DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: City and County Building 1437 Bannock Street Denver, Colorado 80202	 **COURT USE ONLY**
CONSUMER CRUSADE, INC., a Colorado corporation, Plaintiff, v. AFFORDABLE HEALTH CARE SOLUTIONS, INC., a California corporation; and JOHN DOE and JANE DOE, its Officers and Directors, Defendants.	Case No. 04 CV 0803
Attorneys for Defendants: Patrick L. Ridley, #17022 Richilano & Ridley, P.C. 1800 15th Street, Suite 101 Denver, CO 80202 (303) 893-8000 telephone (303) 893-8055 facsimile	Courtroom 7

DEFENDANTS' OMNIBUS MOTION TO DISMISS

Defendants Affordable Health Care Solutions, Inc. and its officers and directors ("AHCS"), through undersigned counsel, and pursuant to Rule 12(b)(1) and (5), C.R.C.P., moves for dismissal of this case in its entirety. In the alternative, AHCS requests that this Court dismiss certain claims for statutory damages that are unavailable as a matter of law. As grounds in support, AHCS states as follows:

I. INTRODUCTION

Defendant A.H.C.S. moves for dismissal of this case based upon lack of jurisdiction over the subject matter and based upon Plaintiff's failure to state a claim upon which relief may be granted. The Telephone Communication Privacy Act of 1991, 47 U.S.C. §227(b)(1)(C) (1991) (the "TCPA"), prohibits, among other things, "any person within the United States . . . [from] us[ing] 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 Act creates a private right of action to secure injunctive relief and to recover actual damages or $500; whichever is greater, for each violation of the Act. This private right of action may only be pursued, however, "if otherwise permitted by the laws or rules of court of a State." *Id.*

The plaintiff, Consumer Crusade, Inc., (hereafter, "Assignee"), does not claim to have received any faxes from AHCS, let alone to have received any faxes that violate the provisions of the TCPA. Instead, the Assignee in this case is attempting to pursue such claims on behalf of "various individuals in the State of Colorado ('Claimants')" who allegedly have received faxes from AHCS that violate the TCPA." (Complaint at ¶4). The Assignee attempts to do so by alleging that "at various times, each of the Claimants assigned their original claims under the TCPA to the Plaintiff." (Complaint at ¶6).

Because the Assignee is statutorily barred from recovering any of the relief claimed in this lawsuit, and because this Court has no jurisdiction to entertain a cause of action

under the TCPA, this case should be dismissed in its entirety.

II. ARGUMENT

1. The Assignee is Statutorily Barred From Recovering Any Of The Damages Claimed.

As a threshold matter, it is important to recognize the extent to which the Assignee's Complaint distorts the remedies available under the TCPA. Even if the Assignee has standing to pursue this case (it does not), and even if this Court has jurisdiction over TCPA claims (it does not), the Assignee's prayer for more than $15,000.00 in damages based on treble damages is a wild exaggeration of the relief that is even theoretically available to a private party under the TCPA.

> The Assignee's TCPA claims seek an award of statutory damages in the amount of $500 for each of the alleged statutory violations that are cognizable in a private right of action together with an award of treble damages should AHCS be deemed to have willfully and knowingly violated the provisions of the TCPA. (Complaint at ¶9-17). In addition, the Assignee seeks injunctive relief against AHCS. (*Id.* at ¶C). However, Colorado law forbids the assignment of statutorily-fixed damages and treble damages, and it also forbids the assignment of a claim for injunctive relief. Accordingly, Assignee has no standing to pursue any of the claims for relief set forth in the Complaint, and dismissal of this case is required.

"The general rule, established by the great weight of authority, is that if a cause of action is of such a nature that on the death of the party entitled to sue, the right of action would survive to his personal representative, it may be assigned; but, if the cause of action is such that it would not survive, it may not be made the subject of a valid assignment." *Olmstead v. Allstate Ins. Co.,* 320 F.Supp. 1076, 1078 (D.Colo.1971) (applying Colorado law). *See also Micheletti v. Moidel,* 32 P.2d 266, 267 (Colo.1934) ("The general rule is that

assignability and descendability go hand in hand"); 6A C.J.S. *Assignments* §35 (2003) ("[a] right of action which, by reason of its personal nature or otherwise, will not survive the owner's death is not assignable").

The survivability of claims is governed by Section 13-20-101, 5 C.R.S. (2003). That section provides, in relevant part, as follows:

> All causes of action, except actions for slander or libel, shall survive and may be brought or continued notwithstanding the death of the person in favor of or against whom such action has accrued . . . and, *in tort actions based upon personal injury, the damages recoverable after the death of the person in whose favor such action has accrued shall be limited to loss of earnings and expenses sustained or incurred prior to death and shall not include damages for pain, suffering, or disfigurement, nor prospective profits or earnings after date of death.*

§13-20-101(1), 5 C.R.S. (2003) (emphasis added).

There can be little doubt that a private right of action under the TCPA is an action that sounds in "tort" and is one predicated "upon personal injury" for purposes of Colorado's survival statute.[1] As such, Colorado's survival statute precludes the recovery of

[1] The TCPA was enacted in order to protect the privacy of individuals against the intrusive conduct of telemarketers, and it is firmly established that privacy-related claims are actions that sound in tort. *See, e.g., Pearson v. Kancilia*, 70 P.3d 594, 598 (Colo.App.2003) ("[i]n Colorado, 'invasion of privacy' encompasses three separate torts" including "intrusion upon the seclusion of another"); *Betor v. Quantalytics, Inc.*, ___ N.E.3d ___, 2003 WL 22407121 at *1 (Ohio Com.Pl. Oct. 3, 2003) (recognizing that TCPA was enacted "to provide citizens with protection against invasion of privacy" and noting that, under the TCPA, "[e]ach unsolicited fax advertisement is an independently actionable tort"); *Collins v. Collins*, 904 S.W.2d 792, 804 (Tex.App.1995) (cause of action under state wiretap statute "sounds in tort" because statutory violation "is clearly an invasion of privacy"); *Hansen v. Stoll*, 636 P.2d 1236, 1242 (Ariz.App.1981) ("invasion of privacy involves personal injury . . . and sounds mainly in tort").

The fact that a cause of action under the TCPA is a creature, not of the common law, but of federal statute is of no consequence because courts routinely recognize federal statutory claims as causes of action that sound in tort. *See, e.g., Wilson v. Garcia*, 471 U.S. 261, 277 (1985) (statutory

any claims for relief other than damages attributable "to loss of earnings and expenses sustained or incurred." However, Assignee does not seek to recover either of those forms of permitted damages. Rather, Assignee seeks recovery only of statutory, liquidated damages in the amount of $500 for each violation and treble statutory damages. C.R.S. §13-20-101(1) plainly and unambiguously precludes the survivability of such claims for relief and thus, those claims for relief cannot be assigned as a matter of law. The same conclusion holds with respect to Assignee's claim for injunctive relief.

In addition to being compelled by Colorado law, prohibiting the assignment of the TCPA claims for relief being pursued by Assignee here is entirely consistent with the very reasons why Congress created those remedies in the first place. The legislative history of the TCPA demonstrates that Congress intended that private actions under 47 U.S.C. § 227(b)(3) be treated as small claims easily litigated by the affected individuals without the need to hire, and pay, attorneys. Senator Hollings, *the sponsor of the bill*, explained:

> The substitute bill contains a private right-of-action provision that will make it easier for consumers to recover damages from receiving these computerized calls . . . [I]t is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court. . . . . Small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation [$500] is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the bill if the attorneys' costs to

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cause of action created by 42 U.S.C. §1983 is a "tort claim[] for personal injury"); *Curtis v. Loether*, 415 U.S. 189, 195 (1974) (Title VII's private right of action alleging housing discrimination is a "damage action under the statute [that] sounds basically in tort"); *Boehme v. U.S. Postal Serv.*, 343 F.3d 1260, 1265 (10th Cir. 2003) (Colorado's forcible entry and detainer statute, §13-40-104(1)(d), which creates a cause of action for damages, costs, attorney's fees and to restore possession of disputed real property is an "action [that] sounds in tort").

consumers of bringing an action were greater than the potential damages.

137 Cong. Rec. S16205-06 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings).

Here, far from an injured consumer pursuing a simple TCPA claim in small claims court without the assistance of, or need for, counsel, this case is being prosecuted by a corporation that has suffered no injury at all but, whose raison d'etre seems to be the pursuit of TCPA claims as an assignee of others.[2] To be sure, the financial terms of these "assignments" are not yet known, nor are the circumstances surrounding these "assignments," nor is anything known at this stage about the relationship between the corporate "assignee" and counsel.

Nevertheless, the Complaint itself establishes beyond a doubt that this case bears no resemblance at all to the sort of TCPA cases envisioned by Congress when it decided to permit a private right of action to enforce the TCPA, and created remedies that were intended to promote private enforcement actions that would be "fair" both to the affected consumers, and to telemarketers.[3]

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[2] According to a search of the CoCourts.com website, a database that tracks all court cases in Colorado, Consumer Crusade, Inc. has filed at least 25 lawsuits in 2004.

[3] In addition to controlling Colorado law and the purpose underlying the TCPA, more general rules of law also support the conclusion that the claims for relief presented in this case cannot validly be assigned. For instance, a number of courts have ruled that the public policies that underlie consumer protection laws (which, like Colorado's consumer protection act, typically include regulation of unsolicited fax advertisement) are policies that would be undermined were assignment of those claims permitted. *See, e.g., Investors Title Ins. Co. v. Herzig*, 413 S.E.2d 268, 271-72 (N.C.1992) (assignment of consumer protection claims is "offensive" to legislative objectives underlying such laws); *Winchester Homes Inc. v. Hoover Universal Inc.*, 1992 WL 88416 at *2 (Va.Cir.Ct. Jan. 6, 1992) (claims arising under Virginia consumer protection act cannot be assigned).

2. The TCPA imposes a penalty and therefore Plaintiffs claims are not assignable.

a. Recovery under 47 U.S.C. § 227(b)(3) provides a statutory penalty for violations of the Act.

A statute will be construed as penal in nature when the statute: 1) "create[s] a new and distinct statutory cause of action, "*Palmer v. A. H. Robins Co., Inc,*, 684 P.2d 187, 214 (Colo. 1984), 2) "requires no proof of actual damages as a condition precedent to recover, "*Palmer,* 684 P.2d at 214, 3) "impose[s] penalties in excess of actual damage," *Carlson v. McCoy*, 566 P.2d 1073, 1074 (Colo. 1977), and 4) serves a public interest "through the deterrent effect of the damages awarded, *Carlson*, 566 P.2d at 1075. While the case law is unclear as to how many criteria must be satisfied in order to make a determination, 47 U.S.C. § 227(b)(3) satisfies all four criteria and should be construed as a statutory penalty.

i. 47 U.S.C. § 227(b)(3) creates a new and distinct statutory cause of action.

Similarly, numerous courts have concluded that statutory causes of action that provide for awards of treble or punitive damages cannot be assigned because to do so would allow uninjured, third parties to profit from the injury of another. *See, e.g., GATX/Airlog Co. v. Evergreen Int'l Airlines Inc.*, 52 Fed.Appx. 940, 942 (9th Cir.2002) ("California law . . . bars the assignment of claims for punitive damages"); *Canal Indemnity Co. v. Green*, ___ S.E.2d ___, 2003 WL 22966370 at *5 (Ga.App. Dec. 18, 2003) ("a right to punitive damages cannot be assigned"); *Investors Title Ins. Co. v. Herzig*, 413 S.E.2d 268, 272 (N.C.1992) (no assignment of statutory cause of action which provides for award of treble damages because assignment allows a third party "to profit from" and to receive "a windfall from another person's injury"); *Hart Conversions, Inc. v. Pyramid Seating Co., Inc.*, 658 N.E.2d 129, 131 (Ind.App.1995) (statutory cause of action permitting an award of treble damages, because it is a "punitive statute intended to deter the wrongdoer and others from engaging in similar future conduct," could not be assigned).

The TCPA was enacted to allow state jurisdiction over unsolicited interstate calls and faxes, *GTE*, 2004 WL 162938 at 12, in response to a growing concern over unsolicited advertising. *Id*. at 8. Prior to the enactment of the measure, unsolicited faxes were considered a legitimate advertising strategy, and the recipient of such advertising "assume[ed] both the cost associated with the use of the facsimile machine and the cost of the expensive paper used to print out the facsimile messages."' H.R. Rpt. 102-317, 25 (1991); *GTE*, 2004 WL 162939 at 8. Legislative history of the measure shows that it was fully understood that "these costs are borne by the recipient of the fax advertisement…" *Id*. Prior to the passage of the Act, no remedy existed. Thus, the Act created a new and distinct statutory cause of action.

ii. 47 U.S.C. § 227(b)(3) requires no proof of actual damages as a condition precedent to recovery.

The TCPA provides that the recipient of an unsolicited fax may "receive $500 in damages for each such violation" in lieu of actual damages when the actual monetary loss is less than $500. 47 U.S.C. § 227(b)(3)(B). The alternative provision to an actual damages award suggests that Congress did not intend for the recipient to bear a burden of proof with regard to showing damages. *See id*. The wording also suggests that a recipient may file a claim for monetary damages even in the absence of actual damages, further

suggesting that no proof of actual damages is required. *Id.*; *see Kaplan v. First City Mortg.*, 701 N.Y.S.2d 859, 863 (City Ct. 1999). In addition, where "plaintiff offered no proof of actual monetary loss as a result of [an] unsolicited telephone call", the *Kaplan* court concluded that the plaintiff was"[n]onetheless,… entitled to damages of $500 for the TCPA violation." 701 N.Y.S.2d at 863.

iii. 47 U.S.C. § 227(b)(3) imposes monetary damages in excess of actual damage.

The TCPA provides that the recipient of an unsolicited fax may "receive $500 in damages for *each such* violation." § 227(b)(3)(B) (emphasis added). Courts considering whether or not the $500 per fax award violates the Due Process Clause of the Constitution have acknowledged that the Act allows a damage amount in excess of actual damages. *See Kenro, Inc. v. Fax Daily, Inc.*, 962 F.Supp. 1162, 1165 (S.D. Ind. 1997); *see GTE*, WL 162938 at 15; *see Texas v. American Blastfax, Inc.*, 121 F.Supp.2d 1085, 1090 (S.D. Tex. 2001). While these Courts have declined to hold that the excess amount is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable," *St. Louis, Iron Mt. & S. Ry. Co. V. Williams*, 251 U.S. 63, 73 (1919), so as to violate the Due Process clause, *Kenro*, 962 F.Supp. at 1167; *GTE*, 2004 WL 162938 at 16; *American Blastfax*, 121

F.Supp.2d at 1091, the monetary damages imposed are, nonetheless, in excess of actual damages and should be construed as such for the purposes of determining whether or not the statute imposes a penalty. In addition, it has been estimated that "'the cost of one page of paper used by the typical fax machine in use today is two and one-half cents,' and 'it takes between 30 and 45 seconds for a fax machine to print an 8-inch by 11-inch page of text.'" *Destination Ventures, Ltd. V. F.C.C.*, 46 F.3d 54,56 (Or. 1995); *see Kenro*, 962 F.Supp. at 1160. Given this estimate, it is highly unlikely that the actual damages for any one violation will amount to more than nominal damages in any situation.

iv. 47 U.S.C. § 227 was enacted to serve a public interest.

In conjunction with their Due Process analysis of the TCPA, the *Kenro, GTE,* and *American Blastfax* Courts each concluded that the Act was designed to address a public harm. 962 F.Supp. at 1165, 2004 WL 162938 at 16; 121 F.Supp.2d at 1090. The *American Blastfax* Court noted that "the TCPA damage provision was not designed solely to compensate each private injury caused by unsolicited fax advertisements. It was also intended to address and deter the overall public harm caused by such conduct." 121 F.Supp.2d at 1090; *see GTE,* 2004 WL 162938 at 16. In addition, all three Courts pointed out that "Congress identified two legitimate *public harms*

intended to be addressed by the TCPA's ban on unsolicited fax advertisements: (1) these fax advertisements can substantially interfere with a business or residence…and (2) unsolicited fax advertisements unfairly shift nearly all of the advertiser's printing costs." *American Blastfax*, 121 F.Supp.2d at 1091 (emphasis added); *GTE*, 2004 WL 162938 at 16 (emphasis added); *Kenro*, 962 F.Supp at 1166; *see also* H.R. Rpt. 102-317 at 25. In addition, all three Courts concluded that Congress intended for the monetary damages imposed by the Act to serve as a deterrent to these public harms. *Kenro*, 962 F.Supp at 1166 ("Congress designed a remedy that would … effectively deter the unscrupulous practice of shifting these costs …"); *see American Blastfax*, 121 F.Supp. 2d at 1091; *GTE*, 2004 WL 162938 at 16. Overwhelming evidence supports the conclusion that Congress intended the Act to serve as a deterrent to a public harm. Thus, the Act was clearly designed to serve a public interest.

Applying the four criteria clearly shows that TCPA was designed to be a statutory penalty. In addition, numerous courts have considered the damage awards allowed under the Act to be a penalty. *See GTE*, 2004 WL 162938 at 11 ("Congress intended to help states regulate and *penalize* unsolicited fax advertisements." Emphasis added.); *American Blastfax*, 121 F.Supp. 2d at 1090 (referring to § 227(b)(3)(B) as a "minimum *penalty*". (Emphasis added); *Rudgayzer & Gratt v.*

LRS Communications, Inc., 2003 WL 22344990, 1 (N.Y. Civ. Ct.) (classifying the TCPA as a "statutory penalty"); *Condon*, 855 So.2d at 649 ("The [TCPA] provided for a civil *penalty* not to exceed $500 per violation." (Emphasis added.); *Kaufman*, 2 Cal.Rptr.3d at 328 (referring to § 227(b)(3)(B) as a penalty); *Mulhern v. MacLeod*, 2003 WL 22285515, 3 (Mass. Super.) ("[The TCPA] creates *penalties* for the transmission of unsolicited facsimiles … " (Emphasis added); *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 50 P.3d 844, 850 (Ariz. App. Div. 1 2002) (referring to violations of the TCPA as a statutory penalty); *Kaplan*, 701 N.Y.S.2d at 863 (referring to violations of the TCPA as a statutory penalty); *Kaplan v. Democrat and Chronicle*, 698 N.Y.S.2d 799, 800 (N.Y. 1999) (holding "that the alternative remedy provided by the [TCPA] of up to $500 in damages…is punitive rather than compensatory."). Furthermore, Colorado law specifically classifies treble damages statutes as a statutory penalty. *Carlson v. McCoy*, 566 P.2d 1073, 1075 (Colo. 1977).

b. Claims arising under a penalty statues are not assignable.

"[A] right to recover a penalty is generally not assignable," 36 Am. Jur. 2d *Forfeitures and Penalties* § 56 (2003), on the grounds that "[a]ssignability of such claims encourages litigation and strife" and that "the conversion of penalties into commodities of assets [is against public policy]," *Peterson v. Ball*, 296 p. 291, 294 (Cal. 1931); *Wilson v. Schrader*, 79 S.E. 1083, 1086 (W. Va. 1913). While

addressing the issue of whether or not a statue imposing liability on directors for the debts of a corporation allows assignability, the Supreme Court of Colorado acknowledged the general rule that statutory penalties are not assignable. *Credit Men's Adjustment Co. v. Vickery*, 62 Colo. 214, 218 (Colo. 1916) (holding that the statute in question was "not an assigned right of action to collect a penalty" and classifying the claim as remedial in order to allow the claim to proceed). Furthermore, a review of the case law overwhelmingly indicates that the general rule against the assignability of statutory penalties is well settled. Twelve other states found to have addressed the issue have concluded that statutory penalties are not assignable. *Peterson*, 296 p. at 294 (statutory penalties not assignable); *Canal Indem. Co. v. Greene*, 2003 WL 22966370 at 5 (Ga. App.) ("claims for statutory penalties … may not be assigned"); *Robinson v. St. Maries Lumber Co.*, 204 p. 671, 672 (Idaho 1921) ("The right to recover the penalty … is a personal right, [sic] and cannot be assigned."); *Hart Conversions v. Pyramid Seating Co., Inc.*, 658 N.E.2d 129, 131 (Ind. App. 1995) ("The general rule is that the right to collect a penalty is a personal right which is not assignable."); *Lloyd v. First Nat. Bank of Russell*, 47 p. 575, 576 (Kan. App. 1897) ("The right of action for a penalty is clearly personal and nonassignable."); *Rorvik v. North Pacific Lumber Co.*, 195 p. 163, 167 (Or. 1921) ("Rights given by statute for the redress of personal wrongs are generally not assignable."); *National Surety Corp. v. State*, 198 So. 299, 301 (Miss. 1940) ("The

general rule is that a right to recover a penalty is not assignable."); *Heitfield v. Benevolent and Protective Order of Keglers*, 220 P.2d 655, 659 (Wash. 1950) ("In general, a cause of action for the recovery of a penalty is not assignable unless specifically made so by statute."); *Snodgrass v. Sisson's Mobile Home Sales, Inc.*, 161 W.Va. 588, 591 (W. Va. 1978) ("As a general rule, an action to collect a statutory penalty is not assignable unless the statute contains language indicating an intention to make the cause of action assignable."); *see Investors Title Insurance Co., v. Herzig*, 413 S.E.2d 268, 272 (N.C. 1992) (holding that treble damages pursuant to a cause of action for unfair practices are punitive in nature and not assignable); *see Pardoe v. Iowa State Nat. Bank*, 76 N.W. 800, 802 (Iowa 1898) (usury statute providing for the recovery of a statutory penalty not assignable).

In addition to the general rule, "[i]t is well-settled that penal statutes are to be strictly construed" for the purposes of determining liability. Fletcher, *Fletcher Cyclopedia of the Law of Private Corps.* vol. 3A, § 1203 (West 2003); *see Denning*, 326 P.3d at 79 ("the statute in question is penal and must be strictly construed."); *Credit Men's Adjustment*, 62 Colo. at 216 ("the statute … may well be considered penal, in the sense that it should be strictly construed."). The TCPA creates a "[p]rivate right of action" allowing a "person or entity" to file a claim based on violations of the Act. 47 U.S.C. § 227(b)(3). The language of the statute clearly entitles the *recipient* of an unsolicited fax to file a claim, *see id.*, and is silent as to the assignability of any claims

arising under the statute. *Id.* Construing the statute strictly, silence on the assignability of claims further indicates that the claim is not assignable.[4]

c. Penalty or not, Colorado law prohibits assignment of TCPA claims.

Even if statutory penalties are assignable, Colorado law prohibits the assignment of TCPA claims. *See Livingston v. U.S. Bank*, 58 P.3d 1088, 1090-1091 (Colo. App. 2002). In *Livingston*, Plaintiff sought class action certification on behalf of all persons who received U.S. Bank facsimile advertisements who did not request that they be added to the facsimile advertisement database. *Id.* The court denied the request for class certification because the predominance requirement of C.R.C.P.23(b)(3) was not met. *Id.* The court found that the question of whether any individual fax recipient gave "prior express invitation or permission" would have to be decided on an individual basis and therefore would overwhelm, let alone predominate over, the common issues. *Id*. Individual inquiries into the facts and circumstances of each recipient's invitation and permission would have to be made. *Id*. Each potential plaintiff must prove that a specific transmission to its machine was without express invitation or permission.

If *Livingston* stands for anything, it stands for the proposition that TCPA claims are claims of individuals not assignees. Plaintiff's use of an assignment

[4] Not only is the statute silent on assignability, the statutory language is strained by implying the right to assign. The TCPA provides an injunctive remedy as well as statutory penalties. While Plaintiff requests an injunction against Defendant, Defendant has never sent and Plaintiff has never received a single fax. The assignors are the ones who allegedly received fax transmissions – not Plaintiff. To imply assignability makes the injunctive relief meaningless.

mechanism is simply an attempt to avoid the holding and reasoning of *Livingston*. Plaintiff will be required to prove that each fax sent was sent to the facsimile machine of each individual assignor and was done so without the assignor's prior express permission. This will require individual testimony from each assignor and the requisite discovery equivalent to numerous lawsuits rolled into one.

For all of these reasons, the law prohibits the assignee from recovering or obtaining any of the relief requested in its Complaint. Consequently, the Complaint should be dismissed in its entirety for failure to state a claim upon which relief can be granted.

2. This Court Lacks Jurisdiction Over The Assignee's TCPA Claims.

Even if this Court were to conclude that the Assignee can pursue the purported assigned claims under the TCPA, dismissal of this case is required because this Court has no jurisdiction to entertain a private right of action under the TCPA.

In order to bring a private action under the TCPA, such actions must be authorized by the state in which they are brought. Unlike other state legislatures that have done so, Colorado has never authorized the filing of private TCPA actions in state court. To the contrary, Colorado has designed and enacted its own laws governing unsolicited fax advertising, which laws differ in a number of material respects from the provisions of the TCPA. Colorado has, as a result, rejected the congressional policy reflected in the TCPA in favor of its own laws designed to address unsolicited fax advertising.

a. <u>The TCPA Requires That Colorado "Opt-In" Before A Private Cause of Action Under The TCPA Can Be Brought In State Court</u>.

When Congress enacted the TCPA, it created a conditional private right of action that permits a TCPA claim to be brought only "*if otherwise permitted* by the laws or rules of court of a State." 47 U.S.C. §227(b)(3) (emphasis added). Every federal circuit court that has addressed the issue has reached "the somewhat unusual conclusion" that the TCPA, although it is a federal law, does not create federal question jurisdiction but is, instead, a law over which "state courts have exclusive jurisdiction." *E.g., Murphy v. Lanier*, 204 F.3d 911, 915 (9th Cir.2000) ("[w]e join the Second, Third, Fourth, Fifth and Eleventh Circuits in the somewhat unusual conclusion that state courts have exclusive jurisdiction over a cause of action created by a federal statute, the Telephone Consumer Protection Act of 1991") (internal quotations omitted).

There is less unanimity on the question of what a state must do, if anything, to allow private litigants to assert TCPA claims in state court. Some courts have ruled that the phrase "if otherwise permitted" requires an affirmative act by a state allowing private causes of action to be brought in that state, i.e., a state must "opt in" to the TCPA. *See, e.g., Autoflex Leasing, Inc. v. Manufacturers Auto Leasing, Inc.*, 16 S.W.3d 815 (Tex.App.2000). Other courts have ruled that private litigants may bring TCPA claims in state court absent a state's election to "opt out" of the TCPA by enacting an express prohibition on the enforcement of the TCPA in its courts. *See, e.g., Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.2d 907 (Mo.2002).

This Court should follow the rule that the TCPA permits a private cause of action in state court only when a state has elected to "opt in" to the TCPA by enacting legislation that authorizes private TCPA claims to be prosecuted in state court because the rule is consistent with the TCPA's plain language, constitutional limitations on congressional power, and the purpose and history underlying the TCPA.

First, the plain and unambiguous meaning of the phrase "if otherwise permitted," requires each state to adopt enabling legislation that allows private TCPA actions to be pursued in courts of that state. *See, e.g., Merriam-Webster Online Dictionary,* http://www.merriam-webster.com (2003) ("permit" means "to consent to expressly or formally," "to give leave," or "to make possible.") *See also Office of Personnel Management v. Richmond,* 496 U.S. 414 (construing the phrase "permitted by law" to require some form of express authorization). In using the phrase "if otherwise permitted," "[c]ongressional intent is clear: the right to bring an action under the TCPA is dependent upon proper authorization under state law." *Nicholson v. Hooters of Augusta, Inc.*, 1996 WL 1749407 at *2 (S.D.Ga. Sept. 4, 1996), *rev'd on other grounds*, 136 F.3d 1287 (11th Cir.1998).

By contrast, to construe the TCPA as an "opt out" statute fights with the plain meaning of the TCPA, because such a rule requires a court to read the phrase "if otherwise permitted" to really mean "if not otherwise prohibited." *See, e.g., West*

v. Costen, 558 F. Supp. 564, 582 (W.D.Va.1983) (the phrase "'permitted by law' is different from 'not prohibited by law.' Permission requires an affirmative authorization, not just indulgent silence."). Congress is assumed to mean what it says, and it did not say that TCPA claims can be brought in state court "if not otherwise prohibited." As such, the plain language of the TCPA supports the conclusion that states must "opt in" before a private cause of action can be pursued in state courts.

Second, construing the TCPA to require states to "opt in" is consistent with the TCPA's purpose and legislative history. When it enacted the TCPA, Congress was attempting only to assist states in their individual efforts to regulate telemarketing activities, which efforts had been stifled by the states' inability to regulate interstate, as opposed to intrastate, telemarketing. 47 U.S.C. §227 (Congressional finding No. 7) ("Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation; therefore, Federal law is needed to control residential telemarketing practices"); *see also Van Bergen v. State of Minnesota*, 59 F.3d 1541, 1548 (8th Cir.1995) ("the TCPA was intended not to supplant state law, but to provide interstitial law preventing evasion of state law by calling across state lines").

As such, the TCPA "was enacted for the benefit of the states, not the federal

government." *R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc.*, 815 A.2d 816, 819 (Md.App.2003). *See also Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 515 (3d Cir.1998) (the TCPA "does not appear to reflect any significant federal interest, or one that is uniquely federal [and i]t does not reflect an attempt by Congress to occupy this field of interstate communication or to promote national uniformity of regulation").

In light of the purpose and history of the TCPA to *supplement* state efforts to regulate telemarketing, there is no basis for concluding that Congress was, at the very same time, attempting to provide a cause of action in states that had enacted no such legislation. In other words, construing the TCPA as an "opt in" statute is perfectly consistent with the purpose and history of the Act.

By contrast, the history and purpose of the TCPA belie the notion that Congress could have intended the TCPA to apply even in those states that had made no attempt to regulate inter- or intra-state telemarketing activities because, as to those states, there are no regulations for the TCPA to supplement and no state policy being evaded through interstate marketing activities.

Third, construing the phrase "if otherwise permitted" to require an affirmative act by the states is consistent with constitutional limitations on congressional power. It is firmly established that states are required to permit the enforcement of federal laws in state court only when federal law provides for

concurrent jurisdiction in federal *and* state courts. *See, e.g., Donnelly v. Yellow Freight Sys. Inc.*, 874 F.2d 402, 409 (7th Cir.1989) ("[w]hen presented with a federal claim over which concurrent jurisdiction exists, state courts are under a duty to exercise jurisdiction over the federal claim") (internal quotations omitted). *See also Testa v. Katt*, 330 U.S. 386 (1947); *Wowlett v. Rose*, 496 U.S. 356, 367 (1990) ("the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature [and t]he Supremacy Clause makes those laws 'the supreme Law of the Land,' and charges state courts with a *coordinate responsibility* to enforce that law") (emphasis added).

Congress did not create concurrent jurisdiction over the Act's private right of action provisions and therefore, the states are under no constitutional obligation to permit the enforcement of the TCPA in state courts. *E.g., Murphy v. Lanier*, 204 F.3d 911, 915 (9th Cir.2000). Construing the TCPA's use of the phrase "if otherwise permitted" to allow states, in their discretion, to "opt in" to the TCPA is perfectly consistent with the fact that the TCPA does not create concurrent jurisdiction and thus, the states are under no constitutional obligation to allow enforcement of the TCPA in state courts. *See Murphey v. Lanier*, 204 F.3d 911, 914 (9th Cir.2000) (TCPA does not violate federal law because it "explicitly allows states to choose whether to allow their courts to enforce the federally created right").

By contrast, reading the TCPA to create a cause of action cognizable in state

courts absent express state consent raises significant constitutional concerns and, for that reason alone, is an interpretation that should be disfavored. *See, e.g., Public Citizen v. Dept. of Justice*, 491 U.S. 440, 466-467 (1989) (a court should adopt an interpretation of statutes that avoids creating serious constitutional questions about the validity of the law in question).

For all of these reasons, this Court should rule that the TCPA's provision that a private cause of action may be pursued in state court "if otherwise permitted" by state law requires that Colorado affirmatively elect to permit such claims to be filed in its courts. Because Colorado has not enacted legislation "opting in" to the TCPA, Assignee's TCPA claims should be dismissed for lack of jurisdiction.[5]

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[5]In so urging, we readily acknowledge that the weight of authority is that the TCPA is an "opt out" statute. However, this line of authority should be rejected for any number of reasons. Most notably, the majority of cases holding that the TCPA is an "opt out" statute are premised on authority that in no way supports the rule. Nearly every court that has adopted the opt-out approach has done so by relying exclusively upon the Fourth Circuit's decision in *International Science & Technology Institute, Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146 (4th Cir. 1997). *See, e.g., Reynolds v. Diamond Food & Poultry, Inc.*, 79 S.W.3d 907, 910 (Mo. 2002) (finding *"Int'l Science* persuasive" and ruling a TCPA claim "may be brought unless a state does not otherwise permit such a suit"); *Hooters of Augusta, Inc. v. Nicholson*, 537 S.W.2d 468, 470 (Ga.App. 2000) ("persuaded by the analysis in *Intl. Science*" and holding "the absence of a statute declining to exercise the jurisdiction authorized by the TCPA gives Georgia citizens the right to seek the relief provided by the TCPA").

The problem, however, is that the court in *International Science* was not called upon to decide whether the TCPA was an "opt in" or an "opt out" statute, the case does not hold that the TCPA is an "opt out" statute and, in fact, the case never even uses the phrase. Nevertheless, most courts that have relied on *International Science* to support the "opt out" rule have seized upon the court's statement that "states may refuse to exercise the jurisdiction authorized by the statute." *International Science*, 106 F.3d at 1156.

But, the court repeatedly refers to the TCPA as a law that allows the states to consent to

b. Even If The TCPA Is Construed As An "Opt Out" Statute, This Court Should Rule That Colorado Has Opted Out Of The TCPA.

Eight years after Congress passed the TCPA, the Colorado General Assembly amended the Colorado Consumer Protection Act to include a provision governing unsolicited fax advertising. Section 6-1-702, 2 C.R.S. (2003) (hereafter, the "CCPA") provides, in relevant part, as follows:

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

§6-1-701(1)(b)(I), 2 C.R.S. (2003).

Unlike the TCPA which, as a general proposition, proscribes the very act of sending an unsolicited fax advertisement, Colorado has adopted a far more tolerant attitude towards this activity. Under Colorado law, sending an unsolicited fax advertisement is not, in and of itself, actionable. Rather,

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jurisdiction over private suits. *See id.* at 1150 (state court jurisdiction over private suits is "subject to their consent"), 1152 (private actions may be brought in state court "so long as the states allow such actions"), 1154 (such actions may be brought "if the state consents"). These statements suggest, as other courts have recognized, "that the Fourth Circuit, if called upon to do so, might very well interpret 47 U.S.C. § 227(b)(3) as an "opt in" provision." *R.A. Ponte Architects, Ltd., v. Investors' Alert, Inc.*, 815 A.2d 816, 825 n.7 (Md.App.2003).

The important point for present purposes is that the plain language and legislative purpose of the TCPA, together with constitutional limits on congressional authority, all support the "opt in" approach, whereas those cases which reject the rule in favor of the "opt out" interpretation of the TCPA have done so based upon authority which, at best, provides ambiguous and tenuous support for the rule.

sending an unsolicited fax is actionable only if the fax does not contain a toll free number that recipients can call to notify the sender to stop sending the unsolicited ads. In short, Colorado law is much more permissive than the TCPA, and Colorado law makes actionable conduct that is not actionable in a private cause of action under the TCPA. *See* Argument 3 *infra.*

The General Assembly is presumed to know the law. *Leonard v. McMorris,* 63 P.3d 323, 331 (Colo.2003). Consequently, the General Assembly is presumed to have been aware of the TCPA when it enacted the CCPA. Nevertheless, the General Assembly rejected the TCPA treatment of fax advertising and, instead, decided to address the issue in a materially different fashion than Congress chose.

The only sensible understanding of these facts is that the General Assembly has chosen not to accept the grant of jurisdiction over private actions under the TCPA. To hold otherwise (assuming, of course, that the TCPA is not an "opt in" statute) would require attributing to the General Assembly the illogical and inconsistent intention of immunizing under state law activity that is actionable under federal law, but allowing suits based on either or both laws to be prosecuted in state court. *See R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc.*, 815 A.2d 816, 827 (Md.App.2003) (Maryland legislature has chosen, implicitly, "*not* to accept the grant of jurisdiction over private actions under [the TCPA]" by virtue of its enactment of consumer protection laws governing fax advertising that are materially different from

the provisions of the TCPA).

What is more, to hold that Colorado has not implicitly "opted out" of the TCPA would render the CCPA essentially meaningless. Colorado has determined that unsolicited fax advertisements are a permissible form of commercial advertising, provided that the recipient can call a number and request that no further faxes be transmitted. This permissive policy and the statute that reflects this policy is rendered entirely meaningless however, if that very same conduct is actionable in a private suit brought under the TCPA and prosecuted in Colorado state court. In other words, to conclude that Colorado, in embracing a public policy different from that embraced by Congress, and enacting a law which reflects that public policy, acknowledged and accepted that private TCPA claims could be asserted in state court, is to attribute to the General Assembly the intention to embrace a policy and enact laws that it knows, and intends to be, of absolutely no consequence. Such a conclusion, anomalous in any circumstance, is particularly so in this context, where the TCPA was itself enacted to assist the states in their efforts to regulate telemarketing activities, not to frustrate and override the manner in which states have attempted to deal with the issue.

Consequently, even if this Court were to conclude that that a state need not "opt in" to the grant of jurisdiction contained in the TCPA, it nevertheless should conclude that, by enacting laws that allow conduct which is proscribed by the TCPA, and by proscribing conduct that is not actionable under the TCPA, the

General Assembly has elected to "opt out" of the TCPA's grant of jurisdiction. Consequently, this Court has no jurisdiction to entertain Assignee's TCPA claim.

III. CONCLUSION

For the foregoing reasons, AHCS requests that this Court enter an Order dismissing this case in its entirety.

Respectfully submitted this 23rd day of April, 2004.

/s/ Patrick L. Ridley

Patrick L. Ridley, Atty No. 17022
RICHILANO & RIDLEY, P.C.

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2004, the foregoing **Defendants' Omnibus Motion To Dismiss** was FILED AND SERVED ELECTRONICALLY via CourtLink, the duly signed original held in the file located at RICHILANO & RIDLEY, P.C., copies addressed to:

A.M. Demirali, Esq.
The Demirali Law Firm
875 S. Colorado Blvd., Box 662
Denver, CO 80246

/s/ Dawn Mueller

Dawn Mueller

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: City and County Building 1437 Bannock Street Denver, Colorado 80202	**COURT USE ONLY**
CONSUMER CRUSADE, INC., a Colorado corporation, Plaintiff, v. AFFORDABLE HEALTH CARE SOLUTIONS, INC., a California corporation; and JOHN DOE and JANE DOE, its Officers and Directors, Defendants.	Case No. 04 CV 0803
Attorneys for Defendants: Patrick L. Ridley, #17022 Richilano & Ridley, P.C. 1800 15th Street, Suite 101 Denver, CO 80202 (303) 893-8000 telephone (303) 893-8055 facsimile	Courtroom 7

ORDER GRANTING DEFENDANTS' OMNIBUS MOTION TO DISMISS

Upon motion of Defendants and being fully apprised of the facts herein, it is hereby ORDERED that Defendants' Omnibus Motion to Dismiss is GRANTED.

DONE AND DATED this _____ day of _____, 2004.

BY THE COURT:

_____
District Court Judge