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February 8, 2005

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

Re: In the Matter of ccAdvertising Petition for Expedited Declaratory Ruling
CG Docket No. 02-278, DA 04-3187

Dear Ms. Dortch:

On February 3, 2005, the Office of Attorney General of the State of North Dakota (the "State") submitted for filing in the above-referenced proceeding a copy of the February 2, 2005 Opinion and Order ("Opinion") in *State of North Dakota ex rel. Stenehjem v. FreeEats.com, Inc.*, an enforcement action brought by the State against FreeEats.com, Inc. d/b/a ccAdvertising ("ccAdvertising"), Petitioner in this proceeding.

In the Opinion (a copy of which also is attached hereto), the Honorable Gail Hagerty, District Judge, Burleigh County District Court (the "Court"), granted the State's Motion for Summary Judgment with respect to the liability portion of the case, finding, *inter alia*, that "the Telephone Consumer Protection Act does not preempt North Dakota law." In its treatment of the preemption issue, the Court relies exclusively on a 1995 decision by the 8th Circuit Court of Appeals, *Van Bergen v. Minnesota*.¹ According to the Court, its reliance on *Van Bergen* is warranted because that case "addressed the very issues presented" in the State's enforcement action. Opinion at 3. Based on fundamental flaws in the Court's reasoning, and because the

¹ 59 F.3d 1541 (8th Cir. 1995).

Opinion (which ccAdvertising plans to appeal) never addresses the specific issue raised by ccAdvertising in its Petition for Declaratory Ruling in CG Docket No. 02-278 (the “Petition”), the Opinion should have no effect on the Commission’s consideration of the Petition.

At issue in the State’s enforcement action against ccAdvertising – and in ccAdvertising’s Petition – is whether North Dakota law as applied to ccAdvertising’s *interstate* political polling calls is preempted by federal law. In contrast, in *Van Bergen* the nature of the calls was never revealed; consequently, the 8th Circuit did not address the issue of preemption as applied to interstate calls.

The Court’s conclusion that *Van Bergen* “addressed the very issues presented” in the State’s action against ccAdvertising is curious, because it cannot be reconciled with the Court’s finding that *Van Bergen* was inconclusive with respect to whether interstate or intrastate calls were at issue in that case. According to the Court, the nature of the calls in *Van Bergen* “was not explicitly stated, or even implied.” Opinion at 6. To buttress this finding, the Court noted that in *Van Bergen* the plaintiff “did not even place any calls, he sought an injunction [against enforcement by the State of Minnesota] before placing them.” *Id.*

Assuming the Court is correct that the nature of the calls at issue in *Van Bergen* was not explicit, “or even implied,” then the Court’s reliance on that decision is misplaced, and its finding that the issues before it are “the very issues” before the *Van Bergen* court, is illogical. Having determined that the nature of the calls in *Van Bergen* could not be determined, the Court should not have relied on that case, but rather should have produced an independent analysis of the facts and issues it was asked to address.

Moreover, the Court compounded its error by proceeding to assume that the calls in *Van Bergen* – had any been placed – *would have been* interstate calls. See Opinion at 6. In doing so, the Court repeated the mistake that the State made in its Comments to the Commission on ccAdvertising’s Petition. As another commenter has shown, however, the State “apparently did not notice that the court in *Van Bergen* ... read the savings clause [in the Telephone Consumer Protection Act] to preserve from preemption only state rules covering intrastate calls, directly contrary to North Dakota’s [and now the Court’s] interpretation.”² The Court failed to address this issue. The Court likewise failed to consider that “*Van Bergen*’s conclusion that the TCPA

² Reply Comments of Hypotenuse, Inc./SurveyUSA in Support of Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, Nov. 17, 2004, at 27.

was intended to 'supplant state law' only makes sense if the 'state law' at issue refers to rules governing intrastate calling."³

In light of the foregoing, the Opinion should have no bearing on the Commission's consideration of the Petition. It is for the Commission to determine in this proceeding whether North Dakota's statute can apply to interstate calls.

Sincerely,



E. Ashton Johnston

EAJ/jas

Attachment

cc: Hon. Wayne Stenehjem, Attorney General, State of North Dakota

³ *Id.* at 27-28. See also Comments of the Direct Marketing Association, CG Docket No. 02-278, at 6-7.

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

Case No. 04-C-1694

State of North Dakota ex rel. Wayne
Stenehjem, Attorney General,

Plaintiff,

vs.

FreeEats.com, Inc. dba The FreeEats
Companies,
ccAdvertising,
ccAdvertising.biz,
ccAdvertising.info,
ElectionResearch.com,
FECads.com, and
FECResearch.com,

Defendant.

Opinion and Order

Both the State of North Dakota (the State) and FreeEats.com, Inc. (FreeEats) have requested the Court grant summary judgment in this matter. In order to decide the matter the Court must determine whether the federal Telephone Consumer Protection Act preempts Section 51-28-02 of the North Dakota Century Code and whether that section passes constitutional muster.

As explained in this opinion, the statute is not preempted, and because the statute is a content-neutral time, place, or manner restriction on speech and it does not violate constitutional free speech protection.

FACTS

This action was commenced by the North Dakota Attorney General's office, Consumer Protection & Antitrust Division. The complaint alleges FreeEats violated

North Dakota law by contacting, or attempting to contact, residents of North Dakota by telephone using an automatic dialing-announcing device (ADAD) containing a pre-recorded polling voice message. *Compl.*, ¶ 8. The telephone messages were wholly automated, no live human being was on the calling end of the telephone. *Id.*, ¶ 10. It is alleged the North Dakota telephone subscribers did not knowingly request, consent to, or authorize the automated message from FreeEats. *Id.*, ¶ 11.

The complaint asserts the messages were not from "school districts to students, parents, or employees, messages to subscribers with whom FreeEats had a current business relationship, or messages advising employees of work schedules." *Id.*, ¶ 13. For the alleged violations, the State requested injunctive relief, civil penalties, and attorney fees and costs pursuant to North Dakota law. *Id.*, ¶ 14. FreeEats does not dispute this, admitting the calls were noncommercial political polling calls automatically placed by FreeEats in Virginia. *See Aff. Gabriel Joseph, III*, November 11, 2004.

Both parties filed motions for summary judgment. FreeEats claims, because (1) the calls were placed outside of North Dakota and (2) were noncommercial in nature, North Dakota law is preempted by the federal Telephone Consumer Protection Act (TCPA). FreeEats also argues the statute violates the First Amendment's free speech guarantees.

The State asserts the North Dakota law prohibiting most pre-recorded phone messages is not preempted by federal law and is not unconstitutional. The State also claims liability should be rendered against FreeEats as a matter of law because FreeEats has already admitted it made ADAD telephone calls in violation of North Dakota law.

LAW AND ANALYSIS

In their briefs, the parties address two main issues: Preemption and constitutional concerns. The presumption against federal preemption is strong, unless Congress clearly intended to do so. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). In the same light, finding a North Dakota statute unconstitutional is difficult. In order for a statute to be held unconstitutional under the State Constitution, four of the five justices of the North Dakota Supreme Court must agree.

Federal Preemption

As stated, the presumption against federal preemption is strong. States have historically regulated against unfair business practices. *Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 879-80 (8th Cir. 2002). Consumer protection laws enjoy a stronger presumption against preemption. *Black v. Financial Freedom Senior Funding Corp.*, 92 Cal. App. 4th 917, 926 (Cal. App. 2001) (holding "unfair business practices are included within the states' police power, and are thus subject to this heightened presumption against preemption"). Even the FCC has stated "states have a long history of regulating telemarketing practices." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1992*, 68 Fed. Reg. 44154, ¶ 53.

The Eighth Circuit Court of Appeals has addressed the very issues presented here. *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995). In *Van Bergen* the Eighth Circuit held the Minnesota ADAD statute was not preempted by the TCPA.

The Minnesota statute read, as it does today:

A caller shall not use or connect to a telephone line an automatic dialing-announcing device unless: (1) the subscriber has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of

the message; or (2) the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 325E.30 do not apply to (1) messages from school districts to students, parents, or employees, (2) messages to subscribers with whom the caller has a current business or personal relationship, or (3) messages advising employees of work schedules.

Minn. Stat. § 325E.27 (1995); *Van Bergen*, 59 F.3d at 1546. Section 51-28-02 of the North Dakota Century Code states, in virtually identical language to § 325E.27:

A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 51-28-05 do not apply to messages from school districts to students, parents, or employees, messages to subscribers with whom the caller has a current business relationship, or messages advising employees of work schedules.¹

The same analysis used to find Minnesota's ADAD statute valid should be used here.

Van Bergen involved political ADAD telephone calls. Van Bergen, a candidate for governor of Minnesota, planned to use inexpensive ADAD calls to reach potential voters. *Van Bergen*, 59 F.3d at 1546. The Minnesota Attorney General's office, however, informed Van Bergen the ADAD statute would apply to the noncommercial political type calls he was planning on placing. *Id.* Van Bergen then applied for, and was denied, a temporary restraining order against the enforcement of the statute. He appealed the decision.

The Eighth Circuit analyzed whether the statute was preempted by the Federal TCPA. The Court cited the savings clause of the TCPA, stating state laws are not preempted if the State "imposes more restrictive intrastate requirements or regulations

¹ In addition to Minnesota and North Dakota, at least four other states currently have similar provisions in their statutes prohibiting noncommercial interstate ADAD calling. Burns Ind. Code Ann. § 24-5-14-1 to 5 (2004); R.I. Gen. Laws § 5-61-3.4 (2004); S.C. Code Ann. § 16-17-446 (2003); Tenn. Code Ann. § 47-18-1502 (2004).

on, or which prohibits-- . . . (B) the use of automatic telephone dialing systems” *Van Bergen*, 59 F.3d at 1547 (quoting 47 U.S.C. § 227(e)(1)). There was no express preemption of the Minnesota statute found in the TCPA by *Van Bergen*. *Id.* at 1547-48. The TCPA simply does not state more restrictive state laws are preempted, only that more restrictive intrastate requirements are not preempted. If Congress wanted to expressly preempt state ADAD laws it would have done so explicitly.

The TCPA did not preempt the Minnesota statute by implication. *Van Bergen*, 59 F.3d at 1548. While it is possible for federal law to preempt state law by implication, the TCPA was found not to carry such an implication. *Id.* The Court stated: “If Congress intended to preempt other state laws, that intent could easily have been expressed as part of [the savings clause].” *Id.* The Court held Congress did not intend to “‘occupy the field’ of ADAD regulation . . . or to promote national uniformity of ADAD regulation, as it expressly does not preempt state regulation of intrastate ADAD that differs from federal regulation.” *Id.* The Minnesota statute was not preempted for this reason, nor should the nearly identical North Dakota statute be preempted.

The Minnesota statute did not conflict with the TCPA. *Van Bergen*, 59 F.3d at 1548. Only two differences were found between the TCPA and the “virtually identical” Minnesota statutes: 1) the TCPA exempts only emergency calls, and the Minnesota statute exempts callers with prior personal or business relationship from restrictions on ADAD calls; 2) The TCPA only applies to residences and specified businesses, such as hospitals, and the Minnesota statute applies to both residences and businesses. *Id.* at 1548. Recognizing the variations, the Court cited to a provision in the TCPA where Congress authorized the FCC to consider: “the inclusion of

businesses in the locations to which ADAD calls are limited; and the exemption of calls that do not adversely affect privacy rights, among which may be calls from those with whom a prior business or personal relationship exists." *Id.* The Court found "it was clear that the Minnesota statute and the TCPA [were] designed to promote an identical objective, and that there [was] nothing in the two statutes that create[d] a situation in which an individual [could not] comply with one statute without violating the other." *Id.* The same is true for the North Dakota statute.

FreeEats argues *Van Bergen* interpreted only the *intrastate* implications of the Minnesota ADAD statute, not the *interstate* implications. This alleged fact was not explicitly stated, or even implied, in *Van Bergen*. Van Bergen did not even place any calls, he sought an injunction before placing them. The State's explanation of this omission here is persuasive; why would the Eighth Circuit even need to address federal preemption if the calls had been made intrastate? The savings clause would then *clearly* allow for state regulation of intrastate ADAD calls, making the need to address preemption a waste of the Court's time.

First Amendment

FreeEats argues Section 51-28-02 violates its right to freedom of speech guaranteed by the First Amendment. *Van Bergen* held Minnesota's ADAD statute constitutional. As both state's ADAD provisions are nearly identical, the same rationale in *Van Bergen* should be applied here to find the statute constitutional.

The statute is content-neutral, despite FreeEats' assertion it is not. FreeEats asserts the exceptions to the ADAD statute allowing schools, employers, and those with current business relationships to use ADAD technology to contact those subscribers is "content based" and "speaker based." This rationale is incorrect.

Government is permitted to place "reasonable restrictions on the time, place or manner of engaging in protected speech" as long as the regulations are "without reference to the content of the regulated speech." *Van Bergen*, 59 F.3d at 1550 (quoting *Ward v. Rock Against Racism*, 497 U.S. 781, 791 (1989)).

The relationship between the caller and subscriber is determinative, not content. "Caller" was defined by Minnesota statute as "a person, corporation, . . . or commercial entity who attempts to contact, or who contacts, a subscriber in this state by using a telephone or a telephone line." Minn. Stat. § 325E.26 subd. 3. North Dakota defines a "caller" using virtually identical language. (*Section 51-28-01(2)*). In Minnesota "message" is defined "as including any call, regardless of its content." M.S.A. § 325E.26 subd. 6. North Dakota uses virtually identical language. (*Section 51-28-01(5)*).

The basis for the restrictions, both in Minnesota and North Dakota, is not on the basis of the content of their messages, rather it is on the basis of their relationship with the subscriber. *Van Bergen*, 59 F.3d at 1550. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). In addition, these exceptions all rest on the single premise that the caller has a current relationship with the subscriber, implying the subscriber's consent to receive ADAD calls. *Id.* Section 51-28-01 is content-neutral.

Van Bergen also addressed whether the content-neutral time, place, or manner restriction on the statute was "narrowly tailored to serve a significant government interest." The Court concluded it was narrowly tailored and provided

adequate alternatives to communication. *Van Bergen*, 59 F.3d at 1553-54. It declared residential privacy was a significant government interest. "[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." *Id.* at 1554 (citation omitted). The Court concluded: "Moreover, we do not believe that external evidence of the disruption ADAD calls can cause in a residence is necessary: It is evident to anyone who has received such unsolicited calls when busy with other activities." *Id.*

ADAD calls intrude on the privacy and peacefulness of the home and the efficiency of the workplace. *Id.* at 1555. They do not provide the telephone subscriber the ability not to receive such calls. *Van Bergen* held "the government has a substantial interest in limiting the use of unsolicited, unconsented-to ADAD calls." *Id.*

Van Bergen next concluded the substantial interest the government had in restricting ADAD calls was narrowly tailored and provided ample alternative channels for communication (e.g. a live operator can call the subscriber). *Id.* at 1555-56. The statute did not foreclose an entire medium of communication. *Id.* at 1555. The limits on ADAD calls were deemed to be designed to fix perceived problems with the liberal use of the technology. "ADADs are a new technology, and people have been campaigning for elective office, soliciting for charities, spreading religious messages, and selling products for centuries without the benefit of these machines." *Id.* at 1556.

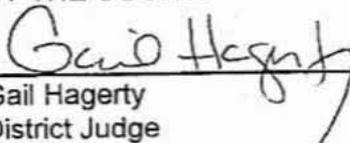
The North Dakota ADAD statute is narrowly tailored to the governmental interests of protecting the privacy and tranquility of the private home and efficient workplace. The ability to place a telemarketing phone call to a resident of North Dakota is not foreclosed by the ADAD statute.

Conclusion

The State's motion for summary judgment is **granted**. FreeEats' motion for summary judgment is **denied**.

Dated February 2, 2005.

BY THE COURT:



Gail Hagerty
District Judge

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
Case No. 04-C-1694

State of North Dakota ex rel. Wayne
Stenehjem, Attorney General,

Plaintiff,

vs.

FreeEats.com, Inc. dba The FreeEats
Companies,
ccAdvertising,
ccAdvertising.biz,
ccAdvertising.info,
ElectionResearch.com,
FECads.com, and
FECResearch.com,

Defendant.

Affidavit of Mailing

04-C-1694

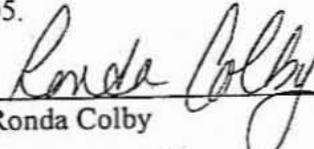
I, Ronda Colby, being duly sworn, depose and say that I am a United States citizen over 21 years of age, and on the 2nd day of February, 2005, I deposited in a sealed envelope true copies of the attached:

OPINION AND ORDER

in the United States mail at Bismarck, North Dakota, postage prepaid and addressed to:

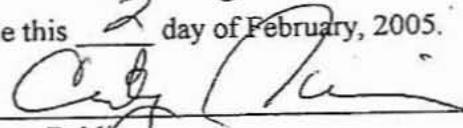
Lawrence King, PO Box 1695, Bismarck, ND 58502.
Emilio Cividanes, 1200 19th St NW, Washington, DC 20036-2430.
James Thomas, PO Box 1054, Bismarck, ND 58502.

Dated this 2nd of February, 2005.



Ronda Colby

Subscribed and sworn to before me this 2 day of February, 2005.



Notary Public
Burleigh County, North Dakota
My Commission Expires: 4/12/08