

IN THE SUPREME COURT OF OHIO

STANLEE E. CULBREATH, :  
 :  
 Appellant, : Case No. 06-1302  
 :  
 v. :  
 :  
 GOLDING ENTERPRISES, LLC, *et al.*, :  
 :  
 Appellees. :

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REPLY MERIT BRIEF OF APPELLANT STANLEE E. CULBREATH

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Respectfully submitted,

Richard O. Wuerth (0022056)  
(COUNSEL OF RECORD)  
rwuerth@lah4law.com  
Beth Anne Lashuk (0063144)  
blashuk@lah4law.com  
LANE, ALTON & HORST, LLC  
175 South Third Street, 7<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 228-6885, 228-0147 fax

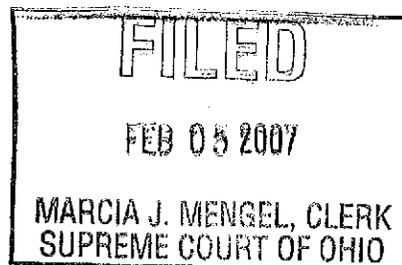
ATTORNEYS FOR APPELLEES,  
U.S. FOUR, INC., W.D. EQUIPMENT  
RENTAL, INC., JOHN BASINGER AND  
JOSH WELLINGTON

Karen S. Hockstad (0061308)  
(COUNSEL OF RECORD)  
khockstad@hockstadlaw.com  
HOCKSTAD LAW OFFICE, LTD.  
5003 Horizons Drive, Suite 200  
Columbus, Ohio 43220  
(614) 360-1048, 451-3156 fax

ATTORNEYS FOR APPELLEES,  
KAREN HOCKSTAD AND  
GOLDING ENTERPRISES, LLC

John W. Ferron (0024532)  
(COUNSEL OF RECORD)  
jferron@ferronlaw.com  
Lisa A. Wafer (0074034)  
lwafer@ferronlaw.com  
FERRON & ASSOCIATES  
A Legal Professional Association  
580 North Fourth Street, Suite 450  
Columbus, Ohio 43215  
(614) 228-5225, 228-3255 fax

ATTORNEYS FOR APPELLANT,  
STANLEE E. CULBREATH



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## INTRODUCTION

On November 9, 2004, Appellant Stanlee E. Culbreath filed his Complaint, by which he sought to obtain injunctive relief and other statutory remedies based upon the violation of well-established Ohio and federal laws by Appellees Golding Enterprises, LLC, U.S. Four, Inc., W.D. Equipment Rental, Inc., John Basinger, Josh Wellington and Karen Hockstad. (R. 13, Complaint, No. 9 of Lower Court's Case History Index) In his Complaint, Appellant asserted that Appellees' faxed advertisement violated the Telephone Consumer Protection Act, 47 U.S.C. §227, *et seq.* (Appellant's Appdx. 43)<sup>1</sup> (hereinafter "TCPA"), and its regulations set forth at 47 C.F.R. §68.318 (Appellant's Appdx. 40), in four distinct ways: (1) by transmitting to Plaintiff by telephone facsimile machine an unsolicited advertisement with Appellant's prior express approval; (2) by sending the fax without clearly stating the name of the sender on the fax; (3) by sending the fax without clearly stating the date and time when the fax was transmitted; and (4) by sending the fax without clearly stating the telephone or fax number of the sender. The Complaint also asserted that Appellees violated the Ohio Consumer Sales Practices Act ("CSPA"), R.C. §1345.01, *et seq.* (Appellant's Appdx. 69), in the same four ways as they violated the TCPA. (R. 13, Complaint, No. 9 of Lower Court's Case History Index)

In their Merit Brief, Appellees admit they *knowingly* violated the TCPA by transmitting their advertisement by fax to Appellant without his prior express permission. (Appellees' Merit Brief, p. 4) However Appellees argue that their indisputable failure to comply with the fax sender identification requirements set forth in 47 C.F.R. §38.618(d) does not create additional

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<sup>1</sup> Citations herein to items included within the Appellant's Appendix, attached to Appellant's Merit Brief, are designated by "(Appellant's Appdx. \_)".

causes of action for which Appellant can sue Appellees and recover statutory relief.<sup>2</sup> (Appellees' Merit Brief, pp. 3-19)

Appellees' Merit Brief also asserts that Appellees' unsolicited fax did not violate the CSPA because Appellant, whom the trial court and appeals court below both found had actually received the Appellees' fax for purposes of his claims under the TCPA, was not the recipient of Appellees' fax for purposes of his CSPA claims. (Appellees' Merit Brief, pp. 19-21) Based on this argument, Appellees contend that all of Appellant's CSPA claims were properly dismissed because the law firm he owns "lacks standing" to assert claims under the CSPA. (Appellees' Merit Brief, pp. 25-26)

Finally, in their Merit Brief Appellees implausibly assert that the transmittal of an unsolicited fax advertisement in violation of the TCPA does not violate the CSPA. (Appellees' Merit Brief, pp.21-23)

However, for the reasons discussed below, Appellant respectfully submits that each of Appellees' arguments lacks merit.

## ARGUMENT

- I. **Proposition of Law No. 1: The Telephone Consumer Protection Act Permits an Individual Person Who Receives an Unsolicited Advertisement by Fax to Seek Statutory Damages from the Sender Based on Each Separate Violation of the TCPA and its Related Regulations.**
  - A. **None of the Court Rulings Appellees Cite Explains How the Court Concluded that the Fax Sender Identification Requirements in 47 C.F.R. §68.318(d) Were Promulgated by the FCC Pursuant to 47 U.S.C. §227(d), and Not 47 U.S.C. §227(b).**

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<sup>2</sup> Appellees' fax did not do any of the following, all of which are required by 47 C.F.R. §68.318(d): (1) identify the person who, or entity that, sent the fax; (2) indicate the date or time that it was transmitted; or (3) disclose the telephone or fax number of the sender. (R. 13, Complaint, No. 9 of Lower Court's Case History Index)

In their Merit Brief, Appellees cite a few court decisions from other jurisdictions in support of their argument that Appellees' violations of the fax sender identification requirements set forth in 47 C.F.R. §68.318(d) are not actionable under 47 U.S.C. §227(b) (Appellant's Appdx. 53). (Appellees' Merit Brief, pp. 7-9) However, the rulings Appellees cite are neither instructive nor persuasive because they either are not on point, they neglect to analyze together properly 47 U.S.C. §227(b) and 47 C.F.R. §68.318(d), or they fail to take into account the controlling interpretation of 47 C.F.R. §68.318(d) by the Federal Communications Commission ("FCC").<sup>3</sup>

One case that Appellees cite, which was decided by the Alabama Court of Civil Appeals, *Lary v. Flasch Business Consulting, et al.* (2003), 878 So.2d 1158 (Appellees' Merit Brief, p. 6), is clearly inapposite. In *Lary*, the court ruled as follows:

"[S]ubsection [47 U.S.C. §227(d)(1)] bars persons in the United States from initiating communications using a fax machine or making telephone calls using automatic telephone dialing systems where those devices do not comply with 'technical or procedural standards' prescribed by the Federal Communications Commission; it also bars the use of electronic devices to send faxes unless those faxes are clearly marked with the sending date and time and clearly identify the sender's name and telephone number. However, in contrast to violations of subsection (b) of 47 U.S.C. §227, which are subject to private rights of action under 47 U.S.C. §227(b)(3), Congress did not authorize private citizens to bring actions to impose penalties for or recover damages allegedly flowing from violations of subsection (d) of that statute."

Thus, *Lary* stands for the proposition that the recipient of an unsolicited fax advertisement cannot maintain a private right of action under 47 U.S.C. §227(d) (Appellant's Appdx. 64). Appellant readily agrees that no private right of action exists under 47 U.S.C. §227(d). However, this point is entirely irrelevant because the instant appeal involves Appellant's claims

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<sup>3</sup> In enacting the TCPA in 1991, Congress explicitly directed the FCC to issue regulations implementing its provisions. 47 U.S.C. §227(b)(2) (Appellant's Appdx. 60).

asserted under 47 U.S.C. §227(b) and FCC's identification requirements for fax senders set forth in 47 C.F.R. §68.318(d).

In another case that Appellees cite, *Adler v. Vision Lab Telecommunications, Inc.* (D.D.C. 2005), 393 F. Supp.2d 35, 38 (Appellees' Merit Brief, p. 7), the court cites no statutory or regulatory authority for its conclusion that 47 C.F.R. §68.318(d) was promulgated under 47 U.S.C. §227(d), and not 47 U.S.C. §227(b):

“Count II asserts a cause of action based on regulations promulgated by the Federal Communications Commission (“FCC”) pursuant to the TCPA, which require that faxes properly identify the individual or entity sending the faxed message and the number of the sender. 47 C.F.R. §68.318(d). Defendants contend the TCPA does not provide a private right of action for such a claim. Based on the plain language of the statute, the Court agrees.”

Thus, *Adler* can hardly count as persuasive authority on this important issue; in fact, it utterly fails to describe the basis for its conclusion that that 47 C.F.R. §68.318(d) must have been promulgated by the FCC pursuant to 47 U.S.C. §227(d).

*Klein v. Vision Lab Telecomms., Inc.*, 399 F. Supp. 2d 528, which Appellees also cite (Appellees' Merit Brief, p. 8), suffers from the same glaring deficiency as *Adler*. Rather than offer any explanation for its conclusion that 47 C.F.R. §68.318(d) was promulgated under 47 U.S.C. §227(d), the court in *Klein* merely expresses its bafflement about how this regulation could have been promulgated under 47 U.S.C. §227(b):

“This Court cannot understand how language governing technical fax requirements in §227(d), a section that contains no language permitting a private right of action, suddenly bestows a private right of action when it is redrafted into an F.C.C. regulation that fails explicitly to identify the subsection under whose authority it was promulgated.”

*Klein v. Vision Lab Telecomms., Inc.*, *supra* at 538. In a feeble attempt to rationalize its ruling, the *Klein* court focused mainly on the fact that 47 U.S.C. §227(b) is designed to prevent fax transmissions, whereas 47 U.S.C. §227(d) pertains to procedural requirements. Even if this is

accepted as true, the *Klein* court's observation ignored the obvious; the fax sender identification requirements detailed in 47 C.F.R. §68.318(d) are designed to prevent unlawful junk fax transmissions by imposing requirements on the **senders** of the unlawful faxes. Thus, the regulations promulgated at 47 C.F.R. §68.318(d) clearly relate to the **transmission of faxes**, just as 47 U.S.C. §227(b) obviously does.

Indeed, this same intellectual indolence is on prominent display in each of the other cases Appellees cite. See also *G.M. Sign, Inc. v. Franklin Bank, S.S.B.* (N.D. Ill. April 19, 2006), Case No. 06-C-0949, unreported, 2006 U.S. Dist. LEXIS 29667 (Appellees' Appdx. 29)<sup>4</sup>; and *Kopff v. Battaglia* (D.D.C., 2006), 425 F. Supp.2d 76, 91. (Appellees' Merit Brief, pp. 8-9)

Appellees' failure to cite any other court's explanation of how it determined that 47 C.F.R. §68.318(d) was promulgated by the FCC pursuant to 47 U.S.C. §227(d), and not §227(b), is noteworthy. Although many courts have held, in dismissive fashion, that this must be the case, none has ever explained how it reached this significant conclusion.

**B. The FCC Promulgated the Fax Sender Identification Requirements Set Forth in 47 C.F.R. §68.318(d) Pursuant to Congress' Authority, Which is Explicitly Set Forth in 47 U.S.C. §227(b).**

**1. The FCC Issued the Fax Sender Identification Requirements Set Forth in 47 C.F.R. §68.318(d) Pursuant to 47 U.S.C. §227(b) to Help Consumers Identify and Hold Accountable Those Who Fax Unsolicited Advertisements to Them.**

Contrary to the above-noted rulings from other jurisdictions upon which Appellees rely, it is clear that the FCC issued the fax sender identification requirements set forth in 47 C.F.R. §68.318(d) pursuant to the authority bestowed upon it in 47 U.S.C. §227(b), which provides in regard to faxed advertisements:

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<sup>4</sup> Citations herein to items included within the Appellees' Appendix, attached to Appellees' Merit Brief, are designated by "(Appellees' Appdx. \_)".

“(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

**It shall be unlawful for any person within the United States or any person outside the United States if the recipient is within the United States--**

\* \* \*

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

\* \* \*

(2) Regulations; exemptions and other provisions

**The Commission shall prescribe regulations to implement the requirements of this subsection.** \* \* \*

(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.” (Emphasis added.)

Thus, 47 U.S.C. §227(b) proscribes the transmittal of a fax advertisement without the recipient’s express authority (47 U.S.C. §227(b)(1)(C)), **requires the FCC to issue regulations** to implement 47 U.S.C. §227(b) generally (47 U.S.C. §227(b)(1)(C)), and creates a private right of action for anyone who receives a faxed advertisement in sent in **“violation of [47 U.S.C. §227(b)] or the regulations prescribed under [47 U.S.C. §227(b)].”** See 47 U.S.C. §227(b)(3). Subsection 227(b) restricts the manner by which persons may use a telephone or telephone facsimile machine to communicate with others for commercial purposes.

In contrast, 47 U.S.C. §227(d) provides in pertinent part:

“(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, 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.**

(Emphasis added.) (Appellant's Appdx. 66)

While §227(d) does, like §227(b), proscribe certain conduct in regard to the transmittal of an advertisement by fax (47 U.S.C. §227(d)(1)), unlike §227(b), it only **directs the FCC to revise its regulations regarding the technical requirements that manufacturers of telephone facsimile machines must meet.** See 47 U.S.C. §227(d)(2). Subsection 227(b) restricts the manner by which persons may use a telephone or telephone facsimile machine to communicate with others for commercial purposes.

Subsequent to the enactment of the TCPA, the FCC promulgated regulations at 47 C.F.R. §68.318(d), which, after amendments, provided as follows on the date when Appellees faxed their advertisement to Appellant:

“(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 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. If a facsimile broadcaster demonstrates a high degree of involvement in the sender’s facsimile messages, such as supplying the numbers to which a message is sent, that broadcaster’s name, under which it is registered to conduct business with the State Corporation Commission (or comparable regulatory authority), must be identified on the facsimile, along with the sender’s name.** Telephone facsimile machines manufactured on and after December 20, 1992, just clearly mark such identifying information on each transmitted page.” (Emphasis added.)

Given the plain wording of the first two sentences of 47 C.F.R. §68.318(d), it is clear that the FCC issued this part of the regulation to provide instructions to those who send commercial advertisements to others by fax, mandating that they identify themselves by name and telephone or fax number and indicate the date and time of their fax transmission. In other words, the sender identification requirements must be met by those who *operate* fax machines, not those who *manufacture* fax machines. The second sentence makes clear that fax broadcasters, under certain circumstances, must also identify themselves on the fax, too.

The first two sentences of 47 C.F.R. §68.318(d) clearly relate to the manner by which persons must identify themselves while operating telephone facsimile machines. The last sentence of 47 C.F.R. §68.318(d) imposes a requirement upon telephone facsimile machine manufacturers. Thus, the FCC issued the first two sentences of 47 C.F.R. §68.318(d) pursuant to its authority under 47 U.S.C. §227(b)(1)(C), which required the FCC to issue regulations to implement §227(b) generally. And the FCC issued the last sentence of 47 C.F.R. §68.318(d) pursuant to its authority under 47 U.S.C. §227(d)(2), which directed the FCC to revise its

existing regulations regarding the technical requirements that manufacturers of telephone facsimile machines must meet.

Since the FCC issued the fax sender identification requirements set forth in 47 C.F.R. §68.318(d) pursuant to its authority under 47 U.S.C. §227(b)(1)(C), Appellant has a valid claim against Appellees under 47 U.S.C. §227(b)(3) based upon their unquestionable failure to comply with the fax sender identification requirements in 47 C.F.R. §68.318(d).

This construction is fully support by the FCC, itself, which has opined why a consumer's ability to enforce the fax sender identification requirements set forth in 47 C.F.R. §68.318(d), as separate actionable violations of the TCPA, serves an important remedial function:

“The TCPA and Commission rules require that any message sent via a telephone facsimile machine contain [1] the date and time it is sent and [2] an identification of the business, other entity, or individual sending the message and [3] the telephone number of the sending machine or of such business, other entity, or individual.\*\*\* [T]he TCPA mandates that a facsimile include the identification of the business, other entity, or individual creating or originating a facsimile message \*\*\*. [The rules governing the identification of senders of faxes] permit consumers to hold fax broadcasters accountable for unlawful fax advertisements \*\*\*.” (Emphasis added.)

*In the Matter of Rules and Regulations Implementing the Telephone and Consumer Protection Act of 1991*, Report and Order (July 3, 2003), FCC 03-153, ¶203 (Appellant's Appdx. 150); see also *In Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Order on Further Reconsideration* (Released April 10, 1997) at ¶6 (the FCC stated that the purpose of §68.318(d) is to “ensure that *consumers* [as opposed to governmental enforcement agencies or state attorneys general] will have the information they need to identify the sender of an unsolicited facsimile.”) (Appellants' Appdx. 159).

Where, as here, the FCC has interpreted its own regulations, the FCC's interpretation must be followed. As this Court recently explained:

“The power of an administrative agency to administer a congressionally created \* \* \* program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.’ *Morton v. Ruiz*, 415 U.S. 199, 231 [94 S. Ct. 1055, 39 L. Ed. 2d 270] (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” (Emphasis added.)

*Charvat v. Dispatch Printing Co.* (2002), 95 Ohio St.3d 505, 510.

2. **Because 47 U.S.C. §227(d) Only Directs the FCC to Issue Regulations Regarding Standards for the Manufacture of Fax Machines, the Fax Sender Identification Requirements of 47 C.F.R. §68.318(d) Could Not Have Been Promulgated Lawfully by the FCC Pursuant to 47 U.S.C. §227(d).**

Appellees argue that violations of 47 C.F.R. §68.318(d) are not actionable because the regulation was prescribed under 47 U.S.C. §227(d), which does not provide for a private right of action. (Appellees’ Merit Brief, pp. 6-10) However, Appellees’ argument fails to consider the crucial distinction between the regulatory authorizations set forth in 47 U.S.C. §227(b)(2) and 47 U.S.C. §227(d)(2), as discussed above.

The only Congressional directive to the FCC in 47 U.S.C. §227(d) pertains to the manufacture of “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.” (Emphasis added.)

See 47 U.S.C. §227(d)(2) (Appellant’s Appdx. 66). In contrast, the relevant provision of 47 C.F.R. §68.318(d) – the fax sender identification requirements in the first sentence that

Appellees violated – clearly pertain to the **operation** of telephone facsimile machines. Thus, in their Merit Brief, Appellees either misstate the law or miss the crucial difference between the regulatory authority of the FCC under 47 U.S.C. §227(b)(2) and its authority under 47 U.S.C. §227(d)(2). (Appellees’ Merit Brief, pp. 5-6) Regardless of which it is, because the FCC’s regulatory authority under 47 U.S.C. §227(d)(2) pertains only to **manufacturers** of fax machines – and not **operators** – the FCC could not have lawfully promulgated 47 C.F.R. §68.318(d) pursuant to 47 U.S.C. §227(d)(2).

Appellees readily acknowledge that the identification requirements set forth by the FCC at 47 C.F.R. §68.318(d) are redundant to the fax sender identification requirements contained within the TCPA at 47 U.S.C. §227(d). (Appellees’ Merit Brief, pp. 5-6) Appellees assert that the similarity in language between the statutory fax sender identification provision (47 U.S.C. §227(d)(1)(B)) and the regulation at issue (47 C.F.R. §68.318(d)) means that the regulation must have been promulgated pursuant to 47 U.S.C. §227(d)(2). *Id.* However, Appellees’ argument does not derive from any applicable rule of construction or common sense.

As noted above, the first two sentences of 47 C.F.R. §68.318(d) could not have been properly issued by the FCC pursuant to 47 U.S.C. §227(d)(2) because they do not relate to fax machine manufacturing standards. Moreover, common sense strongly suggests that the FCC would not have issued 47 C.F.R. §68.318(d) only to echo the requirements already set forth in 47 U.S.C. §227(d)(1)(B)(2).

**C. Congressional Intent Cannot Be Inferred From Congress’ Silence in the Junk Fax Prevention Act of 2005, as Appellees Argue.**

Appellees also argue that, if Congress intended to provide a private right of action for violations 47 C.F.R. §68.318(d), it would have done so when it amended the TCPA through its

recent enactment of the Junk Fax Prevention Act of 2005.<sup>5</sup> (Appellees' Merit Brief, pp. 13-14) This argument entirely lacks merit. Congressional intent cannot be inferred from Congress' failure to act or speak to an issue. See *Schneidewind v. ANR Pipeline Co.* (1988), 485 U.S. 293, 306 ("This Court generally is reluctant to draw inferences from Congress' failure to act."); see also *American Trucking Association, Inc. v. Atchison* (1967), 387 U.S. 397, 416-418; and *Red Lion Broadcasting Co. v. FCC* (1969), 395 U.S. 367, 381.

**II. Proposition of Law No. 2: The Ohio Consumer Sales Practices Act Provides Remedies to an Individual Person Who Receives an Unsolicited Advertisement by Fax for Consumer Goods or Services, Even if He Receives it at His Place of Business.**

**A. The Trial Court's and Appeals Court's Rulings that Appellant Was the Recipient of Appellees' Faxed Advertisement for Purposes of the TCPA, But that Appellant's Law Firm Was the Recipient of Appellees' Faxed Advertisement for Purposes of the CSPA, Are Factually Unsupportable and Legally Irreconcilable.**

Ohio courts have also acted to curb the onslaught of junk faxes by applying existing consumer protection statutes to this form of intrusive advertising. In particular, the courts in Ohio have held that the Consumer Sales Practices Act ("CSPA") prohibits the transmittal of an unsolicited fax advertisement by a supplier to a consumer. See *Compoli v. EIP Limited* (July 1, 2002), Cuyahoga C.P. No. 446780, unreported (Appellant's Appx. 133); see also *Grady v. St. Cloud Mortgage* (March 7, 2003), Cuyahoga C.P. No. 484945, unreported (Appellant's Appx. 138). Here, Appellees admit that they willfully violated the TCPA. (Appellees' Merit Brief, p. 4) Therefore, Appellees' conduct also constitutes a violation of the CSPA.

Significantly, the only evidence before the trial court regarding who received Appellees'

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<sup>5</sup> The Junk Fax Prevention Act of 2005 amended 47 U.S.C. §227(a)(2) to permit businesses and other entities to send, without the recipient's prior express consent, commercial facsimiles to recipients with whom they enjoy an established business relationship. See 47 U.S.C. §227(a)(2) (Appellant's Supplemental Appendix 1, cited hereinafter as "Supp. Appdx. \_").

fax was the affidavit of Plaintiff-Appellant Stanlee E. Culbreath (“the Culbreath Affidavit”), which was submitted with Appellant’s Motion for Summary Judgment. (R. 13, Motion for Summary Judgment, No. 65 of Lower Court’s Case History Index) In the Culbreath Affidavit, Appellant states that he personally received Appellees’ fax advertisement. *Id.* Indeed, Appellee John Basinger admitted in his deposition that men, such as Appellant, were the targets of Appellees’ fax advertisement campaign:

Q. You’re aware that advertisements were sent by facsimile machine to a number of numbers in the Columbus area in May of this year, correct?

A. I’m aware invitations were sent.

Q. And they had the name of Dockside Dolls in them, correct?

A. That’s correct.

Q. **They invited people to come to the club?**

A. **Right.**

Q. And what is the level of your awareness? Were you personally involved in this or did someone tell you about it?

A. No, I was personally involved.

Q. What was your personal involvement?

A. I’m the one who instructed the managers to do it.

Q. And why did you do that?

A. I get two or three a day from Disneyland, Disneyworld, hotels, cruises, things like that. I thought it was a good idea.

Q. Your hope was to help drum up more business for Dockside Dolls, correct?

A. Right.

Q. **And the patrons of your business are persons, human beings that come to Dockside Dolls for entertainment, for drinks, that sort of thing, correct?**

A. **Correct.**

Q. The instruction that you gave to managers, did you give them any instructions on what they specifically should fax?

A. I approved the invitation and I got fax numbers to car dealerships, construction offices, law firms, wherever there’s a large group of men.

Q. **So your target was large groups of men?**

A. **Correct.**

Q. **Was it your hope that a fax received at wherever you sent it, a car dealership or law firm, would be shared and disseminated amongst men at that location?**

A. **Correct.** (Emphasis added.)

(R. 13, Basinger Dep. 13-15,<sup>6</sup> No. 77 of Lower Court's Case History Index)

The trial court found that Appellant was the recipient of Appellees' faxed advertisement for purposes of the TCPA, and awarded Appellant the maximum monetary relief available as to his First Cause of Action under the TCPA. (R. 13, September 28, 2005 Decision, No. 99 of Lower Court's Case History Index) The appeals court affirmed these rulings. (R. 48) However both courts ruled that Appellant did not receive Appellees' faxed advertisement for purposes of the CSPA and, therefore, his CSPA claims were dismissed. (R. 13, September 28, 2005 Decision, No. 99 of Lower Court's Case History Index; R. 48)

The lower courts' rulings concerning Appellant's TCPA claims cannot be reconciled with the rulings by the trial court and the appeals court that **Appellant's law firm, not Appellant, was the recipient of Appellees' fax for purposes of the CSPA.** The undisputed evidence in the record from the Culbreath Affidavit, and from Appellee Basinger's deposition, is that Appellant personally received the faxed advertisement. Thus, there can be no legitimate dispute but that Appellees intended that their fax would be received by men, such as Appellant. Appellant received Appellees' faxed advertisement for purposes of the TCPA and, therefore, it logically follows that he must also have been the recipient of the same fax for purposes of the CSPA.

Appellees try to downplay the irreconcilable nature of the lower courts' rulings by claiming that Appellant received Appellees' fax as a representative of his law firm, Culbreath & Associates, LPA. (Appellees' Merit Brief, pp. 19-21) However, as noted above, there is **no evidence** that Appellant received Appellees' fax in his capacity as a representative of Culbreath & Associates, LPA. Therefore, Appellees' claim that Appellant must have received the fax in his representative capacity is not supported by any evidence within the record.

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<sup>6</sup> See the Transcript from the September 9, 2004 Deposition of John Basinger, cited herein as ("Basinger Dep. \_"). (Supp. Appdx. 9)

Moreover, Appellees' argument that Appellant must have received the fax as a representative of his law firm is problematic because it was not raised before the trial court or the appellate court below. Therefore, this argument should not be considered by this Court. See *Jones v. Action Coupling & Equipment* (2003), 98 Ohio St.3d 330, 333, citing *Gibson v. Meadow Gold Dairy* (2000), 88 Ohio St.3d 201, 204 ("We need not address this argument, as it was not raised below."); see also *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St. 3d 78, 80; and *State ex rel. Gibson v. Industrial Commission* (1988), 39 Ohio St.3d 319, 320.

**B. Even if the Lower Courts Were Correct in Concluding that, for Purposes of Appellant's CSPA Claims, Appellant's Law Firm Received Appellees' Faxed Advertisement, Appellant's Law Firm Would Have Standing to Assert Claims Under the Consumer Sales Practices Act.**

In their Merit Brief, Appellees also posit that Appellant's law firm, Culbreath & Associates, LPA, lacks standing to assert claims under the CSPA. (Appellees' Merit Brief, pp. 25-26) As noted above, however, the only evidence in this case regarding the recipient of Appellees' fax were the Culbreath Affidavit and Appellee Basinger's deposition, which unequivocally establish that Appellant personally received Appellees' faxed advertisement, just as Appellees had wanted. (R. 13, Motion for Summary Judgment, No. 65 of Lower Court's Case History Index; R. 13, Basinger Dep. 13-15, No. 77 of Lower Court's Case History Index, Supp. Appdx. 9) However, even if there were any evidence to support Appellees' claim that Appellant's law firm received the faxed advertisement, Appellant respectfully submits that his law firm would have standing to assert a claim under the CSPA.

As support for Appellees' position, Appellees cite *Ferron & Associates v. U.S. Four, Inc.*, 2005 Ohio 6963. (Appellees' Merit Brief, pp. 25-26) In *Ferron*, the Tenth District Court of Appeals concluded that a corporation is not an "individual" as contemplated by the CSPA. *Ferron, supra* at ¶¶14-15. However, Appellant respectfully submits that the *Ferron* case was

wrongly decided by the Tenth District Court of Appeals.

In *Ferron*, *supra*, the appeals court relied exclusively upon the holding in *Toledo Metro Federal Credit Union v. Papenhagen Oldsmobile, Inc.* (1978), 56 Ohio App.2d 218. However, the *Ferron* court's reliance on *Toledo Metro* is misguided. *Toledo Metro* has only been cited five other times by the courts in Ohio during the last 27 years, and has never been adopted by this Court – and for good reason.

The decisions in *Toledo Metro* and *Ferron* rely upon a false dichotomy, differentiating between different classes of potential plaintiffs – individuals versus businesses – where nothing in the CSPA itself compels or requires such a distinction. These rulings focus on the only term – “individual” – that the Ohio legislature did not define in the CSPA or anywhere else within the Ohio Revised Code. In so doing, these decisions ignore other key definitions within the CSPA that clearly indicate that “individual” should not be defined in such a way as to prevent business consumers from bringing actions to curtail the egregious sales practices.

The CSPA defines several of its most significant terms:

“(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.** \*\*\*.”

(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 the person deals directly with the consumer.

(D) **“Consumer” means a person** who engages in a consumer transaction with a **supplier**.” (Emphasis added.)

R.C. §1345.01 (Appellant's Appdx. 69).

Appellant's legal professional association, which clearly is a type of corporation under Ohio law, is, therefore, a “person” under the CSPA. Accordingly, Appellant's law firm has

standing to assert claims under the CSPA because a “consumer” is “a person who engages in a consumer transaction with a supplier.” R.C. §1345.01(D); see also *State ex rel. Jackman v. Court of Common Pleas* (1967), 9 Ohio St. 159, 167 (“[T]he maxim, *expresso unis est exclusio alterius* [the expression of one thing is the exclusion of another], is not a rule of law but rather a rule of construction used as a tool [to discern statutory intent].”); and *Balt. Ravens, Inc. v. Self-Insuring Employers Evaluation Board* (2002), 94 Ohio St.3d 449, 454 (“[T]his court has long recognized that the canon “*expresso unis est exclusio alterius*” is \*\*\* an aid to statutory construction that must yield whenever a contrary legislative intent is apparent.”)

The exceedingly narrow interpretation of the CSPA adopted by the appeals courts in *Toledo Metro* and *Ferron* must be rejected as contrary to the principles of liberal statutory construction, which are applicable to a remedial statute such as the CSPA. See R.C. §1.11 (Appellant’s Appendix 67). As this Court ruled in *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 30, the legislative intent of the CSPA was to eliminate incentives for suppliers to engage in unfair or deceptive acts. See also *Parker v. I&F Insulation Co.* (2000), 89 Ohio St. 3d 261, 264 (CSPA awards attorneys’ fees to encourage consumers to pursue CSPA claims even when relatively small damages are involved).

This Court has made it clear that the legislative intent of the CSPA is to encourage consumers to pursue their rights under the CSPA. Accordingly, in order to further the underlying objectives of the CSPA, which include the vindication of consumers’ rights to be free from invasive fax advertising campaigns, Appellant respectfully submits that his law firm should be afforded the same remedies that are available to all other consumers under the CSPA for violations of the law.

C. **Appellees Violated the CSPA by Engaging in an Act or Practice Previously Found to be Unfair or Deceptive by an Ohio Court Determination, Where the Previous Court Determination Was Published by the Ohio Attorney General in the Public Inspection File Before Appellees Faxed Their Advertisement to Appellant.**

Appellees argue that they did not violate the CSPA by faxing their advertisement to Appellant because the fax received by Appellant is not a “consumer transaction” or a “solicitation” as contemplated by the CSPA. (Appellees’ Merit Brief, pp. 21-22) In an attempt to support this argument, Appellees cite *Kopff v. Battaglia* (D.D.C., 2006), 425 F. Supp.2d 76 and *Adler v. Vision Lab Telecommunications, Inc.* (D.D.C., 2005), 393 F. Supp.2d 35. (Appellees’ Merit Brief, p. 23) for the proposition that CSPA claims only arise when there is a consumer-merchant relationship, such as a purchase. However, *Kopff* and *Adler* construe the consumer protection statutes of the District of Columbia, not Ohio. Therefore, these cases are not at all instructive.

To determine whether a specific act or practice is an unfair or deceptive sales practice that violates the CSPA, one must look to three, separate sources of such substantive prohibitions. *First*, R.C. §1345.02(B) (Appellant’s Appdx. 73) contains an enumerated list of practices that are unfair or deceptive. *Second*, pursuant to R.C. §1345.05(B)(2) (Supp. Appdx. 2), the attorney general is authorized to adopt substantive rules defining acts or practices that violate R.C. §1345.02 (Supp. Appdx. 3), which are published in the Ohio Administrative Code. *Third*, the courts of Ohio are empowered to advance the development of consumer law by declaring specific acts and practices to be unfair or deceptive sales practices that violate R.C. §1345.02(A) (Appellant’s Appdx. 72).

Since the CSPA was first enacted in 1972, Ohio courts have declared a significant number of specific acts and practices to be actionable unfair or deceptive sales practices pursuant

to their authority to do so, which is set forth in R.C. §1345.09(B) (Appellant's Appdx. 76). *Frey v. Vin Devers, Inc.* (1992), 80 Ohio App. 3d 1, 6; see also *Fletcher v. Don Foss of Cleveland, Inc.* (1993), 90 Ohio App. 3d 82, 86. However, before a court's declaration will be effective for all suppliers and consumers in Ohio, the court's determination must be adopted by the Ohio Attorney General for publication in the Public Information File ("PIF") of the Ohio Attorney General. See R.C. §1345.05(A)(3) (Supp. Appdx. 6).

Pursuant to R.C. §1345.05(A)(3), on June 2, 2000, the Ohio Attorney General published within the Public Information File the court's determination in *Charvat v. Continental Mortgage Services* (June 1, 2000), Franklin C. P. Case No. 99CVH12-1025, unreported (Appellant's Appdx. 106), which declared that a violation of the TCPA is also a violation of the CSPA. Later, on March 12, 2002, the Attorney General added to the PIF the court's determination in *Compoli v. EIP Limited, supra*, which stands for the same proposition set forth in *Charvat v. Continental Mortgage Services*. See *Compoli v. EIP Limited, supra* at ¶¶6-7 ("A violation of the TCPA is also a breach of Section 1345.02(A) of the CSPA \*\*\* Each unsolicited fax advertisement constitutes a separate violation.") (Appellant's Appx. 133) Then, on February 27, 2003, the Attorney General added to the PIF the court's determination in *Grady v. St. Cloud Mortgage, supra*, which echoed the holdings in *Charvat* and *Compoli*. See *Grady v. St. Cloud Mortgage, supra* at ¶2 ("[U]nder Ohio case law, a violation of the TCPA is also a breach of Section 1345.02(A) of the Ohio Consumer Sales Practices Act.") (Appellant's Appx. 138).

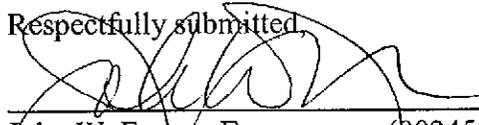
Thus, by the consistent and repeated adoption of court determinations standing for the proposition that a violation of the TCPA is also a violation of the CSPA, the Ohio Attorney General has made it clear in Ohio that a supplier commits an unfair or deceptive act or practice under the CSPA when it violates the TCPA. Accordingly, on June 2, 2000, it became Ohio law

that a supplier violates R.C. §1345.02(A) if it transmits a fax advertisement to a consumer in violation of the TCPA. Therefore, when Appellees transmitted their unsolicited fax advertisement to Appellant in violation of the TCPA, they committed an unfair or deceptive act in violation of the CSPA, which entitled Appellant to pursue the statutory remedies set forth in R.C. §1345.09 (Supp. Appdx. 7). Appellees' argument to the contrary is clearly wrong and unsupported by Ohio law.

### CONCLUSION

For the reasons set forth in Appellant's Merit Brief and this Reply Brief, Appellant respectfully requests that this Court reverse the May 25, 2006 Opinion and Judgment of the Tenth District Court of Appeals, with instructions to enter summary judgment in favor of Appellant as to all of the Causes of Action asserted in his Complaint.

Respectfully submitted,

  
\_\_\_\_\_  
John W. Ferron, Esq. (0024532)

jferron@ferronlaw.com

Lisa A. Wafer, Esq. (0074034)

lwafer@ferronlaw.com

FERRON & ASSOCIATES

A Legal Professional Association

580 North Fourth Street, Suite 450

Columbus, Ohio 43215-2125

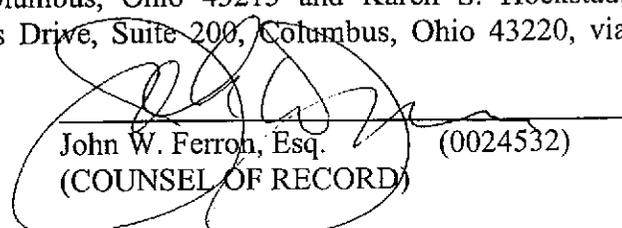
(614) 228-5225, 228-3255 fax

Attorneys for Plaintiff-Appellant,

Stanlee E. Culbreath

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served this 5<sup>th</sup> day of February, 2007, upon Richard O. Wuerth, Beth Anne Lashuk, LANE, ALTON & HORST LLC, 175 South Third Street, 7<sup>th</sup> Floor, Columbus, Ohio 43215 and Karen S. Hockstad, HOCKSTAD LAW OFFICE, LTD., 5003 Horizons Drive, Suite 200, Columbus, Ohio 43220, via regular first class U.S. mail.

  
\_\_\_\_\_  
John W. Ferron, Esq. (0024532)

(COUNSEL OF RECORD)

**SUPPLEMENTAL APPENDIX**

47 U.S.C. §227(a)(2)	Supp. Appdx. 1
R.C. §1345.05(B)(2)	Supp. Appdx. 2
R.C. §1345.02	Supp. Appdx. 3
R.C. §1345.05(A)(3)	Supp. Appdx. 6
R.C. §1345.09	Supp. Appdx. 7
Excerpts from the Transcript of the September 9, 2004 Deposition of John Basinger	Supp. Appdx. 9

47 USCS § 227

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\*\*\* CURRENT THROUGH 109TH CONGRESS 2ND SESSION \*\*\*

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS  
CHAPTER 5. WIRE OR RADIO COMMUNICATION  
COMMON CARRIERS  
COMMON CARRIER REGULATION

47 USCS § 227

§ 227. Restrictions on use of telephone equipment

(a) Definitions. As used in this section—

\*\*\*

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i), shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that--

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)[)].

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- \* AND SB 260 (FILE 172), AND SB 171 (FILE 182), FILED 1/3/07; SB 281 (FILE 189), FILED 1/4/07, AND HB 251 (FILE 190), FILED 1/5/07 \*
- \* ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 \*
- \* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 23, 2007 \*

TITLE 13. COMMERCIAL TRANSACTIONS -- OHIO UNIFORM COMMERCIAL CODE  
CHAPTER 1345. CONSUMER SALES PRACTICES

ORC Ann. 1345.05 (2006)

§ 1345.05. Consumer protection powers and duties of the attorney general

\*\*\*

(B) The attorney general may:

\*\*\*

(2) Adopt, amend, and repeal substantive rules defining with reasonable specificity acts or practices that violate sections 1345.02, 1345.03, and 1345.031 [1345.03.1] of the Revised Code. In adopting, amending, or repealing substantive rules defining acts or practices that violate section 1345.02 of the Revised Code, due consideration and great weight shall be given to federal trade commission orders, trade regulation rules and guides, and the federal courts' interpretations of subsection 45(a)(1) of the "Federal Trade Commission Act," 38 Stat. 717 (1914), 15 U.S.C. 41, as amended.

In adopting, amending, or repealing such rules concerning a consumer transaction in connection with a residential mortgage, the attorney general shall consult with the superintendent of financial institutions and shall give due consideration to state and federal statutes, regulations, administrative agency interpretations, and case law.

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TITLE 13. COMMERCIAL TRANSACTIONS -- OHIO UNIFORM COMMERCIAL CODE  
CHAPTER 1345. CONSUMER SALES PRACTICES

ORC Ann. 1345.02 (2006)

§ 1345.02. Unfair or deceptive consumer sales practices prohibited

(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.

(B) Without limiting the scope of division (A) of this section, the act or practice of a supplier in representing any of the following is deceptive:

(1) That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have;

(2) That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not;

(3) That the subject of a consumer transaction is new, or unused, if it is not;

(4) That the subject of a consumer transaction is available to the consumer for a reason that does not exist;

(5) That the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not, except that the act of a supplier in furnishing similar merchandise of equal or greater value as a good faith substitute does not violate this section;

(6) That the subject of a consumer transaction will be supplied in greater quantity than the

supplier intends;

(7) That replacement or repair is needed, if it is not;

(8) That a specific price advantage exists, if it does not;

(9) That the supplier has a sponsorship, approval, or affiliation that the supplier does not have;

(10) That a consumer transaction involves or does not involve a warranty, a disclaimer of warranties or other rights, remedies, or obligations if the representation is false.

(C) In construing division (A) of this section, the court shall give due consideration and great weight to federal trade commission orders, trade regulation rules and guides, and the federal courts' interpretations of subsection 45(a)(1) of the "Federal Trade Commission Act," 38 Stat. 717 (1914), 15 U.S.C.A. 41, as amended.

(D) No supplier shall offer to a consumer or represent that a consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers, or otherwise helping the supplier to enter into other consumer transactions, if earning the benefit is contingent upon an event occurring after the consumer enters into the transaction.

(E) (1) No supplier, in connection with a consumer transaction involving natural gas service or public telecommunications service to a consumer in this state, shall request or submit, or cause to be requested or submitted, a change in the consumer's provider of natural gas service or public telecommunications service, without first obtaining, or causing to be obtained, the verified consent of the consumer. For the purpose of this division and with respect to public telecommunications service only, the procedures necessary for verifying the consent of a consumer shall be those prescribed by rule by the public utilities commission for public telecommunications service under division (D) of section 4905.72 of the Revised Code. Also, for the purpose of this division, the act, omission, or failure of any officer, agent, or other individual, acting for or employed by another person, while acting within the scope of that authority or employment, is the act or failure of that other person.

(2) Consistent with the exclusion, under 47 C.F.R. 64.1100(a)(3), of commercial mobile radio service providers from the verification requirements adopted in 47 C.F.R. 64.1100, 64.1150, 64.1160, 64.1170, 64.1180, and 64.1190 by the federal communications commission, division (E)(1) of this section does not apply to a provider of commercial mobile radio service insofar as such provider is engaged in the provision of commercial mobile radio service. However, when that exclusion no longer is in effect, division (E)(1) of this section shall apply to such a provider.

(3) The attorney general may initiate criminal proceedings for a prosecution under division (C) of section 1345.99 of the Revised Code by presenting evidence of criminal violations to the prosecuting attorney of any county in which the offense may be prosecuted. If the prosecuting attorney does not prosecute the violations, or at the request of the prosecuting attorney, the attorney general may proceed in the prosecution with all the rights, privileges, and powers

conferred by law on prosecuting attorneys, including the power to appear before grand juries and to interrogate witnesses before grand juries.

(F) Concerning a consumer transaction in connection with a residential mortgage, and without limiting the scope of division (A) or (B) of this section, the act of a supplier in doing either of the following is deceptive:

- (1) Knowingly failing to provide disclosures required under state and federal law;
- (2) Knowingly providing a disclosure that includes a material misrepresentation.

*ORC Ann. 1345.05*

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- \* AND FILED WITH THE SECRETARY OF STATE THROUGH JANUARY 2, 2007 \*
- \* AND SB 260 (FILE 172), AND SB 171 (FILE 182), FILED 1/3/07; SB 281 (FILE 189), FILED 1/4/07, AND HB 251 (FILE 190), FILED 1/5/07 \*
- \* ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 \*
- \* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 23, 2007 \*

TITLE 13. COMMERCIAL TRANSACTIONS -- OHIO UNIFORM COMMERCIAL CODE  
CHAPTER 1345. CONSUMER SALES PRACTICES

ORC Ann. 1345.05 (2006)

§ 1345.05. Consumer protection powers and duties of the attorney general

(A) The attorney general shall:

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(3) Make available for public inspection all rules and all other written statements of policy or interpretations adopted or used by the attorney general in the discharge of the attorney general's functions, together with all judgments, including supporting opinions, by courts of this state that determine the rights of the parties and concerning which appellate remedies have been exhausted, or lost by the expiration of the time for appeal, determining that specific acts or practices violate section 1345.02, 1345.03, or 1345.031 [1345.03.1] of the Revised Code;

*ORC Ann. 1345.09*

PAGE'S OHIO REVISED CODE ANNOTATED  
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TITLE 13. COMMERCIAL TRANSACTIONS -- OHIO UNIFORM COMMERCIAL CODE  
CHAPTER 1345. CONSUMER SALES PRACTICES

ORC Ann. 1345.09 (2006)

§ 1345.09. Private remedies

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, 1345.03, or 1345.031 [1345.03.1] of the Revised Code, the consumer may, in an individual action, rescind the transaction or recover the consumer's 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, 1345.03, or 1345.031 [1345.03.1] 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 the consumer's 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) (1) Except as otherwise provided in division (C)(2) of this section, 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.

(2) If a consumer transaction between a loan officer, mortgage broker, or nonbank mortgage

lender and a customer is in connection with a residential mortgage, revocation of the consumer transaction in an action for rescission is only available to a consumer in an individual action, and shall occur for no reason other than one or more of the reasons set forth in the "Truth in Lending Act," 82 Stat. 146 (1968), 15 U.S.C. 1635, not later than the time limit within which the right of rescission under section 125(f) of the "Truth in Lending Act" expires.

(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 under this section 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.

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IN THE MUNICIPAL COURT  
FRANKLIN COUNTY, OHIO

- - -

Stanlee E. Culbreath, :  
Plaintiff, :  
vs. : Case No. 2004CVF-0234630  
U.S. Four, Inc., et al., :  
Defendants. :

- - -

DEPOSITION

of John Basinger, before me, Iris I. Dillion,  
Notary Public in and for the State of Ohio, at  
the offices of Ferron & Associates, 580 North  
Fourth Street, Columbus, Ohio, on Thursday,  
September 9, 2004, at 9:00 a.m.

- - -

ARMSTRONG & OKEY, INC.  
185 South Fifth Street, Suite 101  
Columbus, Ohio 43215-5201  
(614) 224-9481 - (800) 223-9481  
Fax - (614) 224-5724

- - -

1 Q. Is that pursuant to some kind of  
2 management contract between Golding Enterprises  
3 and W.D. Equipment?

4 A. No. I'm the director of operations  
5 over all the clubs.

6 Q. Is there a written operating  
7 agreement?

8 A. With me?

9 Q. Between Golding Enterprises and W.D.  
10 Equipment Rental?

11 A. It may be but not to my knowledge.

12 Q. You don't know of anything that  
13 spells out who is responsible for what?

14 A. I think there is a contract between  
15 Jerry Golding and Wayne Dennis. I'm sure  
16 there's some sort of management contract with  
17 him. Wayne was owner of the club before we  
18 became partners with him.

19 Q. You're aware that advertisements  
20 were sent by facsimile machine to a number of  
21 numbers in the Columbus area in May of this  
22 year, correct?

23 A. I'm aware invitations were sent.

24 Q. And they had the name of Dockside

1 Dolls in them, correct?

2 A. That's correct.

3 Q. They invited people to come to the  
4 club?

5 A. Right.

6 Q. And what is the level of your  
7 awareness? Were you personally involved in this  
8 or did someone tell you about it?

9 A. No, I was personally involved.

10 Q. What was your personal involvement?

11 A. I'm the one who instructed the  
12 managers to do it.

13 Q. And why did you do that?

14 A. I get two or three a day from  
15 Disneyland, Disneyworld, hotels, cruises, things  
16 like that. I thought it was a good idea.

17 Q. Your hope was to help drum up more  
18 business for Dockside Dolls, correct?

19 A. Right.

20 Q. And the patrons of your business are  
21 persons, human beings that come to Dockside

22 Dolls for entertainment, for drinks, that sort  
23 of thing, correct?

24 A. Correct.

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1 Q. The instruction that you gave to  
2 managers, did you give them any instructions on  
3 what they specifically should fax?

4 A. I approved the invitation and I got  
5 fax numbers to car dealerships, construction  
6 offices, law firms, wherever there's a large  
7 group of men.

8 Q. So your target was large groups of  
9 men?

10 A. Correct.

11 Q. Was it your hope that a fax received  
12 at wherever you sent it, a car dealership or law  
13 firm, would be shared and disseminated amongst  
14 men at that location?

15 A. Correct.

16 Q. When you say you approved the  
17 invitation, I take it someone else designed it  
18 on a piece of paper?

19 A. Yes.

20 Q. Was it done with a computer?

- 21 A. I believe so.
- 22 Q. Do you know who designed it?
- 23 A. I have no idea.
- 24 Q. Was it someone working at Dockside