IN THE SUPREME COURT OF OHIO

CASE NO. 06-1302

STANLEE E. CULBREATH

Appellant

vs.

GOLDING ENTERPRISES LLC, et al.

Appellant

On Appeal from
Court of Appeals of Franklin County,
Tenth Judicial District
Case No. 05APE-11-1230

MEMORANDUM OF *AMICUS CURIAE* TELEPHONE CONSUMER RIGHTS BAR ASSOCIATION OF OHIO, IN SUPPORT OF APPELLANT STANLEE E. CULBREATH

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INTEREST OF AMICUS

The *amicus curiae*, the **Telephone Consumer Rights Bar Association of Ohio**, is an organization of attorneys working to protect the rights of the consumers and small businesses against the invasion of their homes and offices by unwanted telemarketing calls, "junk fax" advertisements, and unsolicited "spam" e-mail. The organization has filed this *Amicus Curiae* brief, due to the unique nature of this case, the significant implications for future plaintiffs, and the assistance which this Court will receive from the combined knowledge of the membership of the organization.

In his merit brief filed in this court, Appellant Culbreath has addressed many aspects of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, and particularly with regard to the scope of the private right of action under the statute. In fact, this issue is currently among the most important issues in the field of litigation under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. Furthermore, as noted in *Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 515 (3rd Cir.1998), it is the right of private enforcement of the TCPA by individual plaintiffs that "puts teeth into the statute."

Hence, the outcome of this case is of direct and major concern to this organization, since nearly all members of this organization are actively involved in litigation under the TCPA as well as the Ohio Consumer Sales Practices Act (CSPA), R.C. Ch. 1345. This honorable Court will directly benefit from the input and expertise of the **Telephone Consumer Rights Bar Association of Ohio**, since the resolution of

this case has the potential to be a landmark legal precedent. Amicus believes that, via this brief, this Court will be able to have a broader and clearer perspective in making its decision in the instant case.

STATEMENT OF FACTS

Amicus hereby accepts, and incorporates by reference, the Statement of Facts, as written and stated by Stanlee E. Culbreath, on behalf of himself and the class he seeks to represent.

ARGUMENT

Proposition of Law No. 1

The Telephone Consumer Protection Act provides a private Right of Action to Any Person Who Receives an Unsolicited Advertisement by Fax, for Each Violation of the TCPA and its Related Regulations arising from the Transmission of the subject Fax Advertisement by the Sender.

The Telephone Consumer Protection Act (TCPA) prohibits the sending of any advertisement message by fax "unless such message clearly contains, in a margin at the top or bottom of each transmitted page or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual." 47 U.S.C. § 227(d)(1)(B). This statutory language is clear on its face, and leaves no room for interpretation.

Furthermore, pursuant to the TCPA, all senders of fax advertisements are also governed by a similar regulation of the Federal Communications Commission, stating (in pertinent part):

"It shall be unlawful for any person within the United States to use a computer or other electronic device to send any message via a telephone facsimile machine unless such message clearly contains, in a margin at the top or bottom of each transmitted page or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual." 47 C.F.R. § 68.318(d).

In the instant case, it was undisputed that Appellee's faxed advertisement did not identify the person or entity who sent the fax; indicate the date or time that it was transmitted, or disclose the telephone or fax number of the sender. The TCPA's private right of action explicitly grants a private right of action for the above violations, pursuant to the following unambiguous language:

> "A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State —
>
> "(A) an action ***based on a violation of this subsection or the regulations prescribed under this subsection*** to enjoin such violation,
>
> "(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages ***for each such violation***, whichever is greater, or
>
> "(C) both such actions " (emphasis added)

This indicates that a fax advertisement sent in violation of the statute's provisions, which also fails to include the mandatory disclosures of name, telephone number, date and time, as required by the FCC regulations, would constitute two distinct violations, and be subject to separate damages for each violation. See, e.g., *Schraut v. Rocky Mtn. Reclamation*, 2001 TCPA Rep. 1182 (Mo. Cir. Ct., Dec. 18, 2001); *Singer v. BFS Capital,* Case No. 05 CV 000988 (Lake C.P., Dec. 1, 2005); *McKenna v. Accurate Computer Services, Inc.*, 2002 TCPA Rep. 1135 (Colo. Dist. Feb. 24, 2003), at 5-6 & n.1; *Sterling Realty Co. v. Klein,* 2005 TCPA Rep. 1353 (N.J. Super Mar. 21, 2005), at 3-4. It was an unambiguous error for the Lower Court and the Appellate Court to reject Appellant's claim for damages for the above-described violations of the FCC's disclosure regulation.

Consumers are entitled to protection from deceptive and improperly identified junk faxes. In light of the volume of unwanted unsolicited junk faxes that burden small businesses and consumers, it is appropriate and sound public policy for congress to prescribe laws to prevent such abuse of their telephone lines.

The Telephone Consumer Protection Act (TCPA) itself authorizes the Federal Communication Commission (FCC) to promulgate rules and regulation to enforce the TCPA. 47 U.S.C. § 227 (b)(2) provides: "(t)he [Federal Communications] Commission **shall** prescribe regulations to implement the requirements of this subsection." In furtherance of the TCPA's goals, the FCC issued regulations forbidding deceptive and unidentified junk faxes.

This is clear from the fact that 47 C.F.R. § 68.318 was adopted by the FCC pursuant to 47 U.S.C. § 227(b)(2) of the TCPA statute. 47 U.S.C. § 227(b)(2) is

absolutely clear in its declaration to the FCC: "The [Federal Communications] Commission ***shall*** prescribe regulations to implement the requirements of this subsection" (emphasis added). Hence, since the FCC's disclosure regulations were adopted ***as part of*** 47 C.F.R. § 68.318, it is beyond question that they were therefore adopted pursuant to the authority of subsection (b) of 47 U.S.C. § 227. [1] It is unambiguously stated in 47 U.S.C. § 227(b)(A) that a plaintiff has a cause of action, under the TCPA, for any violation of the statute and/or ***"the regulations prescribed under this subsection"*** (emphasis added). Thus, the Appellant has pleaded a valid cause of action, based upon Appellee's failure to clearly identify the name of the business, entity, or individual sending the fax advertisement at issue, whereby Appellee is liable to Appellant Culbreath pursuant to 47 C.F.R. § 68.318(d) and 47 U.S.C. § 227(b)(3). Hence, it was unambiguous error for the Lower Court to grant Appellees' motion for summary judgment, and/or to deny the Appellant's motion for summary judgment in regard to Appellant's claims under the TCPA regulations. Hence, the Appellate court should have reversed the decision of the Lower court. Amicus respectfully submits that Mr. Culbreath should be held to have a right of action under the TCPA regulations against Appellees' violation of the law.

Proposition of Law No. 2

The Ohio Consumer Sales Practices Act authorizes a Right of Action for any "Person" who is a "Consumer", against senders of Illegal Unsolicited Advertisements by Fax.

The sending of unsolicited advertisements by facsimile ("fax") has been held to be a violation of R.C. § 1345.02(A) of the Ohio Consumer Sales Practices Act ("CSPA"), if

[1] Specifically, 47 U.S.C. § 227(b)(2).

sent without the prior express consent of the recipient. *See,* e.g., *Jemiola v. XYZ Corporation,* 126 Ohio Misc. 68, 2003-Ohio-7321 (Cuyahoga C.P. 2003), at ¶ 21. In addition, Ohio courts have found that any violation of the TCPA is also a breach of R.C. § 1345.02(A) of the CSPA. *See,* e.g., *Bransky v. Shahrokhi,* 2005-Ohio-79, 2005 WL 77084, 2005 TCPA Rep. 1349 (Cuyahoga App. 2005).

The appellant's Complaint alleges that on or about May 4, 2005, appellant Stanlee E. Culbreath received an unsolicited advertisement via fax, sent by or on behalf of Appellees, in violation of R.C. §§ 1345.02(A) and 1345.09 of the Ohio CSPA statute. *See,* R. 13, Complaint, No. 9 of Lower Court's Case History Index. It is undisputed that he received the fax at his law office, and that this fax promoted a strip club known as "Dockside Dolls".

The Ohio CSPA defines a "consumer transaction" as meaning: "a sale, lease, assignment, award by chance, or other transfer of an item of goods, ***a service,*** a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or ***a solicitation to supply*** any of these things" R.C. § 1345.01(A) (emphasis added). It is uncontested that the subject fax advertisement is a "solicitation" within the meaning of the CSPA.

Appellees contend that Mr. Culbreath does not have standing to sue under the CSPA statute. However, as shall be hereinafter shown, Appellees are asking this honorable Court to disregard the plain language of the applicable statute.

R.C. § 1345.09 of the CSPA provides that: "For a violation of Chapter 1345 of the Revised Code, ***a consumer*** has a cause of action ***and is entitled to relief***". Hence,

pursuant to R.C. § 1345.09, ***"a consumer"*** has standing to be awarded damages under the Ohio CSPA (emphasis added).

R.C. §1345.01(D) of the CSPA defines a "consumer" as being "a ***person*** who engages in a consumer transaction with a supplier". R.C. § 1345.01(B) defines a ***"person"*** as being "an individual, corporation, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or other legal entity" (emphasis added).

Accordingly, Mr. Culbreath is a "consumer" within the scope of R.C. §1345.01(B). The CSPA defines a "consumer" as a "person". R.C. § 1345.01(D). "[A] ***consumer*** has a cause of action ***and is entitled to relief***". R.C. § 1345.09 (emphasis added).

The Consumer Sales Practices Act has No Requirement that, in order for a Solicitation to be Actionable, a Consumer must receive the Solicitation at Home or on the Street.

The CSPA allows ***any*** "consumer" to bring a CSPA claim on the basis of a "solicitation" which violates the statute. R.C. § 1235.01(A) and (D). There is ***no*** requirement that a consumer receive the solicitation at home or on the street.

Nor is there any provision of the CSPA which prohibits a consumer from bringing a cause of action on the basis of a solicitation merely because the consumer received the solicitation at his office, rather than at home or on the street, as long as the solicitation is an offer to supply goods or services which are primarily for "personal, family, or household" use. The law is clear on its face, and leaves no room for contortion.

A purchase of a pizza is a "consumer transaction" since it involves a purchase of goods which are primarily for "personal, family, or household" use. If the owner of a

small business makes a call to a restaurant, and has a pizza delivered to his office, and he later becomes seriously ill due to rotten ingredients or unsanitary food preparation, it is beyond doubt that he would have a valid CSPA claim against the restaurant, notwithstanding that the pizza was delivered to him at his office.

It is no different in the instant case. Mr. Culbreath is a "consumer" within the definition of R.C. §1345.01(D) and R.C. §§ 1345.01(B). He received a faxed solicitation for the "Dockside Dolls" strip club. The fax was sent in violation of the TCPA and CSPA. Appellant therefore has a valid cause of action under the CSPA. The identical conclusion was reached by the court in *Goldberg v. Empire Mtg. Inc.*, 2004 WL 3237126, 2004 TCPA Rep. 1377 (Franklin C.P., Dec. 7, 2004).

R.C. § 1345.09 of the CSPA provides that: "For a violation of Chapter 1345 of the Revised Code, ***a consumer*** has a cause of action and ***is entitled to relief***". Hence, pursuant to R.C. § 1345.09, any ***"consumer"***, including Mr. Culbreath has standing to sue under the Ohio CSPA (emphasis added).

Mr. Culbreath did not authorize or request this faxed solicitation. He therefore has a valid claim under the CSPA, notwithstanding that he received the fax at his business office. It is uncontroverted that the services offered by Appellees are primarily "personal" in nature, no different than any other restaurant or bar.

The Appellate Court wholly misinterpreted the meaning of the terms "Consumer" and "Person" as used within the Ohio Consumer Sales Practices Act.

In its May 25, 2006 Opinion, the Appellate Court ignored the undisputed affidavit of Mr. Culbreath that he was the recipient of Appellees' fax. Instead, the Appellate Court arbitrarily ruled that Mr. Culbreath's *law firm* was the recipient of the subject fax.

On the basis of this unsupported assertion, the Appellate Court then ruled that the CSPA only protects "individuals". More specifically, the Court held: "Because Culbreath & Associates, LPA is not a ***natural person***, the trial court did not err in finding plaintiff's claims not actionable under the OCSPA." R. 48, App. Opinion, May 25, 2006, at ¶27 (emphasis added).

However, the Court clearly erred in its interpretation, since the CSPA ***does not*** limit the term "person" to ***only*** "natural persons". As noted above, the CSPA specifically defines the word "person" to include: "an individual, corporation, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or other legal entity". R.C. §1345.01(B). The statute ***does not*** limit standing to "natural persons" or "individuals".

If this Court were to interpret the term "individual" in R.C. § 1345.01(A) as only allowing "natural persons" to sue under the CSPA, it would be effectively ***obliterating*** R.C. § 1345.01(B) of the statute. Furthermore, when R.C. §1345.01(A) is viewed in pari material with the remainder of the statute, it is clear that the legislature was using the term "individual" interchangeably with the word "person".

Appellees' interpretation of the CSPA would render the words "person" and "consumer" superfluous, ***despite*** being clearly defined therein. Such a result contravenes the fundamental rule of statutory construction contained in R.C. 1.47(B), which provides that the General Assembly, in enacting a statute, intends that "the ***entire*** statute is intended to be effective" (emphasis added).

It is a well-settled rule of statutory construction that an entire statute must be read together because no part of it is superior to any other part. "A statute is passed as a whole

and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." 2A Singer, Sutherland, *Statutory Construction* § 46:05, at 154 (6th ed. 2000). *See also*, e.g., *Rice v. Certainteed Corp.*, 84 Ohio St. 3d 417, 419 (1999) ("Even if the word were ambiguous, a 'holistic approach' to statutory construction confirms that a seemingly indistinct provision is often clarified by the remainder of the statutory scheme");

In the instant case, the convoluted interpretation of the CSPA by the Appellate Court is at odds with the plain text as well as the entire basic purpose of the CSPA statute. It is long settled that the central purpose of the CSPA is to provide consumers with "strong and effective" remedies against unfair or deceptive business practices. *Einhorn v. Ford Motor Co.*, 48 Ohio St.3d 27, 30 (1990). The transmission of unsolicited fax advertisements has been held to be unfair and deceptive, within the meaning of the CSPA. *See,* e.g., Jemiola v. XYZ Corp., supra, 126 Ohio Misc.2d 68 at ¶ 21. Amicus respectfully submits that Mr. Culbreath should be held to have a right of action under the CSPA against Appellee's violation of the law in order to further the underlying objectives of the CSPA, which include the vindication of consumers' rights to be free from invasive junk fax advertising campaigns.

The TCPA and CSPA are Remedial Statutes and, Therefore, they Must Be Construed Liberally in Favor of Consumers.

The TCPA and CSPA are remedial laws. "Legislation providing means or method whereby causes of action may be effectuated, wrongs redressed and relief obtained is remedial." *Black's Law Dictionary* (6th ed., 1991). It is well-settled that a remedial

statute must be "construed ***broadly*** to effectuate its purposes". *Tcherepnin v. Knight*, 389 U.S. 332, 335 (1967) (emphasis added); *Jemiola v. XYZ Corporation*, supra, ¶ 22; *Einhorn v. Ford Motor Co., supra,* 48 Ohio St.3d at 30. The judgment of the Appellate Court is a narrow interpretation of the TCPA and CSPA, ***not*** a broad interpretation.

This honorable Court, in *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1995), held that a party seeking summary judgment must "specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims." Appellee did not meet this fundamental initial burden. Appellees' motion was supported ***entirely*** by conclusory assertions.

Appellee submitted ***no*** affidavit or other competent evidence in support of its arguments. In contrast, Appellant submitted a sworn affidavit, directly supported by relevant caselaw. "[I]f the adverse party contends otherwise, an opposing affidavit setting forth the appropriate facts must be submitted." *State ex rel Corrigan v. Seminatore,* 66 Ohio St.2d 459 (1981).

However, the Appellant's affidavit is uncontradicted by any evidence or testimony. In addition, the Appellee's assertions of law and fact, in the instant case, are strongly disputed by the applicable caselaw and the sworn affidavit submitted by Mr. Culbreath.

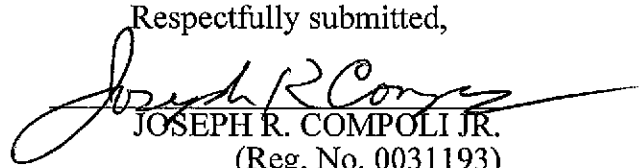
Hence, it was unambiguous error for the Lower Court to grant Appellees' motion for summary judgment, and/or to deny the Appellant's motion for summary judgment in regard to Appellant's claims under the TCPA regulations and the Ohio CSPA statute. Hence, the Appellate court should have reversed the decision of the Lower court.

Amicus respectfully submits that Mr. Culbreath should be held to have a right of action under the TCPA regulations and the Ohio CSPA against Appellees' violation of the law.

CONCLUSION

WHEREFORE, for all of the reasons stated above, Amicus Curiae **Telephone Consumer Rights Bar Association of Ohio** respectfully urges that this honorable Court reverse the May 25, 2006 Opinion and Judgment of the Court of Appeals of Franklin County, and instruct the said Court to enter summary judgment in favor of Appellant as to all claims in Appellant's complaint.

Respectfully submitted,



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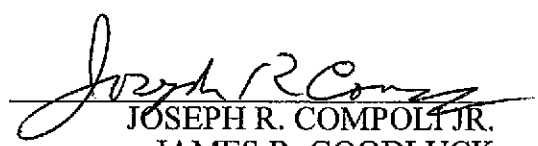

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APPENDIX

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[**CITE: 47USC227**]

TITLE 47--TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5--WIRE OR RADIO COMMUNICATION

SUBCHAPTER II--COMMON CARRIERS

Part I--Common Carrier Regulation

Sec. 227. Restrictions on use of telephone equipment.

(a) Definitions

As used in this section--

(1) The term ``automatic telephone dialing system'' means equipment which has the capacity--

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term ``telephone facsimile machine'' means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(3) The term ``telephone solicitation'' means 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, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(4) The term ``unsolicited advertisement'' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

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

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--

(i) to any emergency telephone line (including any ``911'' line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

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

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission--

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

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

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines--

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

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

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect.

(3) Private right of action

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

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

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

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall--

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific ``do not call'' systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall--

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall--

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and--

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State--

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b) of this section.

(d) Technical and procedural standards

(1) Prohibition

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

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that--

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(f) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) ``Attorney general'' defined

As used in this subsection, the term ``attorney general'' means the chief legal officer of a State.

(June 19, 1934, ch. 652, title II, Sec. 227, as added Pub. L. 102-243, Sec. 3(a), Dec. 20, 1991, 105 Stat. 2395; amended Pub. L. 102-556, title IV, Sec. 402, Oct. 28, 1992, 106 Stat. 4194; Pub. L. 103-414, title III, Sec. 303(a)(11), (12), Oct. 25, 1994, 108 Stat. 4294.)

Amendments

1994--Subsec. (b)(2)(C). Pub. L. 103-414, Sec. 303(a)(11), substituted ``paragraph'' for ``paragraphs''.

Subsec. (e)(2). Pub. L. 103-414, Sec. 303(a)(12), substituted ``national database'' for ``national datebase'' after ``such single''.

1992--Subsec. (b)(2)(C). Pub. L. 102-556 added subpar. (C).

Effective Date; Deadline for Regulations

Section 3(c) of Pub. L. 102-243, as amended by Pub. L. 102-556, title I, Sec. 102, Oct. 28, 1992, 106 Stat. 4186, provided that:

``(1) Regulations.--The Federal Communications Commission shall prescribe regulations to implement the amendments made by this section [enacting this section and amending section 152 of this title] not later than 9 months after the date of enactment of this Act [Dec. 20, 1991].

``(2) Effective date.--The requirements of section 227 of the Communications Act of 1934 [this section] (as added by this section), other than the authority to prescribe regulations, shall take effect one year after the date of enactment of this Act [Dec. 20, 1991].''

[Code of Federal Regulations]
[Title 47, Volume 3]
[Revised as of October 1, 2002]
From the U.S. Government Printing Office via GPO Access
[CITE: 47CFR68.318]

[Page 360-361]

TITLE 47--TELECOMMUNICATION

CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION (CONTINUED)

PART 68--CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE NETWORK--
Table of Contents

Subpart D--Conditions for Terminal Equipment Approval

Sec. 68.**318** Additional limitations.

(a) General. Registered terminal equipment for connection to those services discussed below must incorporate the specified features.

(b) Registered terminal equipment with automatic dialing capability.

(1) Automatic dialing to any individual number is limited to two successive attempts. Automatic dialing equipment which employ means for detecting both busy and reorder signals shall be permitted an additional 13 attempts if a busy or reorder signal is encountered on each attempt. The dialer shall be unable to re-attempt a call to the same number for at least 60 minutes following either the second or fifteenth successive attempt, whichever applies, unless the dialer is reactivated by either manual or external means. This rule does not apply to manually activated dialers that dial a number once following each activation.

Note to paragraph (b)(1):

Emergency alarm dialers and dialers under external computer control are exempt from these requirements.

(2) If means are employed for detecting both busy and reorder signals, the automatic dialing equipment shall return to its on-hook state within 15 seconds after detection of a busy or reorder signal.

(3) If the called party does not answer, the automatic dialer shall return to the on-hook state within 60 seconds of completion of dialing.

(4) If the called party answers, and the calling equipment does not detect a compatible terminal equipment at the called end, then the automatic dialing equipment shall be limited to one additional call which is answered. The automatic dialing equipment shall comply with paragraphs (b)(1), (b)(2), and (b)(3) of this section for additional call attempts that are not answered.

(5) Sequential dialers shall dial only once to any individual number before proceeding to dial another number.

(6) Network addressing signals shall be transmitted no earlier than:

(i) 70 ms after receipt of dial tone at the network demarcation point; or

(ii) 600 ms after automatically going off-hook (for single line equipment that does not use dial tone detectors); or

(iii) 70 ms after receipt of CO ground start at the network demarcation point.

(c) Line seizure by automatic telephone dialing systems. Automatic telephone dialing systems which deliver a recorded message to the called party must release the called party's telephone line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(d) Telephone facsimile machines; Identification of the sender of the message. It shall be unlawful for any person within the United States to use a computer or other electronic device to send any message via a telephone facsimile machine unless such message clearly contains, in a margin at the top or bottom of each transmitted page or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity,

[[Page 361]]

or individual. Telephone facsimile machines manufactured on and after December 20, 1992, must clearly mark such identifying information on each transmitted message.

(e) Requirement that registered equipment allow access to common carriers. Any equipment or software manufactured or imported on or after April 17, 1992, and installed by any aggregator shall be technologically capable of providing consumers with access to interstate providers of operator services through the use of equal access codes. The terms used in this paragraph shall have meanings defined in Sec. 64.708 of this chapter (47 CFR 64.708).

[62 FR 61691, Nov. 19, 1997]

OHIO CONSUMER SALES PRACTICES ACT

1345.01. DEFINITIONS.

As used in sections 1345.01 to 1345.13 of the Revised Code:

(A) "Consumer transaction" means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. "Consumer transaction" does not include transactions between persons, defined in sections 4905.03 and 5725.01 of the Revised Code, and their customers; transactions between certified public accountants or public accountants and their clients; transactions between attorneys, physicians, or dentists and their clients or patients; and transactions between veterinarians and their patients that pertain to medical treatment but not ancillary services.

(B) "Person" includes an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or other legal entity.

(C) "Supplier" means a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not he deals directly with the consumer.

(D) "Consumer" means a person who engages in a consumer transaction with a supplier.

(E) "Knowledge" means actual awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness.

1345.02. UNFAIR OR DECEPTIVE ACTS OR PRACTICES

(A) No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.

1345.04. JURISDICTION OF COMMON PLEAS, MUNICIPAL AND COUNTY COURTS

The courts of common pleas, and municipal or county courts within their respective monetary jurisdiction, have jurisdiction over any supplier with respect to any act or practice in this state covered by sections 1345.01 to 1345.13 of the Revised Code, or with respect to any claim arising from a consumer transaction subject to such sections.

1345.09. CONSUMER'S RELIEF; ATTORNEY'S FEE.

For a violation of Chapter 1345. of the Revised Code, a consumer has a cause of action and is entitled to relief as follows:

(A) Where the violation was an act prohibited by section 1345.02 or 1345.03 of the Revised Code, the consumer may, in an individual action, rescind the transaction or recover his damages.

(B) Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02 or 1345.03 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code, the consumer may rescind the transaction or recover, but not in a class action, three times the amount of his actual damages or two hundred dollars, whichever is greater, or recover damages or other appropriate relief in a class action under Civil Rule 23, as amended.

(C) In any action for rescission, revocation of the consumer transaction must occur within a reasonable time after the consumer discovers or should have discovered the ground for it and before any substantial change in condition of the subject of the consumer transaction.

(D) Any consumer may seek a declaratory judgment, an injunction, or other appropriate relief against an act or practice that violates this chapter.

(E) When a consumer commences an individual action for a declaratory judgment or an injunction or a class action under this section, the clerk of court shall immediately mail a copy of the complaint to the attorney general. Upon timely application, the attorney general may be permitted to intervene in any private action or appeal pending under this section. When a judgment becomes final, the clerk of court shall mail a copy of the judgment including supporting opinions to the attorney general for inclusion in the public file maintained under division (A)(3) of section 1345.05 of the Revised Code.

(F) The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if either of the following apply:

(1) The consumer complaining of the act or practice that violated this chapter has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith;

(2) The supplier has knowingly committed an act or practice that violates this chapter.

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS

STATE OF MISSOURI

LOIS SCHRAUT, Plaintiff,

v.

ROCKY MOUNTAIN RECLAMATION, Defendant.

Cause No. 01AC-002848 O CV

Division 39

Decided December 18, 2001

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 granted in part and denied in part.

SYNOPSIS:

Defendant sought to dismiss plaintiff's claims for unsolicited faxes arguing that 1) the faxes were not an "advertisement" under the TCPA; 2) that there is no cause of action for the technical violations of the statute requiring date and time be denoted on all faxes; and 3) injunctive relief is inappropriate. The court held that violations of the header identification requirements in the statute were not actionable, but violations of similar requirements in the regulations were actionable under 47 U.S.C. § 227(B)(3). The court also rejected defendant's argument that goods or services must be offered "for sale" in order to be covered by the statute, and held that injunctive relief was statutory and available upon a violation of the statute.

SUBSEQUENT HISTORY:

none

PRIOR HISTORY:

none

CITED BY:

none

APPEARANCES:

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

John E. Toma, Jr., St. Louis, Missouri for defendant.

JUDGES:

Patrick J. Clifford

HOLDINGS:

[☛1] **Unsolicited Advertisement**

The TCPA only requires that the faxes "advertise the commercial availability or quality of any property, goods or services." It does not require that such property, goods, or services be "for sale."

[☛2] **Header violations (fax)**

There is no private right of action for violations of the statute's proscriptions at 47 U.S.C. § 227(d).

[☛3] **Header violations (fax)**

Violations of the FCC's regulations at 47 C.F.R. 68.318 mandating identification in the fax header are actionable under 47 U.S.C. § 227(b)(3).

[☛4] **Header violations (fax)**

It seems abundantly clear that a fax that violates both the statute and the identification requirements of the regulations is "worse" than a fax that only violates only a single proscription.

[☛5] **Header violations (fax)**

Consumers have a right to be free from unsolicited advertising faxes ,and they also have a right to receive proper identification on all faxes. A consumer who receives a call or fax violating multiple rights provided under the TCPA should recover for each right violated.

[☛6] **Remedial/Penal nature**

The TCPA is a remedial consumer protection statute.

[☛7] **Injunction - statutory**

If Plaintiff proves a violation of the statute, he will be entitled to an injunction.

OPINION:

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D-1

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION TO DISMISS

[*1] This matter came before the Court on November 6, 2001 on Defendant's motion to dismiss Plaintiff's Second Amended Petition. This is an action originally brought by Plaintiff against Defendant alleging three unsolicited facsimile advertisements were sent to Plaintiff in violation of the Telephone Consumer Protection Act ("TCPA") 47 U.S.C. § 227. Defendant seeks to dismiss the Petition arguing that 1) Defendant did not send an "advertisement" to Plaintiff; 2) that there is no cause of action for the technical violations of the statute requiring date and time be denoted on all faxes; and 3) injunctive relief is "unprecedented." The parties have filed memoranda of law and the Court has heard the arguments of both parties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Standard of Review

On a motion to dismiss, "we accept as true the facts properly pleaded, giving the averments a 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). This facts pleaded claim that Defendant sent the faxes in question to Plaintiff on August 2, 2000, January 10, 2001, and on or about June 1, 2001, and that the fax sent on or about June 1, 2001 "did not include the date and time in the header and therefore constituted a violation of 47 U.S.C. § 227(d)(1) and 47 C.F.R. 68.318(c)(3)." Second Am. Pet. at ¶ 8. These facts are assumed true for the purposes of this motion.

II. Elements of the Telephone Consumer Protection Act.

The elements of a junk fax claim under the TCPA are that a person 1) uses a telephone facsimile machine, computer, or other device 2) to send an unsolicited advertisement. Plaintiff has properly alleged that Defendant sent the faxes at issue, and copies of the faxes are attached to the Petition, and Defendant's motion. The first question is whether or not the facsimile contains an "unsolicited advertisement." This issue must ordinarily be resolved in favor of Plaintiff in a motion to dismiss, since he has sufficiently plead that the faxes are "unsolicited advertisements" as defined by the statute. However, since the faxes at issue are already before the Court, and in that the statute contains an ample definition of "unsolicited advertisement," it is a straightforward application of the law to the facts that would normally need to be tested in a motion for summary judgment. The Court will thus reach this question in the interest of judicial economy.

A. Definition of "unsolicited advertisement"

The statute defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services." The faxes at issue certainly fit this definition. Defendant is engaged in a commercial enterprise. On their face, the faxes are for the purpose of furthering that commercial enterprise, and do so by announcing that Defendant is offering to buy and sell used refrigerant. Used refrigerant clearly is within the meaning of "property, goods, or services."

So is this material "advertising?" Webster's dictionary defines "advertise" as "to make something known to : notify." Defendant's brief argues that the property, goods or services must be offered "for sale." Def. Memo at 2. That overly-restrictive definition is not part of the statute.

[☛1] The TCPA only requires that the faxes "advertise the commercial availability or quality of ***any*** property, goods or services." It does not require that such property, goods, or services be "for sale." Even a cursory glance at the faxes at issue shows that Defendant's service of buying, selling, processing, and banking used refrigerant. But even by Defendant's altered, restrictive definition, these faxes clearly advertise that defendant's goods (used refrigerant) is available for sale. This is a pristine example of where the application of the time honored "duck test" is appropriate - "If it walks like a duck, quacks like a duck, and looks like a duck, then it's a duck." *BMC Industries, Inc. v. Barth Industries, Inc.*, 160 F.3d 1322, 1337 (11th Cir., 1998). Taken as a whole, these faxes clearly are "unsolicited advertisements" under the TCPA.

B. Consideration of *Lutz Appellate Svcs. v. Curry*

Defendant's reliance on *Lutz Appellate Svcs. v. Curry*, 859 F. Supp. 180 (E.D. Pa. 1994) is wholly distinguishable. *Lutz* was an unappealed, early trial court decision, decided on the narrow issue that the short 4 line fax, sent from a man who opened his own business sent to his former co-workers at his former place of business, was "not the advertisement of the commercial availability of property." *Id.* at 181. The court likened the fax to a "help wanted" sign. *Id.* The fax in this case is not a "help wanted" sign, it is a multi-paragraph exaltation of Defendant's company, and advertisement of its services, and goods it deals in. *Lutz* is simply not on point. This Court similarly distinguished *Lutz* while addressing a nearly identical situation in *Davis, Keller, Wiggins, LLC. v. JTH Tax, Inc.*, No. 00AC-023289 (Div. 39, Mo. Cir. Ct. Aug. 28, 2001).

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II. Are violation of the FCC's regulations requiring time and date be included on each facsimile transmission actionable?

Plaintiff alleges that the date and time were not provided in the fax he received on June 1, 2001. Defendant argues that even if true, there is no private right of action for that particular omission. So taking as true Plaintiff's allegation that the date and time were omitted, the question is raised as to whether or not such an omission is actionable under the TCPA.

[☛2] Defendant argues that there is no private right of action for violations of the statute's proscriptions at 47 U.S.C. § 227(d). This is correct. Plaintiff's cause of action for a violation of 47 U.S.C. § 227(d) is dismissed, as there is no private right of action for violating section (d) of the statute. But Plaintiff has alleged not only a violation of 47 U.S.C. § 227(d), but ***also*** 47 C.F.R. 68.318(d) [FN1] (Second. Am. Pet. at ¶ 8). Those regulations in pertinent part state:

> Telephone facsimile machines; Identification of the sender of the message. ***It shall be unlawful for any person within the United States to use a computer or other electronic device to send any message via a telephone facsimile machine unless such message clearly contains, in a margin at the top or bottom of each transmitted page or on the first page of the transmission, the date and time it is sent*** and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual. Telephone facsimile machines manufactured on and after December 20, 1992, must clearly mark such identifying information on each transmitted message.

(emphasis added). Plaintiff's Petition alleges facts that constitute a violation of this regulation. The question that is presented, is can Plaintiff sue for a violation of the regulations? This Court holds that he can. [☛3] Violations of the FCC's regulations are actionable under 47 U.S.C. § 227(b)(3):

> A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State–
>
> (A) an action based on a violation of this subsection **or the regulations prescribed under this subsection** to enjoin such violation,
>
> (B) an action to recover for actual monetary loss **from such a violation**, or to receive $500 in damages for each such violation, whichever is greater, or
>
> (C) both such actions.

(emphasis added). The Court also notes that the private right of action provides a mandatory minimum of $500 liquidated damages for "each such violation." This indicates that a facsimile advertisement sent in violation of the statute's proscriptions, which also fails to include the mandatory disclosures of date and time required by these regulations, would constitute two distinct violations, and subject to $500 liquidated damages for each violation. This is a common concept in the law, often addressed by the "Blockburger rule," after *Blockburger v. United States*, 284 U.S. 299 (1932). "The appropriate inquiry under *Blockburger* is 'whether each provision requires proof of a fact which the other does not.'" *Ball v. United States*, 470 U.S. 856 (1985). *See Sanchez v. Overmyer*, 891 F.Supp. 1253, 1260 (N.D. Ohio 1995) (application of *Blockburger* rule to individual clauses in a statute); *Lovgren v. Byrne*, 787 F.2d 857, 863 (3rd Cir. 1986) (application of *Blockburger* rule to violation of regulations).

> [FN1] Plaintiff informed the Court at the hearing that a typographical error in the Petition incorrectly identified the section of the regulations as 47 C.F.R. 68.318(c)(3), which should have been 47 C.F.R. 68.318(d). The Court permits this technical amendment to the Petition.

[☛4] Moreover, it seems abundantly clear that a fax that violates both the statute and the identification requirements of the regulations is "worse" than a fax that only violates only a single proscription. An instructive treatment of this issue is found in *FAA v. Landy*, 705 F.2d 624 (2d Cir. 1983):

> The regulatory scheme at issue here clearly states discrete harms. A person who complies with some of the manual requirements, for example, but fails to furnish a copy to the FAA, is subject to a fine for that one discrete violation. It would be anomalous to reward the person who totally ignores the manual requirements by concluding that he, too, is subject to but a single fine when he simultaneously violates several regulations. Other juries have found multiple violations. *See, e.g., United States v. Lockheed L-188 Aircraft*, 656 F.2d 390, 393 (9th Cir. 1979) ($165,000 in fines for 552 separate violations of Part 121 regulations).

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Id. at 636. [☛5] Consumers have a right to be free from unsolicited advertising faxes ,and they also have a right to receive proper identification on all faxes. A consumer who receives a call or fax violating multiple rights provided under the TCPA should recover for each right violated. [☛6] This construction is reinforced by the fact that the TCPA is a remedial consumer protection statute and "should be liberally construed and interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers." *Scarborough v. Atlantic Coast Line R. Co.*, 178 F.2d 253, 258 (4th Cir. 1950). This principle is restated in the very first paragraph of the Missouri Revised Statutes, RSMo.§ 1.010, that "all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof" and this Court has applied that very principle in recent TCPA cases. *See Davis, Keller, Wiggins, LLC. v. JTH Tax, Inc.*, No. 00AC-023289 (Div. 39, Mo. Cir. Ct. Aug. 28, 2001).

IV. Injunctive Relief

Defendant also argues that injunctive relief would be "unprecedented" and bases this argument on a claim that Defendant has not violated the statute. Defendant is complaining about a potential injunction that would prohibit it from violating a statute, that Defendant claims it is in fact not violating. Such a claim is inconsistent.

> It is equally true that it is inconsonant for this defendant, on the one hand, to protest so earnestly its desire to comply with the provisions of the act in the future, and, on the other hand, to contest so vehemently the granting of an injunction which can have no effect unless some provision of the act is in fact violated in the future. As was said in the case of *Fleming v. Tidewater Optical Co.*, D.C. Va., 35 F.Supp. 1015, 1017: "If the defendant in good faith hereafter complies with the Act, the injunction need not affect it; if it violates the provisions of the Act, the Administrator will not have to institute a new suit in order to obtain appropriate relief.'"

Walling v. Builders' Veneer & Woodwork Co., 45 F.Supp. 808, 811 (D.C. Wis. 1942). [☛7] If Plaintiff proves a violation of the statute, he will be entitled to an injunction:

> Where an injunction is authorized by statute to protect the public interest, it is enough if the statutory conditions are satisfied and it is not necessary to show that irreparable injury will result. If the statutory conditions for injunctive relief are made apparent, the injunction issues without further considerations.

Bowles v. Swift & Co., 56 F. Supp. 679, 680-681 (D.C. Del. 1944).

CONCLUSION

Defendant's motion is granted with respect to Plaintiff's cause of action for violation of 47 U.S.C. § 227(d). In all other respects, Defendant's motion is DENIED.

SO ORDERED.

This the 18th day of December, 2001.

/s/ Patrick Clifford

Judge Patrick Clifford, Division 39

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IN THE COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

2005 DEC -1 P 2:19

MARCELLA SINGER, et al. Plaintiffs,	)	CASE NO. 05 CV 000988
-vs-	)	**JUDGMENT ENTRY**
BFS CAPITAL Defendant.	)	December 1, 2005

This matter is before the court on plaintiffs Marcella Singer, North Coast Printing, Inc., Mary Lou Ambrose, Painting Technology, Inc., Jim Betor, Lake Erie Industrial Service, Tom Thumb Clip Co., Inc., Terry Paul, All Point Ornamental and Franklin W. Kirk Co.'s joint motion for default judgment. An examination of the file indicates plaintiffs perfected certified mail service of their complaint on defendant BFS Capital in accordance with Civ.R. 4.1(A).

Further examination reveals that BFS Capital failed to plead or respond to plaintiffs' complaint. Therefore, according to Civ.R. 55, the court finds that BFS Capital is in default.

Reviewing the pleadings and the relevant provisions of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. §§ 227(a)(4), 227(b)(1)(C) and 227(b)(3)(B), the court finds that defendant BFS Capital knowingly sent one unwanted facsimile to Marcella Singer and North Coast Printing, Inc., one facsimile to Mary Lou Ambrose and Painting Technology, Inc., two facsimiles to Jim Betor, and Lake Erie Industrial Service, one facsimile to Tom Thumb Clip Co., Inc., one facsimile to Terry Paul and All Point Ornamental and one facsimile to Franklin W. Kirk Co. Furthermore, none of the facsimiles sent by BFS Capital to these plaintiffs contained the date and time of transmittal as is required by 47 U.S.C. § 227(d) and 47 C.F.R. § 69.318(d).

While the TCPA authorizes minimum damages for each violation in the sum of $500, it also authorizes the trial court to award up to three times the minimum damage amount if it finds that the facsimile was sent either willfully or knowingly.

Upon consideration of the above, the court awards judgment against BFS Capital and in favor of plaintiffs as follows: for Marcella Singer and North Coast Printing, Inc. the total sum of $1,500; for Mary Lou Ambrose and Painting Technology, Inc. the total sum of $1,500; for Jim Betor and Lake Erie Industrial Service the total of $3,000; for Tom Thumb Clip Co., Inc. the

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total sum of $1,500; for Terry Paul and All Point Ornamental the total sum of $1,500; and for Franklin W. Kirk Co. the total sum of $1,500. Costs are assessed against BFS Capital.

IT IS SO ORDERED.

RICHARD L. COLLINS, JR.
Judge of the Court of Common Pleas

Copies:
Joseph R. Compoli, Jr., Esq.
BFS Capital, Defendant

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DISTRICT COURT, COUNTY OF BOULDER, STATE OF COLORADO

Case No. 02 CV 1329, Division 2

RULING AND ORDER

DOUGLAS M. MCKENNA, individually, and as President of Mathemaesthetics, Inc., a Colorado corporation, as their interests may appear,

Plaintiff,

v.

ACCURATE COMPUTER SERVICE, INC.;
ALLIANCE TICKETS, INC.;
ARANDA GROUP ENTERPRISES, LLC;
CRYSTAL ROSE MANAGEMENT CO., INC.;
DENVER CENTER FOR THE PERFORMING ARTS;
GERRITY AGENCY, INC.;
RAINTREE MORTGAGE SERVICES, INC.;
RELATRIX CORPORATION;
LEISURE INDUSTRIES CORPORATION;
RESORT MANAGEMENT GROUP, L.L.C.;
TRANDALL SPORTS, INC.;
TRAVEL NOW, INC.; and
JOHN DOES #1-100,

Defendants.

FILED
2003

On **February , 2003**, the Court took the following actions on the above-captioned case. The Clerk is directed to enter these proceedings into the register of action.

This matter comes before the Court on Defendants Trandall Sports, Inc.'s motion under C.R.C.P. 12(b)(5) for failure to state a claim upon which relief can be granted. Plaintiffs, Douglas M. McKenna and Mathemaesthetics, Inc. have filed a Combined Response to which Defendant Trandall Sports, Inc. has filed a Reply. Having considered the parties' briefs and applicable law, the Court enters the following Order.

I. STANDARD OF REVIEW

When reviewing a motion to dismiss, the Court must accept the material allegations of the complaint as true and may not dismiss a claim unless the non-moving party is not entitled to relief under any statement of facts. *Douglas County Nat'l Bank v. Pfeiff*, 809 P.2d 1100 (Colo.

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App. 1991). If relief could be granted on the basis of the facts stated in the complaint, then the complaint is sufficient. *Schlitters v. State of Colorado*, 787 P.2d 656, 658 (Colo. App. 1990). The allegations contained in the complaint must be viewed in the light most favorable to the plaintiff. *Fogg v. Macaluso*, 892 P.2d 271, 273 (Colo. 1995). A Court may not consider matters outside the allegations in the complaint when ruling on a motion to dismiss. *Dunlap v. Colorado Springs Cablevision*, 829 P.2d 1286, 1290 (Colo. 1992). "Rule 12(b)(5) motions are viewed with disfavor, and should not be granted unless it appears beyond doubt that the plaintiff cannot prove facts in support of the claim that would entitle the plaintiff to relief." *Schoen v. Morris*, 15 P.3d 1094,1096 (Colo. 2000); *Dunlap v. Colo. Springs Cablevision*, 829 P.2d 1286, (Colo. 1992).

II. FACTS

In considering this Rule 12 Motion to Dismiss, the Court must take the allegations of Plaintiffs' Complaint as true. Therefore, the pertinent facts as found in Plaintiffs Douglas M. McKenna ("McKenna") and Mathemaesthetics, Inc.'s, ("Math, Inc."), [hereinafter collectively referred to as "Plaintiffs"] Complaint are as follows:

McKenna is an individual who resides in the City and County of Boulder, State of Colorado. He maintains a principal residence at 1140 Linden Avenue, Boulder and a telephone line with a telephone facsimile ("fax") machine at a home at 47517 Highway 72 in Ward, CO. Plaintiff Math, Inc. is a Colorado corporation whose principal offices are at a home at 47517 Highway 72 in Ward, CO.

Defendant Trandall Sports, Inc. ("Trandall") is a Colorado corporation whose principal offices are located in the State of Colorado.

The Complaint outlines Plaintiffs' factual allegations as to Defendant Trandall. The relevant section reads as follows:

XIII. FACTUAL ALLEGATIONS AND CLAIMS FOR RELIEF AS TO DEFENDANT TRANDALL SPORTS, INC.

13.1 On or about March 22, 2001, and again on or about April 11, 2001, and again on or about May 2, 2000, and again on June 11, 2001, Plaintiff Math[, Inc.] received unsolicited fax advertisements sent on behalf of the Defendant Trandall. Copies of these faxes are attached hereto and incorporated herein by reference as Exhibits #19, #20, #21 and #22 respectively. The faxes referred to herein were sent without the Plaintiff's prior express permission or invitation, and therefore, constitute separate and distinct violations of 47 USC Section 227(b)(1)(C) with respect to each fax sent.

13.2 The faxes referred to herein were sent without having clearly marked in a margin at the top or bottom or each transmitted page of the message or on the first page of each transmission, the date and time each was sent and an identification of the business, other entity or individual sending the message and the telephone number of the sending machine or of such business, other entity or individual. This constitutes an additional violation of the statutory prohibitions of 47 USC Section 227 with respect to each fax sent.

13.3 The fax attached hereto as Exhibit #20 failed to include therein, a toll-free telephone number as required under C.R.S. Section 6-1-702(1)(b)(I) of the Colorado Consumer Protection Act ("CCPA"). This constitutes an additional violation of the statutory prohibitions of the CCPA with respect to that specific transmission.

13.4 The faxes referred to herein contain a total of nine (9) separate and distinct violations of 47 USC Section 227 and the CCPA.

See Complaint at 14-15.

This matter comes before the Court on Defendant Trandall's Motion to Dismiss of September 20, 2002, to which Plaintiffs filed a Response on October 18, 2002. Trandall filed a Reply on November 11, 2002.

Plaintiffs' complaint asserts the following claims for relief as to all Defendants: (1) Negligence per se and negligence for violating the TCPA; (2) Knowing and willful violations of the TCPA (2); violation of the Colorado Consumer Protection Act § 6-1-105 *et seq.* C.R.S., (2001) ("CCPA"); injunctive relief pursuant to both the TCPA and the CCPA. Plaintiffs seek injunctive relief, damages, and attorney fees and costs against defendants.

The Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §227(b)(3), provides that state courts have exclusive subject matter jurisdiction over private actions brought under it.

III. MERITS

Failure to State a Claim

1. Alleged CCPA Violation

Defendant Trandall first argues that dismissal is proper because its facsimile transmissions do not violate the CCPA. Specifically, Trandall disputes Plaintiff Math Inc.'s allegation that Trandall's failure to provide a toll-free number, rather than just a local number, caused damage to Math Inc.

The CCPA states:

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

C.R.S. § 6-1-702(1)(b)(I) (emphasis added).

The Complaint alleges that on or about April 11, 2001, Defendant Trandall had a fax sent on its behalf to Plaintiff Math, Inc. *See Complaint* at 13.1. This fax, attached to the Complaint as Exhibit 20 did not have a toll free number printed on it, as required by CCPA C.R.S. § 6-1-702(1)(b)(I). *See Complaint* at 13.3.

Although the CCPA and other Colorado statutes that use the term "toll-free telephone number" do not define it, the Federal Communications Commission ("FCC") does. "Calls using either 866, 877, 888, or 800 numbers are all toll-free calls." FCC, TOLL FREE FAQ, found at http://www.fcc.gov/wcb/tapd/toll_free/888faq.html (last visited Feb. 18, 2003).

Also, in looking at links on the Federal Citizen Information Center's web site, the Court finds that "Fed. Phone #s" link takes the user to a list of federal agency phone numbers, many of which begin with area codes such as 202 (denoting a District of Columbia phone number) and 703 (denoting a Northern Virginia phone number). Other numbers begin with one of then previously mentioned toll-free prefixes (e.g. 800, 888, etc.). *See* http://www.pueblo.gsa.gov/call/phone.htm (last visited Feb. 18, 2003). However when a user selects a link entitled "Fed. Toll-free #s, a page listing *only* agencies and entities and their respective toll-free numbers beginning with 800, 888, 877, and 866 appear. *See* http://www.pueblo.gsa.gov/call/toll-free.htm (last visited Feb. 18, 2003).

Finally, for purposes of its analysis of whether a toll free number and a local number are one in the same, the Court is persuaded by the plain language of the CCPA which requires the presence of a "toll-free number" - not a local number - on unsolicited fax transmissions. For purposes of this motion only, the Court finds that a number beginning with a "303" area code is not a toll-free number as required on unsolicited faxes by the CCPA.

Next, Trandall argues that because Math Inc. does not allege the required injury, dismissal is therefore proper for failure to state a claim for relief under the CCPA. Defendant Trandall's argument fails under the Damages provision of the CCPA, codified at C.R.S. § 6-1-113(2), which states:

> Except in a class action or a case brought for a violation of section 6-1-709, any person who, in a private civil action is found to have engaged in or caused another to engage in any deceptive trade practice listed in this article shall be liable in an amount equal to the sum of:
>
> (a) The greater of:
>
> (I) The amount of actual damages sustained; or
>
> (II) *Five hundred dollars*; or
>
> (III) Three times the amount of actual damages sustained . . . .

C.R.S. . § 6-1-113(2) (emphasis added).

The Court finds § 6-1-113(2)(a)(II) applicable to the instant case. In this subparagraph the Colorado General Assembly has provided a liquidated damages provision in the statute, so as

to give a private right of action to any individual who has found him or herself on the receiving end of a deceptive trade practice. *See generally Hall v. Walter*, 969 P.2d 224 (Colo. 1998).

The Court finds that Plaintiffs have stated a claim for relief under the CCPA, and thus, Defendant Trandall's Motion to Dismiss the CCPA claim is DENIED.

2. Alleged TCPA Violation

Defendant Trandall's Motion to Dismiss addresses Plaintiffs' allegations that Trandall's actions, or actions performed on its behalf, violated the TCPA. *See Complaint* at ¶ 13.2; *see also* Exhibits 19-22. Under the TCPA, it is unlawful for any person "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 defines the term "unsolicited advertisement" 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).

There exist two subsections under TCPA, 47 U.S.C. § 227: § 227(b) entitled "Restrictions on the Use of Automated Telephone Equipment and § 227(d), entitled "Technical and Procedural Standards." § 227(b) places prohibitions on the sending of unsolicited fax advertisements, while a paragraph under § 227(d) prohibits any person within the United States from using:

> a computer or other electronic device to send any message via telephone facsimile machine unless such person *clearly marks, in a margin* at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

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

Although no provision for a private right of action exists under § 227(d), one does exist under § 227(b), "based on a violation of this subsection *or the regulations prescribed under this subsection*." 47 U.S.C. § 227(b)(3)(A) (emphasis added). Among the regulations promulgated under the TCPA is 47 C.F.R. § 68.318(d).[1]

> *Telephone facsimile machines; Identification of the sender of the message.* It shall be unlawful for any person within the United States to use a computer or other electronic device to send any message via a telephone facsimile machine unless such message clearly contains, in a margin at the top or bottom of each transmitted page or on the first page of the transmission, the date and time it is sent and an identification of the business,

[1] Although, no language in the regulation or TCPA itself that denotes which TCPA regulations are specific to which subsection, there also is no language that excludes 47 C.F.R. § 68.318(d) from being a regulation under subsection § 227(b). For the purposes of this motion, the Court finds that violation of 47 C.F.R. § 68.318(d) provides an individual with a private right of action under § 227(b)(3)(A).

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> other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual. Telephone facsimile machines manufactured on and after December 20, 1992, must clearly mark such identifying information on each transmitted page.

47 C.F.R. § 68.318(d).

In reviewing the Complaint and accompanying exhibits #19-22, the Court finds that Plaintiffs have stated a claim against Defendant Trandall under the TCPA and its regulations and upon which relief can be granted. The Court now turns to Trandall's argument regarding the unconstitutionality of the TCPA.

Trandall argues that Plaintiffs' TCPA claim should be dismissed, because the statute is unconstitutional. Trandall relies on the recent case, *Missouri ex rel. Nixon v. American Blast Fax and Fax.com, Inc.*, 196 F.Supp.2d 920 (E.D. Mo. 2002) (appeal pending) [hereinafter "*ABF*"]. In *ABF* a Missouri federal district court granted summary judgment on defendants' motion to dismiss the Missouri Attorney General's TCPA claim for sending unsolicited fax advertisements, holding that TCPA provision that prohibits unsolicited fax advertisements is inconsistent with First Amendment free speech protections.

In applying "intermediate" level scrutiny for regulation of commercial speech, as set out in *Central Hudson*, the district court found that the Plaintiff had failed to meet its burden of proof. *See* 196 F.Supp.2d 920; *see also Cent. Hudson Gas & Elec. Corp. v. Pub. Util. Comm'n of N.Y.*, 447 U.S. 557 (1980).

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566.

The *ABF* court found that expression at issue in this cause of action is afforded a level of protection under the First Amendment and that the defendants' fax advertisements concerned lawful activity and were not misleading. *ABF*, 196 F.Supp.2d at 928. *ABF* court then found that the "government fail[ed] to meet its burden in demonstrating that the harms it recit[ed were] real and that its restrictions [would] in fact alleviate them to a material degree." *Id.* at 934. A New York state trial court recently accepted the teachings of *ABF*, declaring that TCPA provisions violate the U.S. and New York Constitutions. *Rudgayzer &Gratt v. Enine, Inc.*, 749 N.Y.S.2d 855 (Civ.Ct. 2002)

Other jurisdictions - both federal and state - that have examined the TCPA's constitutionality have upheld the statute. For example, a federal district court upheld the constitutionality of the TCPA fax blasting restrictions and enjoined the defendant's fax blasting

practices *State ex rel. Hatch v. Sunbelt Communications and Marketing, LLC*, 2002 WL 31017503 (D.Minn.). Applying *Central Hudson* and beginning its analysis with the TCPA's legislative history, the court stated, "[t]he TCPA was enacted to protect the privacy interests of residential telephone subscribers by restricting certain uses of fax machines." 2002 WL 31017503 at 3 (citing *Int'l Sci. & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1150 (4th Cir.1997) (*citing* S.Rep. No. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N.1968)). *See also, Zeid v. The Reding Law Firm, P.C.*, No. 01AC-013005 (Div. 39, Cir. Ct. Mo., March 19, 2002).

This fact in addition to the claimed interest in avoided shifting the cost of fax advertising to consumers (i.e., cost of time, toner and paper) led the *Sunbelt* court to find that the "substantial government interest" prong of the *Central Hudson* test was satisfied. *See* 2002 WL 31017503, *5. Additionally the court in *Destination Ventures, Ltd. v. F.C.C.*, 844 F.Supp. 632 (D.Or.1994), found that Congress' interest in preventing cost shifting "from the advertiser to the unwitting customer" and in avoiding the tying up of fax machines by unwanted faxes "is a substantial interest which is identified in the TCPA's legislative history. *See id.* at 637 (quoting TCPA House Report). The *Destination Ventures* opinion stated, "there were repeated, uncontradicted references made before Congress describing how facsimile advertising shifts economic burdens from the advertiser to the consumer....Congress legitimately relied upon the testimony from authorities, as well as the contemporaneous state laws and media reports." *Texas v. American Blastfax, Inc.*, 121 F.Supp.2d 1085, 1091-92 (W.D.Tex.,2000) (citing *Destination Ventures*, 844 *F.*Supp. at 637). The Court is persuaded by these findings.

Moreover, the Court agrees that the TCPA advances the government interests stated above. It takes no great stretch of the imagination to see how prohibiting unwanted faxes would prevent tying up fax machines or requiring a consumer to pay for toner and paper to accommodate unsolicited and unwanted faxes. It is true that such costs may negligible to some consumers, but in the aggregate, or to a consumer with less means, these costs may be imposing. "The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another person's home or office." *Dietman v. Time, Inc.* 449 F.2d 245, 249 (9th Cir. 1971). The TCPA clearly serves the salutary purpose of preserving the privacy interests of residential telephone subscribers.

In the present case, the Defendant Trandall is also alleged to have violated a provision that requires the sender of the fax to clearly identify him or herself and to give a telephone number of the sending machine. The Court finds that such a small identification would serve to protect residential telephone subscribers' privacy interests, as fax contact is less invasive when the initiator has properly identified him or herself.

Finally, in turning to the last *Central Hudson* prong, the Court finds that self-identification on a fax is a relatively small imposition, and it is not more extensive than necessary to fulfil Congress' objectives. The Court is not persuaded by Defendant Trandall's argument that the TCPA's restrictions "chill" its "right and freedom to exercise its commercial speech by proposing commercial transactions, in this case entertainment, to plaintiff and all recipients on its list." *Trandall's Motion to Dismiss* at 8. With regards to the TCPA § 227(b)(1)(C) prohibition on sending unsolicited facsimile advertisements, this Court adopts the

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views of courts that have all rejected arguments that a better and more narrowly tailored option exists in requiring a consumer to "opt in" do-not-fax list. *See Texas v. Am. Blastfax, Inc.*, 121 F.Supp.2d 1085, 1092; *Kenro, Inc., v. Fax Daily, Inc.*, 962 F.Supp. 1162, 1172 (S.D.Ind.1997); *Destination Ventures*, 844 F.Supp. at 640.

The Court finds that Plaintiffs have stated a claim for relief under the TCPA, and thus, Defendant Trandall's motion to dismiss the TCPA claim is DENIED.

IV. CONCLUSION

For the aforementioned reasons, Defendant Trandall's Motion to Dismiss is **DENIED** as to both the CCPA and the TCPA claims.

Done this 24 day of February, 2003.

BY THE COURT

Daniel C. Hale
District Court Judge

FEB 25 2003

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Sterling Realty Company,
Korinos Village Inc,
Skyl-tech Inc,
Sebro packaging Inc,

Plaintiffs

v.

Richard Paul Klein,
John Does(1-10),
ABC Corporations

Defendants.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION
Special Civil Part

MIDDLESEX COUNTY

Docket No.DC-010870-04
CIVIL ACTION

ORDER OF JUDGMENT

FILED
MAR 21 2005
Frank M. Clofford, J.S.C.

This matter was heard by the court on October 20, 2004 and after briefing by both parties decided by the court in an oral decision on January 3, 2005.

FINDINGS OF FACT

The relevant facts are essential undisputed. Plaintiffs are four businesses that brought suit under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 et seq., for the transmission of seven unsolicited fax advertisements they received in 2004. Copies of the faxes are before the court. All of the faxes advertise defendant's services related to group medical insurance. Sterling Realty Co. ("Sterling") received one fax. Sebro Packing Inc. ("Sebro") received one fax. Korinos Village Inc ("Korinos") received two faxes. Skyl-tech Inc. ("Skyl-tech") received three faxes. The two faxes received by Korinos and two of the three faxes received by Skyl-tech do not contain a "header" or other identification of the sender of the faxes or when they were sent. Plaintiffs had all at one time or another, published advertisements or web sites that included their addresses and fax numbers.

Defendant Klein admits he sent these or similar faxes to Sterling and Sebro and does not deny that he sent the similar faxes received by Korinos and Skyl-tech. Klein testified he obtained addresses and fax numbers of Plaintiffs from advertisements and his practice was to send out mailings promoting his business and then follow up those mailings with faxes.

CONCLUSIONS OF LAW

This TCPA is a relatively simple statute enacted in 1991 which makes it illegal "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). "Unsolicited advertisement" is defined by the statute as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4). As a result, the only way faxes can

be sent is if the faxes do not contain any material advertising the commercial availability or quality of any property, goods, or services, or if they are sent with the prior express permission or invitation of the recipient. An advertiser has the burden of proof that it obtained express permission or invitation to send advertising faxes. Jemiola v. XYZ Corp., 802 N.E.2d 745 (Ohio C.P. Dec. 2003). Regulations promulgated under the statute by the Federal Communications Commission ("FCC") require that all faxes must include "the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual." 47 C.F.R. § 68.318. The TCPA provides a private right of action "to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater" plus injunctive relief. 47 U.S.C. § 227(b)(3). Plaintiffs do not seek actual damages under the TCPA. In addition, Plaintiffs claim that Defendant's acts violate the New Jersey Consumer Fraud Act. N.J.S.A. 56:8-2.

Defendant has raised a number of legal arguments positing that the TCPA does not apply to these faxes and that Plaintiff's consented to the faxes at issue. Finding that there is no dispute to the material facts and only questions of law remaining, the Court finds this matter ripe for summary judgment.

DISCUSSION

Established Business Relationship

Defendant argues that the existence of an "established business relationship" constitutes an exemption to the TCPA's provision covering unsolicited faxes. At one time, the FCC stated that "facsimile transmission [sic] from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient." See 7 F.C.C.R. 8752, n.87, 1992 WL 690928 (1992). However, such an exemption is not supported by the plain language of the statute. As the Texas Court of Appeals noted, "deeming permission is based on an inference and, as such, seems to conflict with the TCPAs requirement that the invitation or permission be express. Characterizing permission granted by implication as 'express' runs afoul of the plain meaning of the word." Chair King, Inc. v. GTE Mobilenet of Houston, 135 S.W.3d 365 (Tex. App., May 2004). Other courts considering this question have universally reached the same conclusion. See, e.g., Jemiola v. XYZ Corp., 802 N.E.2d 745 (Ohio C.P. 2003); Schumacher Fin. Svcs., Inc. v. Nat'l Fed'n of Ind. Bus., 2003 TCPA Rep. 1088 (Mo. Cir. July 3, 2003); Penzer v. MSI Mktng., Inc., d/b/a Y2Marketing, 2003 TCPA Rep. 1142 (Fla. Cir. Apr. 2, 2003).

Public Release of Fax Numbers

Defendant argues that Plaintiffs have publicly released their respective fax numbers and that constitutes an invitation to send faxed advertisements to those numbers. This interpretation conflicts with the statute's plain language that permission or invitation to send faxed ads must be "express" and has been explicitly rejected by the courts and the FCC. Similarly the fact that a plaintiff had given a business card to Mr. Klein and asked him to "stay in touch" does not constitute "express" consent to send advertising faxes.

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Lack of Header

The two faxes received by Korinos and Skyl-tech specifically did not set forth who sent them or when they were sent. This implicates the portion of the TCPA regarding the FCC rules requiring all faxes to have such information. It is the sender's obligation to place the header on the fax, and if not, that is a separate violation of the act. The Court finds that two faxes did not have the required information and this is a separate violation of the Act.

Willful or Knowing Violations

The TCPA gives a court the discretion to treble the liquidated damages of $500 per violation if the court determines the violations were wither "willful" or "knowing." 47 U.S.C. § 227(b)(3). These terms have well established meanings when used in the Act and do not require any specific intent to violate the statute. "Willful" is defined as "the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States." 47 U.S.C. § 312(f). "Knowingly" has long been construed as used throughout the 1934 Communications Act as "knew or should have known" standard. "the 'knowingly' standard only requires that a person either had reason to know or should have known that it engaged in acts which could constitute a violation of the statute." Intercambio, Inc., 3 FCC Rec. 7247 at ¶41, 1988 WL 486783 (F.C.C).

The Court finds that Defendant's acts were both willful and knowing as those terms are used in the Act, but the Court exercises its discretion and declines to increase the damages.

New Jersey Consumer Fraud Act Claims

Plaintiff argues that sending unsolicited fax advertisements in violation of the TCPA is an "unconscionable commercial practice" in violation of the Consumer Fraud Act. N.J.S.A. 56:8-2. While a regulatory violation "can serve as evidence of unconscionable practices under the Consumer Fraud Act," Lemelledo v. Beneficial Management Corp., 289 N.J. Super. 489, 502 (App. Div. 1996), the Court does not find that the conduct of Defendant here rises to the level of such an unconscionable practice.

CONCLUSION

Having considered all the arguments and evidence, the Court holds that the seven faxes at issue were sent by Defednant and constitute material advertising the commercial avaiability of any property goods or services, specifically defendant's services related to group medical insurance. The Court further holds that Defendant did not obtain prior express permission or invitation to sent the faxes at issue to any Plaintiff. The four faxes sent without the proper identification of the sender and time of transmission constitute four additional violations of the statute.

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In summary, the Court finds that Defendant's faxes constitute a total of ten (10) violations of the TCPA and awards judgment to Plaintiffs of five thousand dollars ($5, 500) representing $500 for each violation as follows:

$500.00 .....to Sterling Realty Co.
$500.00 .....to Sebro Packing Inc.
$2,000.00 .....to Korinos Village Inc.
$2,500.00 .....to Skyl-tech Inc

Judgment in favor of Defendant is entered as to Plaintiff's claims under the New Jersey Consumer Fraud Act.

IT IS SO ORDERED, this the 21 day of March , 2005

Frank M. Ciuffani, JSC

FILED

MAR 21 2005

Frank M. Ciuffani, JSC

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C

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District, Cuyahoga County.
David BRANSKY Plaintiff-Appellant
v.
Hamid SHAHROKHI, dba, Nutrition Sol.
Defendant-Appellee
No. 84262.

Jan. 13, 2005.

Civil appeal from Lyndhurst Municipal Court, 03 CVF-01164, Reversed and Remanded.

Joseph R. Compoli, James R. Goodluck, Cleveland, Ohio, for Plaintiff-Appellant.

Telephone Consumer Rights Bar Association, Eric J. Moore, Northfield, Ohio, for Amicus Curiae.

Hamid Shahrokhi, c/o Nutrition Solutions, San Jose, California, for Defendant-Appellee, pro se.

JOURNAL ENTRY and OPINION
BLACKMON, Administrative J.

*1 {¶ 1} In this accelerated appeal, appellant David Bransky appeals the Lyndhurst Municipal Court's award of $500 for his claims against appellee Hamid Shahrokhi, d.b.a. Nutrition Solutions, for violations of the Federal Telephone Consumer Protection Act ("TCPA") and the Ohio Consumer Sales Practices Act ("CSPA"). Bransky assigns the following three errors for our review:

{¶ 2} "I. The trial court erred by refusing to consider or grant damages for appellant under the Ohio Consumer Sales Practices Act (CSPA), nothwithstanding that it is undisputed that appellee committed acts which constitute violations of R.C. 1345.02(A) of the CSPA."

{¶ 3} "II. The trial court erred by refusing to consider or grant damages to appellant under the federal Telephone Consumer Protection Act (TCPA) and the Ohio Consumer Sales Practices Act (CSPA) for appellee's illegal and deceptive act of sending an advertisement by fax without clearly identifying the name and telephone number of the sender."

{¶ 4} "III. The trial court erred in refusing to consider or grant reasonable attorney fees to appellant under R.C. 1345.09(F) of the Ohio Consumer Sales Practices Act (CSPA)."

{¶ 5} Having reviewed the record and relevant law, we reverse and remand the trial court's decision for further proceedings. The apposite facts follow.

{¶ 6} Bransky sued Nutrition Solutions for violating the TCPA and the Ohio CSPA for sending him an unsolicited facsimile containing an advertisement for a weight loss product. [FN1] The TCPA was enacted to rid consumers of unsolicited "junk faxes," which obligate the consumer to pay the price of the ink and paper for the advertisement and blocks the consumer's fax machine from receiving other faxes while the advertisement is being sent. Under 47 U.S.C.S. § 227(b)(1) of the TCPA, it is unlawful for any person within the United States to "use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." Ohio Courts have found that a violation of the TCPA also results in a violation of R.C. 1345.02 of the Ohio CSPA. [FN2]

FN1. Bransky also asserted claims pursuant to R.C. 4719.02(A), failure to register as a telephone solicitor, and R.C. 4719.04(A), failure to obtain a surety bond; however, he does not raise these claims in his appeal. We therefore will not address them.

FN2. *Chambers v. R & C Delivery* (May 2, 2002), Cuyahoga Common Pleas Case No. 437887; *Compoli v. EIP Limited* (July 2, 2002), Cuyahoga Common Pleas Case No. 446780; *Grady v. St. Cloud Mortgage* (Mar. 7, 2003), Cuyahoga Common Pleas Case No. 484945; *Jemiola v. XYZ Corp.* 126 Ohio Misc.2d 68, 2003-Ohio-7321.

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{¶ 7} The trial court served Nutrition Solutions by issuing a summons with the complaint attached, via certified mail. The summons was returned as "unclaimed." The trial court thereafter served Nutrition Solutions by ordinary mail. On October 30, 2003, the trial court entered notice that service had been perfected and an answer was to be filed by November 4, 2003. Nutrition Solutions failed to answer or otherwise appear; therefore, the trial court granted Bransky's motion for default judgment in the amount of $500, which was less than the $3,600 Bransky demanded for compensatory damages. Bransky also made a demand pursuant to R.C. 1345.09(F)(2) for attorney fees and attached an attorney fee invoice for $510 to the complaint. Bransky appeals.

{¶ 8} We will address Bransky's assigned errors together because they share the common issue regarding whether the trial court awarded inadequate damages.

*2 {¶ 9} At the outset, we note the trial court's journal entry does not detail which claims are included in the $500 award. The court stated:

{¶ 10} "This matter came on for consideration on plaintiff's Motion for Default Judgment. The court finds that a complaint was filed on September 8, 2003 and that service was perfected on October 7, 2003. The court further finds that defendant is in default of an answer or other responsive pleading. It is therefore ordered, adjudged and decreed that judgment be awarded in favor of plaintiff against defendant in the sum of $500.00 and costs ." [FN3]

FN3. Trial Court Order, February 3, 2004.

{¶ 11} Because we conclude this amount, in any form, is an inadequate award of damages, we need not remand for clarification. Instead, in the interest of judicial economy, we will address the merits of the appeal.

{¶ 12} A trial court's decision to grant a motion for default judgment is reviewed under an abuse of discretion standard. [FN4] Unlike the initial decision to grant a default judgment, however, the determination of the kind and maximum amount of damages that may be awarded is not committed to the discretion of the trial court, but is subject to the mandates of Civ.R. 55(C) and Civ.R. 54(C). [FN5] Civ.R. 55(C) provides that "in all cases a judgment by default is subject to the limitations of Rule 54(C)." Civ.R. 54(C)'s limitations on default judgments are contained in its first sentence, which provides that "[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." The Civil Rules are "the law of this state with regard to practice and procedure in our state courts." [FN6] Therefore, the question of whether a trial court's award of damages in a default judgment complies with Civ.R. 55(C) and Civ.R. 54(C) is one of law, which we review de novo. [FN7]

FN4. *Huffer v. Cicero* (1995), 107 Ohio App.3d 65, 74.

FN5. *Nat'l City Bank v. Shuman,* 9th Dist. No. 21484, 2003-Ohio-6116.

FN6. *Rockey v. 84 Lumber Co.* (1993), 66 Ohio St.3d 221, 224.

FN7. *Nat'l City Bank,* supra.

{¶ 13} Bransky demanded in his complaint $3,600 in compensatory damages. This amount was comprised of damages set forth in 47 U.S.C.S. § 227(b)(3) and R.C. 1345.09(B).

{¶ 14} 47 U.S.C.S. § 227(b)(3) provides for the following damages:

{¶ 15} "A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State-

{¶ 16} " * * *

{¶ 17} "(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater,* * *.

{¶ 18} "If the court finds that the defendant willfully or knowingly violated this subsection, or the regulations prescribed under this subsection, the court, may, in its discretion, increase the amount of the award to an amount

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equal to not more than 3 times the amount available under subparagraph (B) of this paragraph."

{¶ 19} Bransky alleged two claims against Nutrition Solutions for "willfully or knowingly" violating this provision and requested treble damages in the amount of $1,500 for each claim.

*3 {¶ 20} R.C. 1345.09(B) provides for the following damages:

{¶ 21} "(B) Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) or section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345 .02 or 1345.03 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code, the consumer may * * * recover, * * * three times the amount of his actual damages or two hundred dollars, whichever is greater * * *."

{¶ 22} Bransky alleged three claims against Nutrition Solutions under the CSPA and requested damages of $200 for each claim.

{¶ 23} Bransky also requested attorney fees pursuant to R.C. 1345.09(F)(2) and attached an invoice to the complaint for fees totaling $510. R.C. 1345.09(F)(2) provides that a "court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed if * * * the supplier has knowingly committed an act or practice that violates this chapter."

{¶ 24} Thus, it is apparent from the face of these provisions that the trial court's award of $500 is less than the statutory minimum and clearly does not provide for reasonable attorney fees. We conclude the trial court erred by failing to award Bransky the mandatory statutory amount of damages on each of his claims. Therefore, we remand the matter for the trial court to conduct a damages hearing pursuant to Civ.R. 55(A) to determine the statutory amount Bransky is entitled to, i.e. whether treble damages should be awarded, and whether the attorney fees are reasonable. Accordingly, we sustain Bransky's three assigned errors.

{¶ 25} Judgment reversed and case remanded for further proceedings.

This cause is reversed and remanded.

It is, therefore, ordered that said appellant recover of said appellee its costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, J., and DIANE KARPINSKI, J., concur.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

2005 WL 77084 (Ohio App. 8 Dist.), 2005-Ohio-97

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