied that motion, holding that the TCPA did not impair operation of the pertinent Illinois insurance law.

SUBSEQUENT HISTORY:

none

PRIOR HISTORY:

none

CITED BY:

none

APPEARANCES:

Not recorded

JUDGES:

Patrick E. McGann

HOLDINGS:

[☛1] **McCarran-Ferguson Act**

There is no argument that Congress even suggested, let alone specified, that the TCPA was an effort to regulate the business of insurance.

[☛2] **McCarran-Ferguson Act**

The TCPA does not render the Illinois statute ineffective with no replacement rule or law.

[☛3] **McCarran-Ferguson Act**

Nor is the Illinois scheme superceded, as it remains an effective regulation upon the insurance industry.

[☛4] **McCarran-Ferguson Act**

It is clear to this Court that the TCPA does not run afoul of the prohibitions found in the McCarran-Ferguson Act.

OPINION:

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MEMORANDUM OPINION AND ORDER

[***1**] This matter comes before the Court on the Defendants' Section 2-619 Motion to Dismiss, 735 ILCS 5/2-61 9. The Defendants assert that the Plaintiffs' claims brought under Section 227(C)(3) of the Telephone Consumer Protection Act of 1991 ("TCPA), 47 U.S.C. § 227, are preempted by certain sections of the Illinois Insurance Code and the Illinois Administrative Code, pursuant to the McCarran-Ferguson Act, 15 U.S.C. 1011, ("The McCarran-Ferguson Act").

[***2**] A section-2-61 9-Motion raises defenses or defects that negate the plaintiffs cause of action completely or refute crucial conclusions of law or conclusions of material fact that are unsupported by allegations of specific fact. *Lawson v. City of Chicago*, 278 Ill. App. 3rd 628 (1996). All well-plead facts in the complaint, together with all reasonable inferences drawn therefrom, are deemed admitted for the purposes of the motion, and all pleadings and supporting documents are considered in the light most favorable to the non-moving party. *In re Chicago Flood Litigation*, 176 Ill. 2d 179 (1997).

The facts alleged in the complaint filed against the Defendants are set out at length in the Court's Corrected Memorandum and Opinion filed in this case on April 3, 2003. They will be repeated herein only to give this decision context. In essence, the Plaintiffs allege the Defendants sent unsolicited telephone facsimile messages announcing the commercial availability of insurance.

The State of Illinois has enacted an Insurance Code to regulate the Business of Insurance. 215 ILCS 5/1, et seq. Section 149 of that Code prohibits any insurance company doing business in the State of Illinois from engaging in any activity that is misleading, fraudulent or defamatory. 215 ILCS 5/149. This prohibition extends to the marketing of insurance products. The Defendants contend that this regulation prohibits the application of the TCPA to marketing efforts by persons involved in the insurance business.

Historically, the federal government has ceded regulation of the insurance industry to the several states. In 1944, the United States Supreme Court announced its decision in *United States v. South-Eastern Underwriters Assn.*, 322 US. 533 (1944). The South-Eastern Court held that any insurance company that conducted substantial business across state lines was engaged in interstate commerce and subject to antitrust laws. Within a year of this decision, the Congress enacted the McCarran-Ferguson Act. Through this legislation, Congress reaffirmed that the individual states had primary responsibility for insurance regulation. Section 2(b) of the Act, the provision discussed in this Motion, provides:

> [***3**] No-Act of Congress shall be construed to invalidate, impair or supercede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

In *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969), the Supreme Court emphasized that the focus of the McCarran-Ferguson Act is upon the relationship between the insurance company and its policyholders. This focus includes the type of policy that could be issued, its reliability, interpretation, and enforcement. *National Securities*, 393 U.S. at 460. This statute has been interpreted as creating an inverse preemption of federal law. *United States v. Fabe*, 508 U.S. 491,507 (1993).

In order to determine whether the McCarran-Ferguson Act preempts the prosecution of a claim arising under the TCPA against a seller of insurance, the Court must engage in a three-part analysis of the questioned statute. *Autry v. Northwest Premium Services, Inc.*, 144 F. 3d 1037, 1042 (7th Cir. 1998). First, a Court must determine whether the statute specifically relates to the business of insurance. If it does, standard preemption rules apply. Second, a court must determine whether the state statute was enacted for the purpose of regulating the business of insurance. If the state statute was enacted for the purpose of regulating the business of insurance, the court must determine whether the statute invalidates, impairs or supercedes state law. If the federal statute would have any one of these effects, the federal is preempted by state law.

[☛1] There is no argument that Congress even suggested, let alone specified, that the TCPA was an effort to regulate the business of insurance. It is as clear that Section 149 was enacted for the purpose of regulating the insurance business. Thus, for TCPA to have application against the Defendants it must not invalidate, impair or supercede state law, specifically 215 ILCS 5/149.

There is no question that the relevant sections of the Illinois Insurance Code were enacted for the purpose of regulating the business of insurance, however, the TCPA does not invalidate the Illinois regulation on misleading, fraudulent or defamatory merchandising of insurance products. [☛2] The TCPA does [***4**] not render the Illinois statute ineffective with no replacement rule or law. *Humana, Inc. v. Forsyth*, 525 U.S. 299,307 (1999). [☛3] Nor is the Illinois scheme superceded, as it remains an effective regulation upon the insurance industry. *Id.* No new federal requirements replace those required by Illinois.

As noted, that statute regulates the manner in which any person involved in the business of insurance can merchandise their product or services in Illinois. There is absolutely no restriction on the methods that can be employed to deliver this material or information. The Defendants argue TCPA's prohibition is an infringement

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on Illinois' authority to regulate the insurance industry. This argument ignores the ban on sending unsolicited telephone facsimile messages found in the Criminal Code of 1961 , as amended. 720 ILCS 5126-3. This applies to all merchandisers operating in this State, including those marketing insurance products.

The question presented is whether a federal statute that proscribes the same conduct, but provides materially different remedies, "impairs" state law under the McCarran-Ferguson Act. This question is best answered by determining whether the federal law will frustrate any declared state policy or interfere with the state's administrative regime. *Forsyth*, 525 U.S. at 310. In Forsyth, the Court found that there was no preemption of Nevada's right to regulate insurance where private claims for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") were allowed.

Here, as in Forsyth, there were statutory penalties for similar conduct imposed by the Nevada statutes. Unlike Illinois, which allows limited private claims for violations of the Insurance Code, Nevada allowed extensive common law and statutory claims for damaged insureds. The TCPA, like the Illinois statute prohibiting unsolicited facsimile messages, is designed to reduce the financial impact of the transfer of cost and inconvenience to unwilling recipients of these messages. Thus, the statutes work in tandem to protect this important governmental interest.

The authorities relied upon by the Defendants are inapposite. *Camarena v. Safeway Insurance Co.*, 2002 WL 472245 (N.D. Ill. 2002) dismissed a claim of [***5**] discrimination brought under the Civil Rights Act. The Court found that the private prosecution of this claim would frustrate the extensive administrative scheme developed by Illinois to discourage and punish such practices. As noted, there is no similar policy established by the statute or Director of Insurance in the area of sending unsolicited telephone facsimile messages. *Doe v. Mutual of Omaha*, 179 F 3d 557 (7th Cir. 1999), involved an attempt to use a federal statute to avoid caps on certain medical benefits allowed by the Illinois Insurance laws.

[☛4] It is clear to this Court that the TCPA does not run afoul of the prohibitions found in the McCarran-Ferguson Act. Therefore, the Motion to Dismiss is DENIED.

April 7, 2003

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

WHITING CORPORATION, Plaintiff

v.

MSI MARKETING, INC., Defendant

No. 02 CH 6332
Decided April 3, 2003

NOTICE: The rules of some jurisdictions may impose limitations on the use of materials not designated for publication in certain officially sanctioned reporters. Consult the rules of the applicable jurisdiction regarding use and citation of this opinion.

DISPOSITION:

Defendants' consolidated motions to dismiss denied with respect to all claims except claims under the Illinois Consumer Fraud and Deceptive Practice Act.

SYNOPSIS:

A large number of related cases bringing TCPA, state statutory, and state common law claims were consolidated for hearing defendant's motion to dismiss on various arguments. The United States intervened. The court rejected claims that the TCPA violated 1) First Amendment speech rights, 2) due process and excessive fines clauses, and 3) vagueness doctrine. The court also sustained common law conversion claims. The court dismissed state claims under the Illinois Consumer Fraud and Deceptive Practice Act.

SUBSEQUENT HISTORY:

none

PRIOR HISTORY:

none

CITED BY:

none

APPEARANCES:

JUDGES:
Patrick E. McGann

HOLDINGS:

[☛1] **Constitutional Law: First Amendment**

As the statute in question seeks to regulate commercial speech, it must meet the test set out in *Central Hudson.*

[☛2] **Constitutional Law: First Amendment**

Deference must be accorded to its findings as to the harm to be avoided. *Turner Broadcasting System, Inc.*

[☛3] **Constitutional Law: First Amendment**

The TCPA does not create a complete ban on telephone facsimile advertising.

[☛4] **Constitutional Law: First Amendment**

The TCPA does not prohibit the use of telephone facsimile devices for advertising.

[☛5] **Constitutional Law: Vagueness**

Defendants should not be heard to complain of the statute's vagueness when defendants conduct comes clearly within the proscription of the statute. *Village of Hoffman Estates*.

[☛6] **Constitutional Law: Excessive Fines**

The amount of damages is the result of the defendants' use of technology to aggressively violate a statute that is clear on its face.

[☛7] **Opt-in/Opt-out**

Rejecting the "opt-in" interpretation recognizes the role of the Supremacy Clause in our dual sovereign form of government. There is no prohibition to the maintenance of a private right of action for violation of the TCPA in state courts because Illinois has not acted to decline jurisdiction over these matters.

[☛8] **State Common Law Claims**

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To sufficiently allege conversion a plaintiff must allege: 1) the defendant's unauthorized and wrongful act of control, dominion or ownership over the plaintiff's personal property; 2) the plaintiff's right in the property; 3) the plaintiff's right to immediate possession of the property, absolutely and unconditionally; and, 4) the plaintiff's demand for possession of the property.

[☛9] **State Common Law Claims: Conversion**

The use of a facsimile machine for the distribution of printed material imposes all of the attendant costs on an unwilling recipient. This is sufficient to allege the first three elements of the tort of conversion.

[☛10] **Actual Damages**

The doctrine of *de minimus non curat lex* is usually confined to matters involving an alleged breach of contract.

[☛11] **State Law Claims:**

There is no question that transmitting unsolicited telephone facsimile advertisements violates public policy.

OPINION:

CORRECTED MEMORADUM OPINION AND ORDER

[*1] I. INTRODUCTION

Commencing in 2001, numerous plaintiffs have filed more than 30 complaints in the Circuit Court of Cook County, Illinois seeking relief against various defendants for actions involving the sending and receipt of advertisements via telephone facsimile machines. These actions were assigned to this Court, as related by the Presiding Judge of the Circuit's Chancery Division.

Court and Counsel have conducted case management conferences in an effort to create an efficient management plan for the processing of these cases. As a result, this Court entered a case management order which allowed defendants to file consolidated Motions to Dismiss the separate or consolidated complaints filed by the Plaintiffs. The Court also required the Plaintiffs in those cases to file a consolidated response. A list of all the cases to which this order applies is attached as Exhibit A. The court, on a later date, will entertain any Motions to Dismiss that raise individual issues pertinent only to the moving party.

On March 4, 2003, the Court allowed the United States of America to intervene, as one of the issues raised in the consolidated Motions was the constitutionality of 47 U.S.C. 227 (b)(1)(c). The Court also entertained oral argument on these consolidated Motions on that date. The grounds and issues raised in those motions will be discussed as they relate to each theory of recovery.

[***2**] Each of the complaints seek money damages on three theories: 1) the private right of action granted to each recipient of an unsolicited telephone facsimile advertisement, 47 U.S.C. 227(b)(3)("TCPA"); 2) violations of the Illinois Consumer Fraud and Deceptive Practices Act, ("ICFA") 815 ILCS 505/2; and 3) common law conversion.

The well-pled facts, as they relate to these motions, allege that each plaintiff received an unsolicited advertisement via the use of their personal telephone facsimile machine. This action limited each plaintiff's access to equipment used in their business, occupation or for personal use. This activity also converted each plaintiff's personal property; to wit, paper and toner, to their own use.

II. CONSTITUTIONALITY OF REGULATION OF TELEPHONE FACSIMILE ADVERTISING

The defendants, in their consolidated Motion to Dismiss the plaintiffs' claims brought pursuant to the TCPA, assert that the regulation of advertisements by telephone facsimile is unconstitutionally vague and unnecessarily impinges on freedom of speech rights granted by the First Amendment. In addition, they argue that the TCPA violates the advertiser's Due Process Rights under the Fifth and Fourteenth Amendments and imposes excessive fines in violation of the Eighth Amendment.

The Telephone Consumer Protection Act of 1991, codified at 47 U.S.C. 227, provides in relevant part; "It shall be unlawful for any person…to use any [transmitting device]…to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. 227(b)(1)(c). The term "unsolicited advertisement" is defined 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). Thus, the TCPA prohibits only commercial advertising.

[☛1] As the statute in question seeks to regulate commercial speech, it must meet the test set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Initially, it must be observed that commercial speech is different from other varieties of speech because it proposes a commercial transaction which traditionally occurs in an area subject to governmental regulation. *Ohralik v. Ohio* [***3**] *State Bar Assn.*, 436 U.S. 447, 445-456 (1978). However, any regulation of such speech must be cognizant of the controlling principle that our union depends on a free enterprise economy. The allocation of society's resources depends upon a free flow of information. Thus, it is in society's interest that a free flow of information be maintained so that the consumer

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has enough information to make intelligent and well informed decisions. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748 (1976).

In order to maintain the balance between the limited ability of government to regulate commercial speech and the consumer's right to the full and free flow of information, the Court in *Central Hudson* adopted a four part analysis to determine the constitutionality of any proposed restriction on commercial speech. First, the court must determine whether the speech comes within the First Amendment. To be protected, such speech must concern lawful activity and not be misleading. Next, the court must determine whether the government's interest in regulating the communication is substantial. If these two tests are met, then a determination must be made as to whether the regulation directly advances the governmental interest asserted and whether it is not more extensive than necessary to serve the asserted interest. *Central Hudson*, 447 U.S. at 566.

Applying this analysis to the TCPA's ban on unsolicited telephone facsimile advertising, it is clear there is no claim that any of the information distributed is misleading or promotes any illegal activity.

The Plaintiffs bear the burden of establishing that the legislation survives the remainder of the analysis. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). The Plaintiffs and the intervening Petitioner United States of America, posit that the TCPA was enacted to address the substantial government interest of preventing the shifting of the cost of advertising to the potential consumer and the economic disruptions caused by the intrusive activity of the defendants. The Plaintiffs include this later interest under the broad umbrella of "invasion of privacy." The Court's determination of substantial governmental interest is limited to these two pronouncements. This Court cannot engage in supposition to find additional interests in need of protection. *Edenfield v. Fane*, 507 U.S. 761, 768 (1992). The burden of establishing these interests is not satisfied by mere speculation or conjecture. There must be a demonstration that the harms cited are real. [***4**] *Edenfield*, 507 U.S. at 770-71. The evidence of the governmental interest can come from anecdotes, studies, literature published in the issue. *Edenfield*, 507 U.S. at 771-773; Florida Bar, 515 U.S. at 626-627.

The proponents observe that 15 states, including Illinois, have enacted similar bans on unsolicited facsimiles. They also note that two separate Congresses held hearings on the issue. Subcommittees took testimony on the issue and members noted anecdotal information from constituents on the issue. One Congressman, Edward Markey of Massachusetts, likened receiving an unsolicited fax to receiving "junk mail with the postage due." Private citizens from various walks of life, including the legislative counsel for the American Civil Liberties Union, noted the burden imposed on consumers by the cost shifting effect of receiving an unsolicited advertisement by telephone facsimile.

The Congress also received testimony as to the business disruption caused by this activity. Witnesses testified as to the inability to access equipment because it was occupied by an uninvited user. Evidence was also taken which indicates necessary or anticipated communications were disrupted.

There is no record of similar proceedings in the Senate. However, the bills of both Houses were reconciled in committee. The Court, without invading the separation of powers, cannot find or conjecture that there was anything but a complete consideration of the issues when the TCPA was enacted.

In reviewing the constitutionality of a statute, courts must accord substantial deference to the predictive judgments of Congress. The Supreme Court has recognized that Congress is better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions. [☛2] Even in the realm of First Amendment, where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided. *Turner Broadcasting System, Inc., v. F.C.C.*, 520 U.S. 180, 195-196 (1996). Thus, it appears to this Court that the government has a substantial interest in preventing the cost shifting of advertising and the unwanted disruption of economic activity.

The defendant's argue that improved technology has substantially reduced that burden. Modern fax machines no longer use expensive special papers. Increased [***5**] memories allow for multi-tasking by the equipment virtually eliminating the "temporary kidnapping" of facsimile machines. Thus, they posit, any interests identified by Congress have dissipated. The Congress, perhaps in anticipation of the vast explosion in technology, received testimony concerning the increased capacity of the senders of these messages. Indeed, one of the defendants, Fax.Com, solicits customers with a promise to save more than 75% over direct mail costs. The Court can infer that some of these savings are passed on to consumers who must now pay for the printing. Evidence adduced in other cases involving this issue confirm the problems identified by the Congress still exists. *See, Missouri ex. Rel. Nixon v. American Blast Fax, Inc.*, 196 F. Supp. 2d 920, 924-26 (testimony concerning business disruptions, preventing access to phone lines, occupying personnel with other duties, increased capacity of facsimile senders). Nothing presented by the defendants, however, undermines the continued existence of the identified and substantial government interests.

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The defendants also assert that the prohibition of these facsimile transactions is not dissimilar to the receipt of junk mailings. While it is true that the Court could find no substantial interest in prohibiting the distribution of unwanted "junk mail," *Bolger v. Young Drug Products Corp.*, 463 U.S. 60 (1983), the Court was never asked if the recipient was also required to pay the "postage due" on the mailing or pay a toll on the trip to the wastebasket, let alone subsidize the mailer's printing expense. The defendants also place great emphasis on *Missouri ex. rel. Nixon v. American Blast Fax, Inc.*, *supra*. Unfortunately, as is the fate of all trial judges, the Appellate panel found fault with Judge Limbaugh's analysis and reversed this decision. *Missouri ex. rel. Nixon v. American Blast Fax, Inc.*, 2003 U.S. App. Lexis 5469 (8th Cir. 2003)(Doc. 02-2705/2707).

Having found the existence of two substantial governmental interests, the Court must determine whether the legislative enactment directly addresses these interests. This requires the Plaintiffs to demonstrate that the restriction imposed will not only advance the governmental interest, but that it will do so to a material degree. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996). [☛3]This Court does not find that the TCPA creates a complete ban on telephone facsimile advertising. There is nothing in the law that prevents a distributor from soliciting and obtaining consents for such advertising. [***6**] This can be done in a number of ways such as direct mail or contact, solicitations in printed media, or telephone solicitation. Perhaps the best way to identify the parameters of this requirement is to furnish examples of restrictions that were found unrelated to the asserted interest. The City of Cincinnati, no doubt attempting to dissipate any image from its nickname Porkopolous, enforced an ordinance limiting news racks in order to improve community aesthetics. The result was a reduction of the over 1600 such racks by 62. The publications using these racks were not "mainstream" media. The reduction in unsightly news boxes was in the words of two courts "paltry" or "minute." The regulation, however, was found to have no relation to the stated governmental interest. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993). Similarly, a ban on radio advertising of private state government authorized casino gambling by a federal regulation was found to have no relation to the recognized government interest of reducing gambling. This result was reached because the ban excluded promotion of Indian sponsored casinos and state run lotteries. *Greater New Orleans Broadcasting Assn. v. United States*, 527 U.S. 173 (1999).

[☛4] This restriction directly and materially advances the governmental interest in the efficient operation of commercial enterprises. The cost to industry of both increased operating expenses and lost productivity was amply demonstrated to Congress.

The defendants note the failure to include unsolicited non-commercial faxes supports their position that the goals of the government are not being advanced by the TCPA because these faxes also shift costs and disrupt the orderly conduct of business. They cite to decisions such as *Greater New Orleans Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995). Each of these cases had one distinguishing fact, because in those cases there was no basis to suggest the bans would advance the stated goals. Gambling would not be reduced because Indian sponsored casinos and lotteries could be promoted. Temperance would not be promoted, because alternate means of advertising the alcoholic content of beer was available.

More importantly, the Congress heard evidence that private or non-commercial facsimile transmissions represented but a small percentage of unsolicited messages. Most recipients welcomed the message. Thus, no concern over this segment of unsolicited messaging was ever expressed to the Congress.

[***7**] The other issues raised by the defendants are equally unpersuasive. The Supreme Court has noted that unsolicited junk mail cannot be prohibited because "the short, though regular journey from mail box to trash can…is an acceptable burden so far as the Constitution is concerned." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. at 72 quoting *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y. 1967). There can be no greater cost in taking the short regular walk to the telephone and hanging up on an unsolicited telemarketer. Some of our more imaginative fellow citizens may actually enjoy the exercise as a diversion from the insipid television, or tense moments at the dinner table.

The final prong is the determination that the regulation is not more extensive than necessary to serve the asserted interest. This, in the area of commercial speech, does not mean the least restrictive means. The case law requires a reasonable fit between the legislature's ends and the means chosen to accomplish those ends. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (1999). The defendants posit that there were numerous less restrictive alternatives such as allowing one free fax so that the recipient could notify the sender of any desire not to receive further messages. Another suggestion would be the creation of a "no-fax" list similar to that established by the government to reduce unwanted telemarketing. The defendants also suggest that regulations as to the times when fax messaging can occur would also be less restrictive.

The Plaintiffs and the Intervening United State of America attempt to shift the burden of disproving the existence of the fourth prong of the Central Hudson test. The standard, however, is that the proponent of the statute must show that Congress "carefully calculated the costs

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and benefits associated with the burden on speech imposed by the regulations." *City of Cincinnati*, 507 U.S. at 417.

To make this determination, it appears to this Court it is important to understand the effect of the TCPA ban on unsolicited commercial telephone facsimile messaging. [☛4] This statute does not prevent any person engaged in commercial activity from either sending or receiving information about that activity. In fact, it does not prohibit the use of telephone facsimile devices for advertising. It requires the advertiser to identify those persons who are willing to expend their resources both in time and money to receive the commercial messages being sent.

[***8**] It prohibits the advertiser from passing part of its costs on to a potential consumer. From this understanding, the Court must determine if the restriction imposed, while perhaps not the single best disposition, is one whose scope is in proportion to the interest served. *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989). The suggestions by the defendants as to the regulation of message delivery times does nothing to advance the government interest of preventing cost-shifting. It is also apparent that the concerns Congress addressed in the TCPA were different in the regulation of telemarketers and facsimile advertising. There was a clear recognition of the substantial interference caused by the blast fax industry. It is not this Court's role to substitute its judgment for that of the Congress. The ban on unsolicited commercial telephone facsimile messaging is a reasonable means to the stated government end.

The defendants posit that section 227(b) of the TCPA is unconstitutionally vague. They argue that the definition of the term "unsolicited advertisement" is so vague that persons of common understanding must necessarily guess at its meaning. This ambiguity is exacerbated because senders are subject to private claims, creating a likelihood of differing interpretations in various jurisdictions.

The Due Process Clause of the Fifth Amendment to the United States Constitution, made applicable to the various states by the Fourteenth Amendment, is fundamentally violated by "any statute which either forbids or requires the doing of any act in terms so vague that (persons) of common intelligence must necessity guess at its meaning and differ to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). In Connally, the Court found that a statute that requires, under progressive penalties, that workers be paid the "current rate of wages" in the "locality" where they were working to be too vague to satisfy Due Process concerns. The Court noted that the term "locality" had no definition as to what area constituted a locality. Mr. Justice Sutherland, writing for the Court, recognized that reasonable people could differ as to the boundary of the "locality." The Court indicated that terms that are elastic or dependent on circumstances were problematic. Similarly, the Court found that the term "current rate of wages" was too vague. The Court noted that rates of pay had various levels begetting a minimum or maximum or an amount in between. This uncertainty left an employer to guess at the required payment. The Court also observed that judges and jurors had no [***9**] standards by which to judge an accused's conduct. This could lead to very inconsistent results in the prosecution of alleged violations.

Comparing the Connally decision with the Court's decision in *Roberts v. United States Congress*, 468 U.S. 609 (1984) gives a clearer understanding of the principle. In that case, the Jaycees challenged a determination by the Minnesota Human Rights Department that the Jaycees denied access to a "place of public accommodation" on the basis of the applicant's gender. The Jaycees argue that the term's definition was too vague to satisfy Due Process requirements. This term was defined by Minnesota Law as "a business accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services or facilities, privileges, advantages, or accommodations are extended, offered, sold or otherwise made available to the public." Roberts, 468 U.S. at 469. Membership in the Jaycees was offered to any male applicant aged 21-35 who paid the appropriate fees. Women were accepted as Associate Members but were denied certain benefits given to their male counterparts.

The Jaycees main argument focused on Minnesota's decision that this organization was a public place of accommodation while a similar group, the Kiwanis Club, was not. This created, according to the Jaycees, the sort of vagueness the Due Process Clause was designed to prohibit. In dismissing this argument, the Court found that unlike the open enrollment policy of the Jaycees, Kiwanis Clubs has a formal procedure for choosing members based on specific and selective criteria. These additional standards were clearly outside the contested definition found in the Minnesota law.

Turning now to the TCPA, an "unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of any property goods or services." 47 U.S.C. 227 (a)(4). Merriam Webster defines commercial, when used as an adjective, in numerous ways, including, "work intended for commerce, producing artistic work of low standards for quick market success, suitable, adequate or prepared for commerce, and emphasizing skills or subjects useful in business." Merriam Webster's Collegiate Dictionary, 10 th Ed.1994. In addition, at least one commentator has identified distinctions between commercial and non-commercial speech found in the Supreme Court's analysis of this issue. First, the truth of the information is more easily

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verifiable, [***10**] and secondly, it is engaged in "for profit." Kosinski and Banner, "Who's Afraid of Commercial Speech?"76 VA. L. REV. 627, 634. Admittedly, the authors argue that these are distinctions without difference, but this Court must acknowledge and give deference to these well-established principles continually enunciated by our Supreme Court.

[☛5] Prior to answering the question as to whether the statute is vague by subjecting it to questions presented by hypothetical situations, the Court must determine if the defendants conduct comes clearly within the proscription of the statute. *Village of Hoffman Estates v. The Flipside, Hoffman Estates*, 455 U.S. 489, 495 (1981). Clearly, it does. Each facsimile message advertises the price and availability of services, such as, internet connections, long distance or cellular telephone service, or products such as packaged learning programs, or toner for facsimile and other printing devices. Thus, the defendants should not be heard to complain of the statute's vagueness.

Assuming arguendo, that the Defendant's hypotheticals should be considered, the Court's analysis suggests the following resolutions. A carwash or candy sale is not conducted by a high school band for profit in the business sense of the word "commercial." A plea to oppose apartheid in the manner suggested does not advertise the commercial availability or quality of a product, nor does the announcement, without more, of an essay contest. A warning concerning the danger of a product would be subject to an affirmative defense of necessity, 720 ILCS 5/7-13, or privilege. The availability of private enforcement of the statute does not give the theoretical plaintiffs "unrestrained power…(to) charge a person with a violation." *Kolender v. Lawson*, 461 U.S. 352, 359 (1983). As indicated, the statute has a clear meaning and is easily understandable by persons of common intelligence. A defendant wrongfully sued would have all remedies that are available to any person so situated.

Thus, this Court does not find that the TCPA violates the Due Process prohibition against vague statutes.

The defendants finally assert that the TCPA's damage clause violates the Due Process clause of the Fifth and Fourteenth Amendments, as well as, the excessive fine clause of the Eighth Amendment.

The Due Process Clause of the Fifth and Fourteenth Amendments prohibits federal and state governments, respectively, from imposing a "grossly excessive" punishment on [***11**] a tortfeasor. *TXO Production Corp. v. Alliance Resource Corp.*, 509 U.S. 443, 454 (1993). In order to make this determination, the Court must first identify the interest the government seeks to protect and then determine whether the award is grossly excessive in relation to those identified interests. *TXO*, 509 U.S. at 456.

The Court has already identified those interests as preventing the shifting of advertising costs to potential consumers and promoting the efficient operation of this nation's businesses. The Court also notes that each defendant received adequate notice of the potential penalty if their conduct deviated from the required norm. Thus, the Supreme Court's decision nullifying an award for punitive damages on the basis of lack of notice is inapposite. *BMW of North American v. Gore*, 517 U.S. 559 (1995). Unlike the situation before the Court here, BMW was not sufficiently informed that the same conduct which was acceptable in some jurisdictions, but not in others, was subject to a penalty 500 times greater than the actual loss. It is clear that the penalty here is even greater, but unlike the operators of BMW, who had no notice that the procedure employed ran afoul of the law in Alabama, the statute clearly proscribes the conduct before any defendant acted. Thus, the standard to be applied is more properly found in *St. Louis, Iron Mountain & Southern Railway v. Williams*, 251 U.S. 63 (1919). There, the Court acknowledged the wide latitude that legislatures have in protecting public interest, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established law. This Court is wary of substituting its judgment for that of Congress. The Court is also concerned about the potential damage claims in this case. However, no evidence has been introduced quantifying the amount of damages incurred by businesses in lost productivity. Thus, no mathematical certainty can be reached as to the relationship between actual damages and the penalty imposed. The defendants correctly point to the problems confronted by Judge Spears in *Texas v. American Blast Fax, Inc.*, 164 F. Supp. 2d 892 (D.C. TX. 2001). [☛6] Any penalty computed by multiple violations would be a result of the defendants' use of technology to aggressively violate a statute that is clear on its face. However, this issue must await full resolution until all of the evidence is heard, so that a complete record can be established.

Thus, the Court does not find the TCPA on its face imposes a sanction grossly disproportionate to the interests sought to be protected.

[***12**] Turning now to the Eighth Amendment excessive fine issue. This analysis is similar to that under the prior Due Process inquiry. A fine is a valid exercise of the legislature unless it is grossly disproportionate to the nature of the violation. *United States v. Bajakajian*, 524 U.S. 321 (1998). However, as the dissent in that decision noted, substantial deference must be given legislative determinations as to sanctions for illegal acts. *Bajakajian*, 524 U.S. at 348. On this record, this Court cannot make such a determination, thus, the Motion to Dismiss is denied.

Having found the TCPA constitutional the Court

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moves to analyze the remaining issues.

III. THE PLAINTIFFS MAY NOT PROSECUTE A PRIVATE RIGHT OF ACTION IN ILLINOIS COURTS

The defendant's assert that no private action for violations of the TCPA can be maintained in Illinois state courts because Congress' action in establishing private rights of action in state courts violates the Tenth Amendment to the United States Constitution, and Illinois has never authorized the prosecution of TCPA matters in its courts, providing only for criminal sanctions. The four arguments advanced by the defendants are, in this Court's opinion, summarized above. Article VI of the United States Constitution provides that the laws of the United States made pursuant to the Constitution "shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby."

In *Testa v. Katt*, 330 U.S. 386 (1947), the Court was called upon to determine whether Rhode Island's courts could properly refuse to hear a claim brought under the Emergency Price Control Act. Unlike the TCPA , this law gave concurrent jurisdiction to Federal, State, and Territorial Courts to entertain these claims. The basis for the declination by the Rhode Island Courts was the traditional right enjoyed by the states to enforce penal laws of a foreign state. The Court noted that since the time of the first congress, laws have been enacted conferring jurisdiction on state courts to enforce federal penal statutes. While disputes raged over the relationship between federal and state governments during the first half of the 19 th Century and ultimately, albeit temporarily, were resolved by war, the Supreme Court has been predictably steadfast in holding, "If an Act of Congress [***13**] given a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not been forced, if not provided otherwise by some act of Congress, by a proper action in a State Court." *Claflin v. Houseman*, 93 U.S. 130, 137 (1876). Thus, in *Testa*, the Court dismissed as inadmissible the argument that the state's law must be consistent with the federal regulatory scheme.

In *International Science and Technology Institute, Inc., v. Inacom Communications, Inc.*, 106 F. 3d 1146 (4 th Cir. 1997), a decision relied on heavily by the defendants, after determining that the TCPA granted exclusive jurisdiction for the private right of action in state courts, the court considered the Tenth Amendment argument. The court noted that the TCPA was enacted, in part, in response to claims by several states that efforts to curb unsolicited facsimile messages were being thwarted by the simple fact that many of these messages were traveling in interstate commerce, an area the States designated to be regulated by Congress in ratifying the U.S. Constitution. The Court then acknowledged the role of the Supremacy Clause in our constitutional structure. After expressing concern that Congress not impermissively usurp state resources as prohibited by *New York v. United States*, 505 U.S. 144 (1992), the Court stated any potential conflict was avoided by allowing states to affirmatively deny access to its courts for the private prosecution of TCPA claims.

[☛7] This reasoning is persuasive to this Court. This, as the Court noted, strikes a balance between the right of Congress to regulate interstate commerce and the state's right to allocate its resources to problems it deems necessary and important. The TCPA only encourages state participation in Congress' regulatory scheme. Local officials, accountable to their electors, make the decisions as to state priorities. This also recognizes the role of the Supremacy Clause in our dual sovereign form of government.

Thus, this Court finds no prohibition to the maintenance of a private right of action for violation of the TCPA in state courts because Illinois has not acted to decline jurisdiction over these matters.

IV. CONVERSION

The Defendants have filed a Motion to Dismiss the counts of Plaintiffs' consolidated complaint alleging conversion pursuant to Section 2-615 of the Code of [***14**] Civil Procedure, 735 ILCS 5/2-615. A Section 2-615 motion to dismiss attacks the sufficiency of the complaint, and this Court should decide the motion only on the allegations set forth in the complaint. *Schwanke, Schwanke and Assoc. v. Martin*, 241 Ill. App. 3d 738, 744 (1 st Dist. 1992). All well-pleaded facts in the complaint must be taken as true with all inferences from it to be drawn in favor of the non-movant. *Curtis Casket Co. v. D. A. Brown*, 259 Ill. App. 3d 800, 804 (1 st Dist.1999). This Court accepts as true all well-pleaded facts, but does not need to accept conclusions or inferences which are not supported by specific factual allegations.

In their complaint, the Plaintiffs allege that the Defendants sent telephone facsimile messages to the Plaintiffs without obtaining prior permission. The complaint further alleges, prior to the initiation of the transmission, that each plaintiff had purchased paper and toner for their respective use and had an immediate right to the possession and use of these items. Plaintiffs further allege that the receipt of the unsolicited facsimile message resulted in the unauthorized use of toner and paper by the defendants which rendered these items unusable by the Plaintiffs.

[☛8] To sufficiently allege conversion a plaintiff must allege: 1) the defendant's unauthorized and wrongful act of control, dominion or ownership over the plaintiff's personal property; 2) the plaintiff's right in the property; 3) the plaintiff's right to immediate possession of the

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property, absolutely and unconditionally; and, 4) the plaintiff's demand for possession of the property. *Roderick Development Investment Company, Inc. v. Community Bank of Edgewater*, 282 Ill. App. 3d 1052 (1996). The complaint seeks actual and punitive damages as well as an injunction against future acts of conversion.

At the outset, it must be noted that the complaint does not allege conversion of the Plaintiff's fax machine, only its paper and toner. Thus, cases such as *Omnibus International, Inc. v. AT & T*, 2002 Tex. App. LEXIS 8234 (TX. App. 2002) are inapposite. Moreover, this case remains an unpublished opinion, and under Texas Law it cannot be cited as authority.

The Plaintiffs have pled facts alleging each element of conversion. [☛9] As observed earlier in this opinion, the use of a facsimile machine for the distribution of printed material shifts the recipient of the materials into the role of printer. This imposes all of [***15**] the attendant costs on an unwilling recipient. This is sufficient to allege the first three elements of the tort.

The final element, however, has not been alleged. This element is unnecessary when there is another independent act of conversion that can be shown. *Jensen v. Chicago and Western Indiana R. R. Co.*, 94 Ill. App. 3d 915, 933 (1981). The allegations and reasonable inferences clearly indicate that the paper and toner had been consumed in the process of printing the advertisements sent by or on behalf of the Defendants.

Therefore, the Court finds there are sufficient allegations to state a claim for conversion.

[☛10] The Defendants assert that not withstanding the existence of a properly pled claim, any damages suffered by the proposed class representative are so inconsequential that no claim should be recognized. They opine that the cost incurred by the receipt of an individual facsimile message, including paper, is no more than eight cents. Initially, the Court must recognize that the doctrine of *de minimus non curat lex* is usually confined to matters involving an alleged breach of contract. It is applied to avoid finding a breach where the harm caused is so slight or the damages nominal. *Pacini v. Regopoulous*, 281 Ill. App. 3d 274, 279 (1996). This Court also agrees that much, if not all, of the Plaintiffs arguments and citations do not speak to the relevant issues. Having made these observations, however, this Court is compelled to deny the Motion to Dismiss.

Illinois and other jurisdictions recognize that where a party has established an infringement of a right, damages are presumed. *Ainsworth v. Century Supply Co.*, 295 Ill. App. 3d 644, 649-650 (1998). This entitles a plaintiff to an award of nominal damages. In *Ainsworth*, the plaintiff was depicted in an advertisement for the commercial availability of floor covering products and supplies from the defendant. The use of plaintiff's likeness was unauthorized. In his deposition, the plaintiff testified that he was angered to see the commercial. In reversing the grant of summary judgment, the Court held that the plaintiff was entitled to an award of nominal damages, perhaps even the value achieved by Century by taking his image for their use. *Ainsworth*, 295 Ill. App. 3d at 650. This presumption also arises where, as here, the claim is an intentional tort. *Crosby v. City of Chicago*, 11 Ill. App. 3d 625, 630 (1973).

[***16**] With respect to injunctive relief, the Plaintiffs, however, have not shown their lack of an adequate remedy at law. The Plaintiffs can seek damages under this theory as well as the TCPA, hence, their claim for injunctive relief is dismissed with prejudice. Similarly, the Plaintiffs claim for punitive damages is not supported by well-pled facts. There are no allegations of fraud, actual malice, gross negligence or willfulness, beyond that to state a claim for conversion. *Cirrincione v. Johnson*, 184 Ill. 2d 109, 115- 16 (1988). Moreover, absent some proof of activity undertaken to inundate a particular recipient with telephone facsimile messages, this Court doubts that such a claim will ever lie. In making this statement, the Court has considered the volume of messages modern technology permits. Nevertheless, discovery may lead to the discovery of facts that will make such a claim viable. Thus, subject to a Motion to Amend Pleadings, the claim for punitive damages is dismissed without prejudice.

V. ILLINOIS CONSUMER FRAUD AND DECEPTIVE PRACTICE ACT

The defendants have filed a Motion to Dismiss the count seeking relief under the Illinois Consumer Fraud and Deceptive Practices Act ("ICFA") pursuant to Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615. They advance three arguments in support of their Motion. First, they argue that these are insufficient factual allegations to support a claim that damages were proximately caused by the Defendants action. In addition, they assert that the factual allegations are insufficient to support a claim that the defendants engaged in "deceptive" or "unfair" conduct prohibited by the ICFA. Finally, they note that any statutes alleged to be violated by their conduct does not support a "per se" violation of ICFA. The Court will analyze these arguments in the order perceived to be most useful.

Initially, it should be observed that the parties agree there are no allegations of deceptive practices. Thus, in order to establish a claim, the Plaintiffs must allege ultimate facts that show the Defendants engaged in unfair practices. In *Robinson v. Toyota Motor Credit Corporation*, 201 Ill. 2d 403 (2002), our Supreme Court discussed the elements of such a claim. ICFA is a regulatory remedial statute designed to protect consumers against unfair business practices and is to be liberally

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construed to effectuate its purpose. *Cripe v. Leiter*, 184 Ill. 2d 185, 191 (1998).

[***17**] In *Robinson*, the Court defined the elements of an unfair business practice. In essence, the Court adopted the three-part test cited with approval in *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). Therefore, in order to measure whether a business practice is unfair, a court must consider the following factors: 1) whether the practice offends public policy; 2) whether it is immoral, unethical, oppressive or unscrupulous; and 3) whether it causes substantial injury to consumers. Robinson, 201 Ill. 2d at 417- 418. The Court also noted that all three factors need not be met. Rather, the Court adopted the reasoning of the Connecticut Supreme Court in *Chesire Mortgage Service, Inc. v. Montes*, 223 Conn. 80, 106 (1992). That Court, in a case involving "loan churning" observed that all three criteria need not be satisfied in order to support a finding of unfairness. Rather, a practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. *Chesire*, 223 Conn. at 106.

As the claim is brought under ICFA, the complaint must allege with particularity and specificity the unfair business practices of the defendants. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 502 (1996). The Plaintiffs fail to recognize that in a Section 2-615 Motion, the complaint must stand on its own, thus, reference to citations issued by the FCC, reports or hearings are not relevant to the issues and will not be considered in resolving this Motion.

The well-pled facts, taken as true for purposes of this Motion, are set out above. [☛11] There is no question that transmitting unsolicited telephone facsimile advertisements violates public policy. First, the Criminal Code of 1961, as amended, prohibits this activity. See, 720 ILCS 5/26-3. Knowledge is defined by the Code in Section 5/4-5. A person acts knowingly when he is consciously aware that a result is practically certain to be caused by his conduct. 720 ILCS 5/4-5(b). There can be no question than any individual who causes a telephone facsimile transmission to occur acts knowingly. In addition, the failure of Illinois to "opt out" of the private enforcement of the TCPA suggests that this Act is the public policy of Illinois as well.

The Plaintiffs allege the conduct is oppressive, yet they allege only one or two facsimile transactions to each Plaintiff. This, by inference, suggests minimal disruption of one's business or occupation. The exhibits to the complaint show each plaintiff had a [***18**] reasonable alternative to the receipt of additional messages. They could call to remove themselves from the list. This conduct does not rise to the level of oppression envisioned by the drafters of ICFA.

The final factor requires the allegation of substantial injury to the consumer. In discussing the count alleging conversion, the Court indicated the doctrine of *de minimus non curat lex* had no application in this matter. A complete review of the movants' authorities confirms this position. No case cited involved a tort claim. They involved complaints of short redemption deposits in foreclosure cases, errors in summing damages, or computing interest. The Court acknowledges that the Plaintiff's are not entitled to receive nominal or presumed damages in a claim under ICFA. *Duran v. Leslie Oldsmobile, Inc.*, 229 Ill. App. 3d 1032, 1041 (1992). There are no facts from which the Court can determine the amount of damages incurred by the suggested class plaintiff or consumers as a whole. The term "substantial" is clearly a conclusion.

Thus, evidence of only one of the Robinson factors are found in the Plaintiff's complaint. This Court concludes that the Plaintiff has not stated a claim under ICFA. In reaching this decision, the Court recognizes that the failure to include Illinois' prohibition against unsolicited telephone facsimile transmissions in Section 2Z of ICFA (815 ILCS 505/2Z, also prevents a finding of a per se violation of ICFA. *Illinois ex rel. Daley v. Grady*, 192 Ill. App. 3d 330, 332 (1989).

Therefore, the Count of the Complaint alleging a violation of the Illinois Consumer Fraud and Deceptive Practices Act is Dismissed.

Finally, this Court feels constrained to remark about post-argument activities of the attorneys. It is clearly within the requirements of the Illinois Rules of Professional Conduct to advise the Court of any change of law used in party's argument prior to the Court's decision on the matter. RPC 3.3. The lawyers are to be commended for their action in this regard.

However, this Court seriously doubts that the obligations imposed by that Rule grant counsel a license to present a thirty-plus page brief supporting a clients' position after arguments were closed. If the need arose, a proper motion to re-open arguments would be appropriate.

[***19**] This Court, while troubled by the tactic, will regard it as overzealous advocacy and has returned the unsolicited but permitted telephone facsimile transmission as well as the correspondence to counsel unopened and unread.

VI. ORDER

A. The Motions to Dismiss the Count of the Consolidated Complaint alleging a violation of the TCPA is denied;

B. The Motion to Dismiss the Count of the Consolidated Complaint alleging Conversion is denied;

C. The Count of the Consolidated Complaint

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alleging a violation of ICFA is dismissed; the Plaintiffs are given 28 days to file an amended complaint;

D. The Defendants shall file answer to the Counts alleging violation of the TCPA and conversion within 28 days;

E. The matter is scheduled for case management conference on May 12, 2003 at 2:30 p.m.

DATED: April 3, 2003. ENTERED: April 3, 2003.

[*20] EXHIBIT A

DEFENDANTS JOINING IN CONSOLIDATED MOTIONS TO DISMISS IN RELATED TCPA CASES

02 CH 1189 Goldberg v. Wall Street Alert

02 CH 6332 Whiting Corp v. MSI, Y2K Marketing

02 CH 6335 Whiting Corp v. PageComm of Illinois

02 CH 6336 Whiting Corp v. Fax.Com, Inc.

02 CH 6905 Bernstein v. American Family & Bezanis

02 CH 6908 Bernstein v. Fax.Com, Inc.

02 CH 7687 Whiting Corp v. Lucas Associates

02 CH 7745 Construction v. Gersten Financial

02 CH 7748 Construction Consulting Grp v. Qwest Communications,Inc.

02 CH 7824 Construction v. PageComm of Illinois

02 CH 7827 Construction v. Superior Marketing

02 CH 8362 Phillips v. Consolidate Steel Supp

(not joining in conversion motion because no conversion count alleged Consolidated Steel & Supply Co.)

02 CH 8364 Phillips v. Midco, Inc.

02 CH 8641 Elliot-Dunne v. Judicial Attorney Service

02 CH 8714 Martin v. Onstaff, Inc.

02 CH 10491 Elliot-Dunne v. Voicestream Wireless

02 CH 10852 Elliot-Dunne v. Spradling

02 CH 10890 Schlosser v. MSI Marketing

02 CH 10919 Brill v. Johnson

# # #

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IN THE CIRCUIT COURT IN AND FOR MIAMI-DADE COUNTY
GENERAL JURISDICTION DIVISION

MICHAEL PENZER, Plaintiff,

v.

MSI MARKETING, INC., a foreign corporation, d/b/a Y2MARKETING, Defendant.

Case No.: 01-30868 CA 32

Decided April 2, 2003

NOTICE: The rules of some jurisdictions may impose limitations on the use of materials not designated for publication in certain officially sanctioned reporters. Consult the rules of the applicable jurisdiction regarding use and citation of this opinion.

DISPOSITION:

Plaintiff's motion for class certification granted.

SYNOPSIS:

Plaintiff moved for class certification on unsolicited fax claims. The court found that 1) because Defendant had no evidence that consent was sought or obtained from any person, the question of consent could not constitute an individualized question so to defeat predominance; 2) even if consent was an issue, other common issues of law and fact based on common proofs still predominated; 3) there is no 'established business relationship' exemption for unsolicited faxes; 4) the fact that different class members received faxes with different content does not defeat typicality since all faxes were advertisements; 5) a class action was superior. The court also found that certification was appropriate under Rule 1.220(b)(2) as the injunctive relief sought by plaintiff was based on a common course of conduct by defendant.

SUBSEQUENT HISTORY:

none

PRIOR HISTORY:

none

CITED BY:

none

APPEARANCES:

Marc A. Wites, Deerfield Beach, Florida, for plaintiff.

Roy Hartman, Miami, Florida for defendant.

JUDGES:

Leslie Rothenberg

HOLDINGS:

[☛1] **Class certification**

Here, Plaintiff's and the class' claims arise from a common, if not identical, background as they all received unsolicited facsimile advertisements from Defendant and Defendant does not have any evidence that any person or entity gave Defendant permission or an express invitation to send such faxes.

[☛2] **Class certification**

Defendant's affirmative defenses also raise common and predominate issues that are amenable to class treatment.

[☛3] **Class certification**

The fact that Plaintiff and the Class may have received several different fax advertisements from Defendant (see Plaintiff's Complaint) does not defeat typicality or commonality.

[☛4] **Class certification**

Because Defendant does not have any evidence that any person gave it or any third party express permission to send facsimile advertisements, and the Class expressly excludes all persons that who gave such permission, there are no individual issues that predominate

[☛5] **Class certification**

The fact that Plaintiff alleges that Defendant did not obtain the prior express invitation or permission of any class member are unrebutted by Defendant and must be accepted as true for the purposes of class certification.

[☛6] **Class certification**

The issue of consent does not defeat class certification because – in addition to the fact that Defendant does not have any evidence that any person or entity consented to Defendant's intentional violation of the TCPA – it would be unreasonable to suggest that Defendant even tried to

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obtain and/or make record of any recipient's consent given that Defendant has sent out over 1.6 million unsolicited fax advertisements in Florida.

[☛7] **EBR (fax)**

Defendant's argument about the alleged "business relationship" defenses fails because (a) the plain language of the TCPA makes clear that the defense does not apply to unsolicited facsimile advertisements [FN4] and (b) even if it did, Defendant does not have any evidence to support such defense.

[☛8] **EBR (fax)**

The only logical conclusion that can be drawn from this statutory interpretation is that Congress did not intend to create an "established business relationship" exception to the transmission of unsolicited facsimile advertisements.

[☛9] **Class certification**

There is no individualized issue raised by facsimile transmissions received as e-mails facsimile advertisements are not sent as e-mails, but rather are converted to an e-mail after it has been received over the telephone lines.

[☛10] **Commerce Clause**

Even if Defendant did possess evidence of individual issues of consent as to some class members, such issues would not predominate over the many common questions of law and fact raised by both Plaintiff and the Class' claims and Defendant's defenses.

[☛11] **Class certification**

The resolution of these common issues in a single action also is a superior to burdening multiple courts and judges with countless hearings and hours of labor over the same, exact issues and, therefore, would be "a significant efficiency gain" for Florida's courts.

[☛12] **Class certification**

The Court also finds that the possibility that class members may receive in a settlement of this class action (assuming that the case is not tried to judgment) an amount less than the statutory damages available under the TCPA does not defeat class certification.

OPINION:

ORDER CERTIFYING CLASS ACTION

[***1**] THIS CAUSE came before the Court on Plaintiff's Motion for Class Certification. The Court has carefully reviewed and considered said motion, as well as Plaintiff's Supplement to Motion for Class Certification and the evidence appended to such memoranda, Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Class Certification, Defendant's Supplement to Memorandum of Law in Opposition to Plaintiff's Motion for Class Certification, and argument of counsel presented at the March 24, 2003 hearing on Plaintiff's Motion for Class Certification, and is otherwise duly advised in the premises. It is hereby Ordered and Adjudged as follows.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 1.220(d)(1), Fla. R.Civ.P., the Court makes the following findings of fact and conclusions of law in support of class certification.

[***2**] **I. BACKGROUND**

This class action arises from Defendant's alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. §227(b)(1)(C) (the "TCPA" or the "Act"). Plaintiff brings this action in his own behalf and in a representative capacity on behalf of all persons and entities in Florida who have received unsolicited facsimile advertisements from Defendant.

On December 20, 1991, Congress enacted the Telephone Consumer Protection Act to govern and restrict telemarketing activities conducted via phone and facsimile. The TCPA makes it "unlawful for any person in 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 allows a person or entity to bring in state court an action based on a violation of the TCPA (see Court's Order Denying Defendant's Motion to Dismiss) and to (a) enjoin such conduct and (b) recover the greater of the actual loss suffered by such violation or $500 in damages for each such violation. 47 U.S.C. §227(b)(3)(A-C).

The vast majority of courts have approved the class certification of TCPA claims *See, e.g., Hooters of Augusta, Inc. v. Nicholson*, 537 S.E.2d 468, 472 (Ga. Ct. App. 2000) (affirming certification of TCPA class action); [FN2] *Marine Technologies, Inc. v. DirectTV, Inc.*, Case No. 01-635 (St. Mary's Cir. Ct., MD. October 24, 2002) (certifying TCPA class action); *Coontz v. Nextel Communications, Inc.*, Case No. C200100349, (Tex. Dist. Ct. Johnson Cty. October 16, 2002) (certifying TCPA class action); *Girards v. Inter-Contiental Hotels Corp.*, Case No. 01-3456-K (Tex. Dist. Ct. Dallas Cty. September 18, 2002) (certifying TCPA class action); *Gold Seal Termite and Pest Control Co. v. PrimeTV, LLC*, Cause No. 49C01-0012-CP-3010 (Marion Circuit Court, Indiana, August 29, 2002) (certifying TCPA class action); *Malka & Trainor, P.C. v. Capitol Special* [***3**] *Risks, Inc.*, Civil Action No: 2001-CV-37309 (Ga. Sup. Ct. Fulton Cty. Jan. 25, 2002) (Consent Order Regarding Class Certification entered by Judge Constance C. Russell);

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Jemiola v. XYZ Corp., Case No. 411237 (Ohio Ct. Common Pleas Cuyahoga Cty. Dec. 21, 2001) (certifying TCPA class action); *WPS, Inc. v. Lobel Financial, Inc.*, Case No. 01CP402092 (S.C. Ct. Common Pleas Oct. 12, 2001) (same); *Kondos v. Lincoln Property Co.*, Case No. 00-08709-H, (Tex. Dist. Ct. Dallas Cty. July 12, 2001) (same); *Biggerstaff v. Ramada Inn-Coliseum*, Case No. 98CP-10-4722 (S.C. Ct. Common Pleas, Feb. 1, 2000).

[FN1] *See also Nicholson v. Hooters of Augusta, Inc.*, Case No.: 95-RCCV-616 (Ga. Sup. Ct. Richmond Cty. Aug. 25, 1998) (trial court order granting class certification).

II. CLASS CERTIFICATION PROCEDURES

The substantive merits of a case are not to be considered by the Court on a Motion for Class Certification. Instead, the plaintiff's allegations must be taken as true. *E.g., Latman v. Costa Cruise Lines*, N.V., 758 So.2d 699, 701 (Fla. 3rd DCA 2000)(accepting as true Plaintiff's allegations for purposes of determining class certification); *Oce Printing Systems USA, Inc. v. Mailers Data Services, Inc.*, 760 So.2d 1037 (Fla. 2nd DCA 2000); *Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 313 (S.D. Florida 2001); *Singer v. AT&T Corp.*, 185 F.R.D. 681, 686 (S.D. Fla. 1998). Application of class action criteria under Rule 23, Fed. R. Civ. P., [FN2] is independent of the merits of the complaint, and it is improper for a Court to conduct a "mini-hearing" on the merits in connection with class [***4**] certification. As the United States Supreme Court stated, holding that application of Rule 23 criteria is independent of the merits of the Complaint:

> We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule. . . .[and] is directly contrary to the command of [the Rule] that Court determine whether a suit denominated as a Class action may be maintained 'as such as soon as practicable after the commencement of the action.'

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

[FN2] Federal courts have developed an extensive body of governing case law dealing with issues raised under Rule 23. Florida decisions routinely look to federal case authority in conducting their analyzes under Rule 1.220. *See, e.g., Estate of Bobinger v. Deltona Corp.*, 563 So.2d 739, 745 (Fla. 2d DCA 1992); *Hessen v. Metropolitan Dade County*, 513 So.2d 1330, 1332 (Fla. 3d DCA 1987), *rev. denied*, 525 So.2d 876 (Fla. 1988); *Cohen v. Camino Sheridan, Inc.*, 466 So.2d 1212, 1213-14 (Fla. 4th DCA 1985).

III. EVIDENCE SUPPORTING CERTIFICATION

While the Court did not consider the merits of Plaintiff's claims in determining whether Plaintiff satisfies the requirements of Rule 1.220, Fla.R.Civ.P., the Court notes that Plaintiff presented unrebutted evidence of both the background of this action and which supports the satisfaction of the elements of Rule 1.220. The unrebutted evidence is as follows.

Plaintiff is the owner of a fax machine. *See* Plaintiff's Complaint at 5. On December 9, 2001 at 3:41 p.m., December 9, 2001 at 4:32 p.m., and again on December 16, 2001 at 3:40 p.m., Defendant faxed unsolicited advertisements to Plaintiff. *Id.* at 5. Plaintiff did not give Defendant prior express permission or an invitation to send the unsolicited facsimile advertisement. Id. at 5.

To send fax advertisements, Defendant contracted with an entity named Fax.com. *See* Fax Broadcasting Agreement attached to Plaintiff's Supplement to Motion for Class Certification as Exhibit A ("Plaintiff's Supp."). The Fax.com agreement contains a provision warning parties of the legal risks of fax advertising:

> Buyer acknowledges that Buyer is aware that Seller's faxing of Buyer's commercial message/advertisement on behalf of Buyer presents significant legal issues and risks. Buyer acknowledges that Seller has made no representations, promises or assurances [***5**] to Buyer in this regard, and Buyer has had the opportunity to consult with its own legal counsel with respect to the federal Telephone Consumer Protection Act and applicable state law regarding transmission by fax of unsolicited commercial messages/advertisements and the risks attended thereto.

Fax Broadcasting Agreement at 11.

Although Defendant's corporate representative Ray Settles stated under oath that "Defendant, through its employees, officers and agents, has never sent any advertisements via facsimile in any state" (see Defendant's Answers and Objections to Plaintiff's First Set of Interrogatories at 4, attached to Plaintiff's Supp. as Exhibit E), Defendant later conceded that it has sent over 20 million fax advertisements in at least 37 states. See Defendant's Amended Answers and Objections to Plaintiff's First Set of Interrogatories at 4-5, attached to Plaintiff's Supp. as Exhibit C. In Florida alone Defendant has sent 1,695,524 fax advertisements since February 22, 2001. See Defendant's Amended Answers and Objections to Plaintiff's First Set of Interrogatories at 4-5, attached to

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Plaintiff's Supp. as Exhibit C.

Defendant also conceded in its response to a request for production that it does not possess any documents "that evidence any communications from any person requesting that Defendant send them facsimile advertisements." See Defendant's Amended Answers and Objections to Plaintiff's First Request for Documents at request no. 4, attached to Plaintiff's Supp. as Exhibit D. Defendant did not present any evidence in its memoranda or at the March 24, 2003 hearing that any person or entity gave permission, or otherwise extended a prior express invitation or permission, for Defendant to send unsolicited facsimile advertisements, including but not limited to affidavits, deposition testimony or documents.

[***6**] Similarly, Defendant did not present any evidence that it has any policies or procedures by which it attempts to obtain a prior express invitation or permission from persons or entities to whom Defendant sends unsolicited fax advertisements.

IV. RULE 1.220(A), Fla.R.Civ.P.

A. NUMEROSITY.

Plaintiff has satisfied the numerosity requirement of Rule 1.220(a)(1), Fla. R.Civ.P. Plaintiff has demonstrated that the class of Florida residents includes at least 1,695,524 persons and entities, since Defendant sent at least 1,695,524 fax advertisements in Florida since February 2001. Even if Defendant sent multiple faxes to each recipient, such as in the case of Plaintiff who received three fax advertisements from Defendant, it is clear that the number of class members is sufficiently numerous based on the number of faxes sent by Defendant. *See, e.g., Alfred v. Okeelanta Corp.*, 1991 WL 177658 (S.D. Fla. 1991) (number of members is but one factor; numerosity is linked to impracticability and as such a specific number of members is not held to hard and fast standards)(citation omitted); *Kingston Square Tenants Assoc. v. Tuskegee Gardens, Ltd.*, 1994 WL 808070 (S.D. Fla. 1994); *Access Now, Inc. v. Ambulatory Surgery Ctr. Group, Ltd.*, 197 F.R.D. 522, 525 (S.D. Fla. 2000). [FN3]

> [FN3] *Ventura v. New York City Health and Hospitals Corp.*, 125 F.R.D. 595 (S.D.N.Y. 1989) (Plaintiff's lack of knowledge as to exact number of affected persons is not a bar to maintaining class action, when defendants have means to identify those persons at will); *Society for Individual Rights, Inc. v. Hampton*, 63 F.R.D. 399, (N.D. CAL. 1973) aff'd in part 528 F. 2d 905 (where defendants in proposed class action failed to answer interrogatory concerning number of persons discharged on particular basis per year on ground that number was so large that it would be burdensome and oppressive to count them in order to answer proper interrogatory, requirement of this rule for numerosity was met.).

[***7**] The Court further notes that Defendant did not contest numerosity, and Defendant agreed to the entry of an order though which Defendant agreed to admit it sent at least 75 faxes identical to those attached as exhibits to Plaintiff's complaint to Florida residents. *See* Agreed Order attached to Plaintiff's Supp. as Exhibit F. Accordingly, the Class is too large and dispersed over a large geographic area as to make joinder impracticable. *See, e.g., Estate of Bobinger v. Deltona Corp.*, 563 So. 2d 739, 743 (Fla. 2d DCA 1990) (class in excess of 400 persons would satisfy numerosity requirement, as class as small of 25 persons has fulfilled requirement); *McFadden v. Staley*, 687 So. 2d 357, 358-59 (Fla. 4th DCA 1997) (in affirming class certification, trial court properly concluded that separate joinder of 1,600 potential class members is impracticable). Thus, the Court finds that numerosity has been satisfied.

B. COMMONALITY.

Plaintiff has satisfied the commonality requirement of Rule 1.220(a)(2), Fla.R.Civ.P. The second requirement, commonality, requires an assessment of whether Plaintiff's claims raise at least one question of law or fact common to the members of the Class. *E.g., Fuller v. Becker & Poliakoff, P.A.*,197 F.R.D. 697, 700 (M.D. Fla. 2000). Importantly, "the threshold of 'commonality' is not high. *Broin v. Philip Morris Cos., Inc.*, 641 So.2d 888 (Fla. 3d DCA 1994). Aimed in part at determining whether there is a need for combined treatment and a benefit to be derived therefrom, the rule requires only that resolution of the common questions affect all or a substantial number of the class members." *Broin*, 641 So. 2d at 890 (citation omitted). The claims do not need to arise in the same factual context, but instead must arise from the "same practice or course of conduct" and be based on the same legal theory. *Powell v. River Ranch Property Owners Association, Inc.*, 522 So. 2d 69, 70 (Fla. 2d DCA 1988), *rev. denied*, 531 [***8**] So.2d 1354 (Fla. 1988)("The court's primary concern in considering the typicality and commonality of claims should be whether the representative's claim arises from the same practice or course of conduct that gave rise to the remaining claims and whether the claims are based on the same legal theory."); *Colonial Penn Ins. Co. v. Magnetic Imaging Systems I, Ltd.*, 694 So.2d 852, 853-54 (Fla. 3d DCA 1997)("The common or general interest must be the object of the action, in the result sought to be accomplished in the proceedings, or in the question involved in the action.")(citations omitted).

The Court finds that Plaintiff and the Class' claims raise several common questions of law and fact, including, but

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not necessarily limited to, the following:

A. Whether Defendant is subject to the Act;

B. Whether Defendant violated the Act;

C. Whether Defendant sent unsolicited advertisements to Plaintiff and the Class;

D. Whether Defendant's faxes were "advertisements" under the TCPA;

E. Whether Defendant willfully or knowingly violated the Act;

F. Whether Plaintiff and the Class suffered statutory damages as prescribed by the Act; and

G. The extent of injuries suffered by Plaintiff and the Class.

While the presentation of common questions is itself sufficient to satisfy the commonality requirement, a class action plaintiff may also demonstrate commonality by showing that the plaintiff's and class' claims arise from a common course of conduct. *E.g., McFadden*, 687 So. 2d at 358-59 (class certified where all class members share common interest in obtaining relief based on Defendant's common course of conduct). [☛1] Here, Plaintiff's and the class' claims arise from a common, if not identical, background as they all received unsolicited facsimile advertisements from [***9**] Plaintiff and Defendant does not have any evidence that any person or entity gave Defendant permission or an express invitation to send such faxes.

Further, Plaintiff and the Class all assert only a claim for violation of the TCPA. This common background and common treatment of Plaintiff and the Class further satisfies the commonality requirement. *Paladino v. American Dental Plan, Inc.*, 697 So. 2d 897, 898 (Fla. 1st DCA 1997)(commonality met where all class members aggrieved by insurance Defendant's uniform practice); *Love v. General Development Corporation*, 555 So. 2d 397, 398 (Fla. 3d DCA 1989)(class certification is appropriate where each member seeks enforcement of contractual remedy based on same essential facts).

[☛2] Finally, Defendant's affirmative defenses also raise common and predominate issues that are amenable to class treatment. *See* Defendant's Answer and Affirmative Defenses attached to Plaintiff's Supp. as Exhibit I; *see also Nicholson*, slip op. at 5 ("The defenses urged by Hooters are applicable to all members of the class and can be evaluated on a class-wide basis."). These defenses include:

A. Whether Defendant's faxes were "advertisements" under the TCPA;

B. Whether the TCPA is unconstitutional; and

C. Whether a Florida resident may assert a private claim for violation of the TCPA in state court.

See Defendant's Affirmative Defenses at 29, 32 and 33. Even though the Court has already ruled on these issues in denying Defendant's motion to dismiss, class certification would render these rulings applicable to all class members.

Thus, the Court finds that Plaintiff satisfies the commonality requirement of Rule 1.220(a)(2), Fla. R.Civ.P., because Plaintiff and the Class' claims present common questions of law and fact, [***10**] arise from a common background and seek common relief.

C. TYPICALITY.

The Court finds that Plaintiff satisfies the typicality requirement of Rule 1.220(a)(3), Fla. R.Civ.P., which requires that "the claim or defense of the representative party is typical of the claim or defense of each member of the class." The United States Supreme Court has noted that the "commonality and typicality requirements of [the rule] tend to merge." *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Accordingly, like commonality, the typicality analysis is based on whether the plaintiff's claims are the same or similar to the claims of the other members of the class, or whether they allege a common course of conduct by defendant towards members of the class. *See W.S. Badcock Corp. v. Myers*, 696 So. 2d 776, 780 (Fla. 1st DCA 1996); *Estate of Bobinger*, 563 So. 2d at 745.

Here, Plaintiff's claims are typical of the claims of each class member because Plaintiff seeks the same relief for himself as he does for the class. Further, Plaintiff and the Class' claims arise from an identical course of conduct by Defendant.

[☛3] The fact that Plaintiff and the Class may have received several different fax advertisements from Defendant (see Plaintiff's Complaint) does not defeat typicality or commonality. Plaintiff and the Class' claims are based on Defendant's transmission of unsolicited fax advertisements, and the fact that the advertisements may differ in content does not alter the fact that faxes are all advertisements.

Thus, the Court concludes that Plaintiff satisfies the typicality requirement.

[***11**] **D. ADEQUACY.**

The Court finds that both Plaintiff and his counsel are adequate representatives of the Class. "The 'adequacy of representation' requirement is met if the named representative has interests in common with the proposed class members (*e.g., Broin v. Phillip Morris Cos.*, 641 So. 2d 888, 892 (Fla. 3d DCA 1994), *rev. denied*, 654 So. 2d 919 (Fla. 3d DCA 1995) and plaintiff's attorneys are

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qualified, experienced, and generally able to conduct the litigation. *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987). Through the allegations of his complaint, which the Court accepts as true, by affidavit (*see* Plaintiff's Supp. at Exhibit G), and Plaintiff's deposition testimony (see Deposition Transcript of Plaintiff attached to Plaintiff's Reply to Defendant's Memoranda in Opposition to Plaintiff's Motion for Class Certification and the excerpts from Plaintiff's deposition set forth in such reply at pages 15-20), Plaintiff has demonstrated that he is cognizant of, and determined to, discharge his duties as class representatives.

Defendant's arguments about Plaintiff's adequacy are not supported by the record or case law. "It is well-settled that it is not necessary for named class representatives to be knowledgeable, intelligent or have a firm understanding of the legal or factual basis on which the case rests in order to maintain a class action." *Powers v. Government Employees Ins. Co.*, 192 F.R.D. 313, 317-18 (S.D. Fla. 1998) (proposed class representative adequate where she appeared for deposition, produced documents, and conferred with counsel). Plaintiffs may demonstrate their adequacy by appearing for deposition, producing documents and conferring with counsel. Powers, 192 F.R. D. at 318; *Alfred v. Okeelanta Corp.*, 1991 WL 177658, *14 (S.D. Fla. 1991)(same). Plaintiff satisfies this standard. Plaintiff has (1) demonstrated his understanding of the class action process and his duties as the class representative, (2) appeared for deposition, (3) provided deposition testimony about his receipt of [***12**] unsolicited faxes from Defendant, and (4) confirmed that he keeps in contact with counsel about the case.

Further, there is no case law that suggests that Plaintiff's prior friendship or attorney-client relationship with Plaintiff's counsel precludes a finding of adequacy. Further, the Court believes that Mr. Wites and Wites & Kapetan, P.A. are adequate class counsel regardless of Mr. Wites' prior friendship with Plaintiff. The Court further notes that Plaintiff is represented by two law firms, that Plaintiff did not have any prior relationship with any member of the Cauley Geller firm, and that the Court has the discretion to review and approve any settlement or award of attorneys' fees and costs to Plaintiff's counsel, whether through a settlement or at trial.

Further, Plaintiff's counsel are qualified, experienced and able to conduct this litigation. Thus, the Court finds that Plaintiff and his counsel satisfy the adequacy requirement of Rule 1.220(a)(4), Fla. R.Civ.P.

V. RULE 1.220(b)(3), Fla.R.Civ.P.

In addition to Rule 1.220(a)'s requirements, a plaintiff must establish that the Class claims meet the requirements of one of the subsections of Rule 1.220(b). Here, Plaintiff meets the requirements of Rule 1.220(b)(3), which requires the existence of common questions of law and fact that predominate over any individual issues and that class representation is superior for resolving the controversy than other available methods.

A. PREDOMINANCE.

The predominance requirement of Rule 1.220(b)(3), Fla.R.Civ.P., is met where the basic issue of liability common to all class members predominates over the individual issues of the class members. *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 41 (Fla. 3d DCA), *rev. denied*, 682 [***13**] So. 2d 110 (Fla. 1996). The claims of Plaintiff and the Class arise from a common and typical - if not identical - background regarding the transmission of unsolicited facsimile advertisements on behalf of Defendant. This class-wide issue predominates over any individual issues that can be raised by Defendant.

[☛4] Further, because Defendant does not have any evidence that any person gave it or any third party express permission to send facsimile advertisements, and the Class expressly excludes all persons that who gave such permission, there are no individual issues that predominate. *Nicholson*, slip op. at 4 ("The Court rejects Hooters' contention that individual issues of consent or permission predominate since there is no evidence that any recipients gave permission to receive a Hooters facsimile advertisement before it was transmitted."); *Jemiola*, slip op. at 6 ("In the present case, 'the common nucleus of operative fact' is that all members of the class are recipients of unsolicited facsimile advertisements from the defendant. There is no evidence in the record indicating that the defendant ever obtained 'prior express invitation or permission' from any recipient before sending its facsimile advertisements. Therefore, there are no individual issues of express authorization or consent."); see also *Hooters of Augusta, Inc. v. Nicholson*, 537 S.E.2d 468, 472 (Ga. Ct. App. 2001) (affirming certification of TCPA class action); *ESI Ergonomic Solutions, LLC v. Artists Theatre Circuit, Inc.*, 2002 Ariz. App. LEXIS 109 (Ariz. Ct. App. July 16, 2002) (reversing trial court's denial of class certification).

[☛5] The Court does not agree that Defendant has raised any arguments that defeat predominance, particularly in light of the fact that (a) Plaintiff alleges that Defendant did not obtain the prior express invitation or permission of any class member (see Plaintiff's complaint at 12, 14 and 25) and the Court must accept, at this time, these allegations as true (*Broin*, 641 So. 2d at 890) and (b) Defendant [***14**] did not present any evidence to support such arguments. [☛6] The issue of consent does not defeat class certification because - in addition to the fact that Defendant does not have any evidence that any person or entity consented to Defendant's intentional violation of

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the TCPA - it would be unreasonable to suggest that Defendant even tried to obtain and/or make record of any recipient's consent given that Defendant has sent out over 1.6 million unsolicited fax advertisements in Florida.

[☛7] Similarly, Defendant's argument about the alleged "business relationship" defenses also fails because (a) the plain language of the TCPA makes clear that the defense does not apply to unsolicited facsimile advertisements [FN4] and (b) even if it did, Defendant does not have any evidence to support such defense.

> [FN4] Although deference is generally afforded to the interpretations of an agency charged with administering a statute, "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); *Heimmermann v. First Union Mortg. Corp.*, 305 F.3d 1257, 1261 (11th Cir. 2002) (same). Here, the TCPA expressly provides an established business relationship exclusion in the provisions of the TCPA dealing with telephone solicitations, but does not include the same exemption with respect to facsimile advertisements. Compare 47 U.S.C. § 227(a)(3) with 47 U.S.C. § 227(a)(4). [☛8] Thus, the only logical conclusion that can be drawn from this statutory interpretation is that Congress did not intend to create an "established business relationship" exception to the transmission of unsolicited facsimile advertisements. *Rodriguez v. U.S.*, 480 U.S. 522, 525 (1987) ("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.").

Likewise, Defendant's argument about the mode by which a class member received an unsolicited fax advertisement also fails. Because new technology permits people to convert facsimiles received over a telephone line into an e-mail, Defendant argues that "an individualized inquiry would need to be undertaken as to whether each fax was received on a 'telephone facsimile machine,'" as required by the TCPA. *Id.* [☛9] This interpretation is at odds with the TCPA, as it is based on the faulty premise that the facsimile advertisements are sent as e-mails (for which Defendant did [***15**] not produce any evidence), rather than converted to an e-mail after it has been received over the telephone lines.

In short, since Defendant is without evidence to support the existence of any individual issues, and since it is illogical to assume that Defendant could have obtained prior express consent or permission from the hundreds of thousands, if not millions, of Florida residents to whom it sent fax advertisements, there are no individual issues that predominate or would otherwise require mini-trials over the issue of consent.

[☛10] Finally, the Court also notes that even if Defendant did possess evidence of individual issues of consent as to some class members, such issues would not predominate over the many common questions of law and fact raised by both Plaintiff and the Class' claims and Defendant's defenses. For example, the class mechanism would allow for the resolution in this single class action the issues of (a) whether Defendant's faxes are advertisements, (b) whether the TCPA is constitutional, (c) whether there is a private right of action for TCPA claims in Florida, and (d) whether Defendant knowingly and intentionally violated the TCPA. The resolution of these questions in a single action would "allow class members to bring individual actions with the benefit of a res judicata finding of liability". *Fabricant*, 202 F.R.D. at 317 (citing *Note, Utilizing Statistics & Bellwether Trials in Mass Torts*, 8 Wm. & Mary Bill Rts. J. 199, 236 (1999)(advocating use of and explaining the efficiency of certifying a class to resolve liability issues, followed by mini-trials to resolve individualized issues, rather than full and separate individual trials). [☛11] The resolution of these common issues in a single action also is a superior to burdening multiple courts and judges with countless hearings and hours of labor over the same, exact issues and, therefore, would be "a significant efficiency gain" for Florida's courts. *In re Carbon Dioxide Antitrust Litigation*, 149 F.R.D. 229, 234 (M.D. Fla. 1994). Moreover, [***16**] "[s]hould it become appropriate, the court may divide the class into subclasses to resolve these issues." *Broin*, 641 So. 2d at 891 (citations omitted).

Thus, the Court finds that Plaintiff satisfies the predominance requirement of Rule 1.220(b)(3), Fla.R.Civ.P.

B. SUPERIORITY.

The superiority requirement of Rule 1.220(b)(3), Fla.R.Civ.P., is satisfied where class treatment is superior "to other available methods for the fair and efficient adjudication of the controversy." Here, class certification is superior to alternative methods of adjudication because it is highly unlikely that individual class members would bring individual lawsuits against Defendant. To this end, Defendant has not presented any evidence that any other person or entity has brought a TCPA claim against Defendant in Florida. "The absence of individual lawsuits is typically viewed as supporting the superiority of a class action." *See, e.g., ESI Ergonomics Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 50 P.3d 844 (Ariz. Ct. App. 2002) (lack of individual TCPA cases supported

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superiority of class claims) (citing cases). The absence of other suits shows that class members may be unaware of their rights, the cost and inconvenience of individual litigation exceeds the benefits, and that other class members have no interest in controlling their own litigation. *Id.*

Defendant's arguments that TCPA claims are not amenable to class treatment is without support. The express language of the TCPA does not preclude class action lawsuits to recover damages. Accordingly, class actions are an available and permissible vehicle to seek relief on behalf of a substantial number of persons raising common claims. *See Califano v. Yamasaki*, 442 U.S. 682, 699-700 (1979) ("In the absence of a direct expression by Congress of its intent to depart from the usual course of trying 'all suits of a civil nature' under the Rules established for that purpose, class relief is appropriate in civil actions brought in federal court.").

[☛12] The Court also finds that the possibility that class members may receive in a settlement of this class action (assuming that the case is not tried to judgment) an amount less than the statutory damages available under the TCPA does not defeat class certification. As in all lawsuits, Plaintiff and his counsel may negotiate any settlement with Defendant of any amount, which must of course be approved by this Court as fair and reasonable and must allow class members who do not find the settlement adequate to exclude themselves from the class.

Further, assuming that Defendant chooses to settle this matter rather than try the case to judgment, the class mechanism likely will provide the only means by which class members may obtain any relief, even if in an amount less than that afforded by the statute. As the Fourth District Court of Appeal noted in McFadden, the expense of litigating each of the Class members' claims individually would be so cost prohibitive as to deny the class members with a viable remedy:

> There is no error or abuse of discretion in the trial court's conclusion that a class action is particularly appropriate in this case because of the confluence of a large number of class members and the fact that the injuries suffered by each were relatively minor. It is likely that permitting a class action in this case may provide litigants with their only economically viable remedy.

[***18**] McFadden, 687 So. 2d at 360.

Likewise, the possibility that the damages awarded in a trial in this action may be substantial given the statutory penalty of $500 and that Defendant has sent over 1.6 million fax advertisements does not weigh against class certification. As reasoned by the *ESI Ergonomics* court, "[g]iven that Congress determined the per-violation penalty and allowed for the pursuit of class actions under the statute, it is not for the court to determine that the penalty when applied in a class action context is unfair. The fairness of statutory punishment, within due process concerns, is properly determined by the legislature." *ESI Ergonomic Solutions, LLC v. Artists Theatre Circuit, Inc.*, 2002 Ariz. App. LEXIS 109 (Ariz. Ct. App. July 16, 2002). "To deny the superiority of a class action because the size of the class made the damages annihilating, would serve to encourage violation of the statute on a grand rather than a small scale." Id.

Finally, the Court notes that Defendant does not make any suggestion "that another organizational method is a superior to a class action for the fair and efficient adjudication of this controversy" (*In re Carbon Dioxide Antitrust Litigation*, 149 F.R.D. 229, 234 (M.D. Fla. 1994)) other than to suggest that a better alternative is to allow the class members to bring individual actions. The Court finds that hundreds of thousands of individual actions that could result from Defendant's mass faxing of advertisements would impose a massive and unnecessary burden on Florida's courts, and impose needless costs and time burdens on absent class members. Thus, Plaintiff satisfies the superiority requirement of Rule 1.220(b)(3), Fla. R.Civ.P.

VI. RULE 1.220(b)(2), Fla.R.Civ.P.

Injunctive relief under Rule 1.220(b)(2) also is appropriate to prevent a defendant from continuing its deceptive and misleading practices. *See, e.g., Davis v. Powertel, Inc.*, 776 So. 2d 971 [***19**] (Fla. 1st DCA 2000). Here, Plaintiff has alleged that Defendant has acted or refused to act on grounds generally applicable to all class members in its practice of mass faxing of unsolicited fax advertisements. Thus, while Plaintiff has yet to move for injunctive relief, class treatment provides the best mechanism through which to seek an injunction and determine whether an injunction is an appropriate remedy.

VII. DECISION

In consideration of all of the relevant facts under Rule 1.220, Fla.R.Civ.P., as well as a survey of appellate decisions affirming the certification of class actions with facts and individual issues far more complex than presented here, the Court finds that Plaintiff and his counsel have satisfied all of the applicable elements of Rule 1.220, Fla.R.Civ.P. Plaintiff and the class' claim that Defendant sends unsolicited advertisements via facsimile without the prior express invitation or permission of the recipient is amenable to class treatment, particularly in light of Defendant's failure to present any evidence that any person or entity gave consent or that Defendant made any effort to obtain such consent, as well as the logical conclusion that it would simply be impossible [***20**] for

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Defendant to do so in light of its alleged practice of fax blasting millions of fax advertisements to Florida residents and others throughout the country.

Therefore, Plaintiff's Motion for Class Certification is Granted. Plaintiff and his counsel, the law firms of Wites & Kapetan, P.A., and Cauley, Geller, Bowman, Coates & Rudman, LLP, are respectively approved as class representative and class counsel.

VIII. CLASS DEFINITION

The class is defined as:

> All persons and/or entities who are Florida residents, who received a facsimile advertisement from Defendant or its agents, and who did not provide a prior express permission or invitation to send them the facsimile advertisement (the "Class").

Any person who gave prior express consent for Defendant or its agents to send a facsimile advertisement offering Defendant's services is specifically excluded from the Class. *See, e.g., Nicholson*, slip op. at 4 ("Any recipient of a Hooters facsimile advertisement who specifically contacted either Hooters or Value-Fax to invite the transmission of the Hooters advertisement would not be a member of the class and could not recover under the TCPA."). Also excluded from the Class are Defendant, its parents, subsidiaries and affiliates, its directors and officers, and members of their immediate families.

IX. NOTICE

Pursuant to Rule 1.220(d)(1), Fla.R.Civ.P., the Court hereby orders class counsel to prepare appropriate forms of notice to the Class for the Court's consideration and approval.

[***21**] DONE AND ORDERED in chambers at Miami-Dade County, Florida on this ____ day of _____, 2003.[*]

Hon. Leslie Rothenberg

Circuit Court Judge

# # #

[*] ***Reporter's Note****: The original order was undated, but is clocked-in by the clerk with the date of April 3, 2003.*

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FILED

MAR 3 1 2003

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

STATE OF MISSOURI)
)
COUNTY OF ST. LOUIS)

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

VERTEX CHEMICAL CORPORATION, NATIONAL EDUCATIONAL ACCEPTANCE CORP., and MARILYN MARGULIS, Plaintiffs, v. STARBEAM SUPPLY COMPANY, INC., Defendant.	Cause No. 02AC-011157 E CV Division 43

ORDER AND JUDGMENT

This matter came before the Court on February 26, 2003 on the parties' cross motions for summary judgement. This is an action originally brought by Plaintiffs against Defendant Starbeam alleging transmission of unsolicited advertisements via facsimile 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.

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 International, 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 construed in the light most favorable to the non-moving party.

The material facts are not in dispute, although the parties reach different conclusions on how the law applies to these undisputed facts. Defendant retained a third party, Sunbelt, to send facsimile advertisements received by Plaintiffs. Defendant selected the areas it wished the faxes sent to, when the faxes were to be sent, and the number of faxes to send. Sunbelt determined which specific fax numbers to send them to. Copies of the nine faxes are before the Court and it is not disputed that they are "unsolicited advertisements" proscribed by the statute. 47 U.S.C. § 227(a)(4).

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

Defendant argues that by using a third party to send the faxes, Defendant is not the "person" that sent the faxes and did not directly "use" a fax machine, computer, or other device to send the faxes, and thus Defendant did not violate the statute. This is a question of statutory construction, as to whether "use" and "person" in the statute is limited to the actual person who "presses the button" or includes persons who may employ an agent to do those acts.

Statutory Language

The statute states that:

> 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; or . . .

47 U.S.C. § 227(b) (emphasis added). This language does not explicitly state whether or not liability extends to the principal which employs a third party to send the faxes. It therefore presents some ambiguity to be resolved in accordance with the rules of construction.

One of those rules that is suggested by Defendant is that the Court should look to other parts of the statute. Defendant argues that in the portion of the TCPA dealing with telemarketing

calls, Congress expressly did include strict vicarious liability Defendant suggests that the absence of an explicit vicarious liability provision in the unsolicited fax portion of the statute implies that such liability was rejected by Congress. Defendant also argues that the statute is "penal" and invokes the rule that ambiguous provisions of penal laws should be strictly construed.

Plaintiff argues that the FCC has resolved this ambiguity and established strict vicarious liability. In the Matter of the Telephone Consumer Protection Act of 1991, 10 FCC Rcd 12391 at ¶ 35 (1995). In addition Plaintiff points to 47 U.S.C. § 217, that establishes strict vicarious liability for all portions of the 1934 Communications Act, including the TCPA, such that specific mention would be unnecessary. Plaintiff also argues that the statute is remedial, and should be liberally construed.

Plaintiffs' arguments are more persuasive. The portion of the statute dealing with repeated telemarketing calls which Defendant points to, 47 U.S.C. § 227 (c)(5) is not a direct imposition of vicarious liability. Because the restriction on telemarketing calls require "more than one call within any 12-month period" these multiple calls could come from different entities, but be promoting the same third party. For example, multiple insurance agents could make telemarketing calls in a 12-month period on behalf of Allstate insurance. The language Defendant points to simply says that those multiple calls on behalf of Allstate would give a plaintiff standing to sue - it does not state **who** (Allstate or the individual agents, or both) would be liable in such a suit.

In its brief, Defendant admonishes that "[t]his [C]ourt does not have the luxury of ignoring the rules handed down by our appellate courts for the construction and application of

statutes." This is true, and in this case the rule that can not be ignored is set out in Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984). Because the statute has ambiguity such that two alternative interpretations are conceivable, the highest appellate court in the land - the United States Supreme Court - compels the courts to turn to the administrative agency construction rather than make a blind judicial construction based on the other canons.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. 837, 842-43 (internal footnotes omitted). The role of a court is then to determine if the administrative agency construction is reasonable, even if it is not the construction that the court would have made absent the agency construction. See The Missouri Municipal League et. al v. FCC, 299 F.3d 949, 952 (8th Cir. 2002). Specifically, the 8th Circuit followed the Supreme Court's application of a two-part test for the validity of a federal agency regulation.

> First, we must determine whether congressional intent is clear from the plain language of the statute. If congressional intent is clear, a contrary interpretation by an agency is not entitled to deference. If the language of the statute is ambiguous, however, and the legislative history reveals no clear congressional intent, we **must** defer to a reasonable interpretation of the statutory provision made by the agency.

Id. at 952 citing Ragesdale v. Wolverine Worldwide, Inc., 218 F.3d 933, 966 (8th Cir. 2000) aff'd, 122 S.Ct. 1155 (2002) (emphasis added). The intent of Congress is not so clear on the issue of vicarious liability for fax advertisers so as to preclude the FCC's interpretation. One of the foundational principles of statutory construction is set forth 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." R.S.Mo.§ 1.010. This lends further support to the appropriateness of the FCC's construction. The Court is also mindful of the shortcomings that a contrary conclusion could have on the statutory scheme by enabling wholesale flouting of the TCPA by advertisers who could send unsolicited faxes at will by employing fly-by-night fax broadcasters and remain immune from suit while reaping benefits of the cost-shifted advertising medium.

Because the Court holds that the FCC interpretation establishing strict vicarious liability for the advertiser is controlling, Defendant's alternative argument that Plaintiffs have failed to establish the necessary elements of an agency relationship so as to hold Defendant liable under common law agency theories is moot. The Court also need not reach Plaintiffs' alternative arguments that 1) Defendant's claim that Sunbelt's is responsible for Plaintiffs' injuries and acted without authority, is an affirmative defense that was not properly pled, and 2) that state common law principles can not be applied to a federal cause of action brought in state courts.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

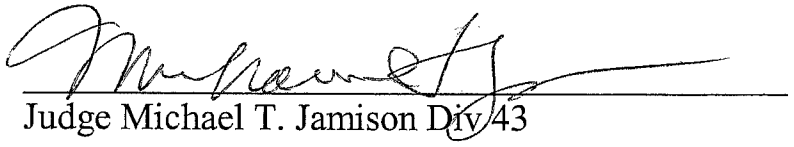
Turning to Plaintiff's Motion for Summary Judgment, the facts establishing the violations of the statute have been met. Defendant's resistance to Plaintiff's motion was based on the same theories of law that formed the basis for Defendant's motion. Having rejected Defendant's legal

arguments on liability, the facts have already been established such that Plaintiffs are entitled to judgment as a matter of law.

CONCLUSION

For the foregoing reasons Defendant's Motion for Summary Judgment is DENIED and Plaintiffs' Motion for Summary Judgment is GRANTED. Judgment in an appropriate amount to each Plaintiff shall issue separately.

IT IS SO ORDERED, this the 31st day of March, 2003.



Judge Michael T. Jamison Div 43

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS

STATE OF MISSOURI

SCHUMACHER FINANCIAL SERVICES, INC., LAWRENCE J. ALTMAN, R.F. SCHRAUT HEATING & COOLING, L.L.C., and I DREAM SOLUTIONS, INC., Plaintiffs,

v.

METROPARK COMMUNICATIONS, INC., Defendant.

Cause No. 02AC-015005 E CV

Division 39

Decided February 14, 2003

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DISPOSITION:

Plaintiff's motion for summary judgment granted.

SYNOPSIS:

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 alleged that Defendant sent them advertising material via facsimile without prior express permission or invitation. Defendant admitted sending the faxes, and that those faxes contain "material advertising the commercial availability or quality of any property, goods or services" and that they were not sent not accident or mistake, but argued that 1) defendant has an "established business relationship" with each plaintiff, and in the alternative, that 2) each plaintiff affirmatively "requested information" be sent to them by defendant. The court held as a matter of law that no "established business relationship" exemption existed, and that even in the light most favorable to defendant, defendant's evidence did not satisfy "prior express permission or invitation" to send advertising material via fax.

SUBSEQUENT HISTORY:

none

PRIOR HISTORY:

none

CITED BY:

none

APPEARANCES:

Max G. Margulis, Margulis Law Group, Chesterfield Missouri for plaintiff.

Brian D. Klar, Klar, Izsak, Stenger, L.L.C., Clayton Missouri for defendant

JUDGES:

Patrick J. Clifford

HOLDINGS:

[☛1] **Express Invitation or Permission (construction)**

It takes more than unilateral action of defendant making phone calls to create an "established business relationship" under the TCPA.

[☛2] **EBR (fax)**

The exclusion of an EBR exemption from the facsimile portion of the TCPA is dispositive.

[☛3] **EBR (fax)**

Neither a court, nor the FCC can read back into a statute an exemption that was intentionally removed.

[☛4] **EBR (fax)**

There is no ambiguity in the TCPA to open to door for an administrative agency's construction with respect to an EBR exemption for faxes..

[☛5] **EBR (fax)**

As a matter of law, there is no "established business relationship" to the broad prohibition for unsolicited fax advertisements.

[☛6] **Express Invitation or Permission (construction)**

It is clear that Congress made a policy choice that permission or invitation to send advertising faxes must be made expressly.

[☛7] **Express Invitation or Permission (construction)**

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One can not expressly consent to receive marketing materials via fax unless they are expressly advised that such materials are marketing materials, and will be sent by fax.

OPINION:

ORDER

[***1**] This matter came before the Court on January 28, 2003 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.

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 International, 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 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). An affidavit in opposition to summary judgment must state specific facts and not conclusions. *First Community Bank v. Western Sur. Co.*, 878 S.W.2d 887 (Mo.App. S.D. 1994). An affidavit that fails to aver specific facts and relies only upon mere doubt and speculation fails to raise any issues of material fact. *J.S. DeWeese Co. v. Hughes Treitler Mfg. Corp.*, 881 S.W.2d 638, 646 (Mo.App. E.D. 1994); *see, also, Morely v. Ward*, 726 S.W.2d 799, 805 (Mo.App. E.D. 1987); *ITT Commercial Fin. Corp.* 854 S.W.2d at 378.

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 them material via facsimile without prior express permission or invitation. At the hearing, Plaintiffs' counsel waived treble damages available under the statute, and seek only the mandatory statutory damages of $500 per violation. Defendant admits it sent the faxes, and that those faxes contain "material advertising the commercial availability or quality of any property, goods or services" and that they were not sent by accident or mistake, but contends that 1) Defendant has an "established business relationship" with each Plaintiff, and in the alternative, that 2) each Plaintiff affirmatively "requested information" be sent to them by Defendant.

I. Defendants Business Records

Defendant provided an affidavit of a records custodian, Mr. Conley, attesting to the authenticity of records of Defendant which record marketing contacts made by Defendant with Plaintiffs. The Court finds Mr. Conley's affidavit is sufficient to qualify the records for admission as business records for the purposes of this motion. Mr. Conley's affidavit also states that Plaintiffs had "requested Metropark send information regarding a telephone system" and this the faxes at issue were not "unsolicited."

This latter attestation is problematic for the Court. As Mr. Conley was not the person who spoke to Plaintiffs during these marketing calls, and did not create the records. He has no personal knowledge about their actual contents other than from reading them. Nowhere in those records does it state the any Plaintiff "requested Metropark send information." That is a conclusion Mr. Conley has apparently drawn from reading those records. Those conclusory statements are not sufficient to establish sufficient "evidence" that any Plaintiff "requested Metropark send information."

II. 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 person or entity and a residential subscriber with or without an exchange of consideration," 47 C.F.R. 64.1200(f)(4). The records of Defendant seem to show only one-way communications - unilateral contacts initiated by Defendant to Plaintiffs, and no calls in return from any Plaintiff back to Defendant. If a "business relationship" could be established solely by a telephone call from a business to a consumer, then practically any business could easily create an established business relationship with practically everyone, by simply making cold-calls. Such a construction is inconsistent with the remedial nature of the statute. [☛1] The Court is of the opinion that it takes more than these phone calls to create an "established business relationship" under the TCPA.

III. Significance of the existence of an Established Business Relationship

Even giving all possible favorable inferences to Defendant at this state of proceedings, and construing Defendant's records as creating a factual dispute as to whether a business relationship existed or not, an

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exemption for an "established business relationship" is simply not present in the unsolicited fax portion of the statute. In fact, Plaintiff demonstrated that the "established business relationship" exemption for fax advertisements was apparently included in an earlier version of the statute, and deleted from the facsimile restrictions while remaining in another portion of the TCPA addressing telemarketing calls. [☛2] 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 generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987). [☛3] Neither a court, nor the FCC can read back into a statute an exemption that was intentionally removed. [☛4] There is no ambiguity here to open a door for an administrative agency's construction. *See Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984). [☛5] As a matter of law, there is no "established business relationship" 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 Plaintiffs. *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).

IV. Prior Express Permission or Invitation.

This case is ultimately reduced to a single question: Did Defendant obtain "prior express permission or invitation" to send the faxes to these plaintiffs. If it did not, then Plaintiffs have shown that they are entitled to judgment as a matter of law. The term "prior express invitation or consent" is not defined in the statute, but 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. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with "implied."

See Brentwood Travel, Inc. v. Lancer, Ltd., No. 01CC 000042 (Mo. Cir. Ct. Aug. 15, 2001). Plaintiffs' affidavits amply provide evidentiary support directly stating they did not in any way give prior express permission or invitation to Defendant so send advertising material via fax. These affidavits are sufficient to meet the summary judgment standard, and the burden thus shifts to Defendant as the party opposing summary judgment, to produce relevant, admissible evidence sufficient to rebut that of Plaintiffs affidavits. Defendant has not met this burden.

The records produced by Defendant to not exculpate it. Nowhere do any of those records state that any plaintiff expressly requested information be sent to them ***by fax***. Indeed, none of the entries in those records says any Plaintiff actually requested anything. The entries do set forth a pattern of calls made by Metropark to Plaintiffs, apparently to solicit business. But the entries in these records with instruction to "send information" to Plaintiffs, appear to have been entered at the impetus of the marketer, and not at the behest of called party. For example, one entry dated "9/28/01" reads:

> Left message about our new Small Office Special. Probably not interested now but possible in the new [sic] future. Send some info and follow up closer to next year."

All the other entries on that record indicate "answering machine" or "left message." Defendant has not demonstrated that these entries mean that the called party affirmatively **asked** for information to be sent, rather than the decision to send information later was made by the person creating the business record. These records are simply not sufficient to demonstrate a genuine dispute.

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. [☛6] One can not expressly consent to receive marketing materials **via fax**, unless they 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. [☛7] It is clear that Congress made a policy choice that permission or invitation to send advertising faxes must be made expressly.

While this policy Congress selected may seem harsh to a business that has never though twice about sending marketing materials by fax to its business contacts, it has been long established that harshness is no justification for

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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).

CONCLUSION

For the reasons stated herein, Plaintiffs' Motion for Summary Judgment is GRANTED. Judgment shall issue forth separately.

It is SO ORDERED, this the 14th day of February, 2002.

/s/ Judge Patrick Clifford

Judge Patrick Clifford, Div. 39

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

FILED

JAN 2 2 2004

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

DAVID L. HARJOE, Individually and on behalf of all others similarly situated, Plaintiffs,	)	
vs.	)	Cause No. 01AC-011582
PRIME TV, LLC, a foreign Limited Liability Company, Defendant.	)	Division: 43

ORDER

This matter came before the Court on January 13, 2004 on Defendant's Motion to Reconsider the Court's decision of November 18, 2003, which granted Plaintiff leave to file an amended petition to include class allegations. Defendant asks the Court to reconsider its prior decision arguing that the amendments sought by Plaintiff are untimely and beyond the Court's discretion to allow, will add parties whose cause of action is barred by the statute of limitations, and will subject Defendant to inconsistent adjudications because there is a class action pending in Indiana against Defendant raising similar claims under the Telephone Consumer Protection Act (the "TCPA"), 47 U.S.C. § 227, and Plaintiff here may be included in the class already certified in the Indiana case. Having heard the arguments and reviewed the briefs of the parties, the Court DENIES Defendant's Motion to Reconsider for the reasons that follow.

First, the Court does not believe its decision permitting the amendment is beyond its discretion and does not find Defendant's arguments on this point persuasive. Nor does

the Court find prejudice to Defendant by the pendency of the competing class action in Indiana. Although the Indiana case was apparently certified nearly a year and a half ago on August 29, 2002, no class notice has been issued and there is no indication that the Indiana case is nearing conclusion. In fact, the Indiana class action is stayed pending resolution of a number of substantive TCPA constitutional challenges which may take some time, and such an extensive delay could prejudice Plaintiff. In light of the fact that constitutional defenses to TCPA claims have already been definitively resolved by the Missouri Supreme Court in Harjoe v. Herz Fin., 108 S.W.3d 653 (Mo. banc 2003), the case at bar may proceed substantially faster than the Indiana litigation, and in the opinion of this Court, will better serve the interests of the putative Missouri class should the Missouri class be certified in this jurisdiction with closer ties to Plaintiff and the putative Missouri class.

The issue of whether the amendment would permit claims that are time barred is another matter however. This raises a question of first impression in Missouri regarding the proper statute of limitations for a TCPA claim.

Historically, if a federal statute does not have a stated statute of limitations, a court will follow the long standing procedure of "borrowing" the statute of limitations from an "analogous state claim." North Star Steel Co. v Thomas, 515 U.S. 29 (1995). However, Congress has altered that procedure for more recent federal statutes such as the TCPA. Id., at note 2. Because of a plethora of problems, including conflicting application of state statutes of limitations to private rights of action created by federal law, Congress, in 1990, adopted 28 U.S.C. §1658, which provides:

Except as otherwise provided by law, a civil action arising under an Act of

Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

Assuming, arguendo, that Defendant's argument of a two year statute of limitations is correct under the "most analogous state law" doctrine prior to adoption and enactment of 28 U.S.C. § 1658, that doctrine evaporated as to civil actions created by Congress after December of 1990 (such as the TCPA's private right of action which was enacted in 1991), with the adoption of the federal catch all statute of limitations.

The TCPA's civil cause of action was created by Congress in 1991, PL 102-243, 105 STAT. 2394 (1991), well after passage of § 1658. The TCPA undeniably creates "a civil action under an Act of Congress" within the meaning of § 1658. Section 1658 therefore provides the statute of limitations (four years) applicable to actions brought pursuant to the TCPA, including this one.

Defendant finally argues that the phrase "if otherwise permitted" in the TCPA's private right of action provision shows Congressional intent to adopt the forum state's statute of limitations. This argument is unavailing. By enacting § 1658, Congress made a four-year statute of limitations as much a part of every subsequent federal statute as if it were set out directly and repetitively within each statute subsequently enacted. For statutes enacted after § 1658 it takes a positive enactment by Congress to replace that four-year statute of limitations with some other period. Congress did not do so in the TCPA.

The Court's constriction of the appropriate statute of limitations for a TCPA claim is reinforced by the fact that the TCPA is much like the Truth in Lending Act, Fair

Credit Reporting Act, and similar remedial consumer protection statutes, and as such "should be construed liberally in favor of the consumer." Ramadan v. Chase Manhattan Corp., 156 F.3d 499, 502 (3d Cir. 1998) (Truth in Lending Act); accord Begala v. PNC Bank, Ohio, N.A., 163 F.3d 948, 950 (6th Cir. 1998) ("We have repeatedly stated that TILA is a remedial statute and, therefore, should be given a broad, liberal construction in favor of the consumer.") The very first paragraph of the Missouri Revised Statues 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. Other courts have expressly recognized the remedial nature of the TCPA. Jemiola v. XYZ Corp., 2003 TCPA Rep 1252, 2003 WL 23010146 (Ohio C.P. Dec. 11, 2003); Davis, Keller, Wiggins, LLC. v. JTH Tax, Inc., 2001 TCPA Rep. 1040 (Mo. Cir. Aug. 28, 2001). Such a remedial construction is a long-established principle:

> [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*.

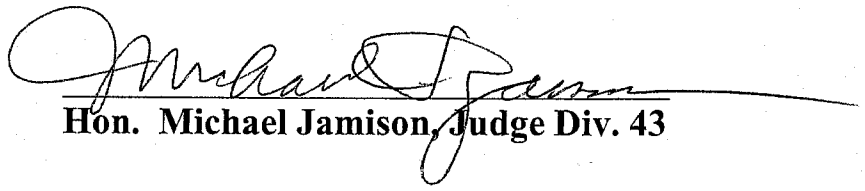
Heydon's Case, 3 Co. Rep. 7a, 7b; 76 Eng. Rep. 637, 638 (1584) (cited in Cummins v. Kansas City Public Service Co., 334 Mo. 672, 698-99 (Mo. banc 1933)). Excluding the TCPA from the provisions of § 1658 is inconsistent with the intent of Congress, the interests of consumers, and the remedial construction proper for the TCPA.

CONCLUSION

The Court holds that the four-year statute of limitations set out in 28 U.S.C. §

1658 applies to actions brought under the TCPA. Defendant's other arguments are not persuasive. This Court further finds that the existence a class action in another jurisdiction, short of a judgment encompassing the Missouri Plaintiff does not create prejudice to the Defendant nor deprive Missouri Courts of jurisdiction over claims of Missouri plaintiffs. For the reasons stated herein, Defendant's motion is DENIED.

IT IS SO ORDERED, this the 22nd day of January, 2004.



Hon. Michael Jamison, Judge Div. 43