COLORADO COURT OF APPEALS Colorado State Judicial Building 2 East Fourteenth Avenue Denver, Colorado 80203 Case No. 03 CA 0241	
DISTRICT COURT, ARAPAHOE COUNTY The Honorable Timothy Louis Fasing Civil Action No. 02 CV 3159	□COURT USE ONLY□
Plaintiffs-Appellants: ALVIN K. LUCERO, d/b/a A&N Quality Products; DOUGLAS M. MCKENNA; and MATHEMAESTHETICS INC., a Colorado corporation; for themselves and all other persons similarly situated v. Defendants-Appellees: BURT BUICK-PONTIAC-GMC TRUCK, INC., a Colorado corporation, d/b/a Burt Custom Finance and d/b/a Burt Automotive Network, Inc.; FAX.COM, INC., a Delaware corporation; KEVIN KATZ; and CHARLES MARTIN	
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APPELLANTS' OPENING BRIEF

APPEAL FROM THE DISTRICT COURT
FOR THE COUNTY OF ARAPAHOE

Honorable Timothy L. Fasing, District Court Judge
Civil Action No. 01-CV-2906

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3. Whether the Trial Court improperly ruled that an express invitation or permission required by the TCPA can be implied by a prior business relationship.

4. Whether the Trial Court improperly found that individual issues predominate over common issues.

5. Whether the Trial Court improperly ruled that a class action was inferior to individual actions for violations of the TCPA.

STATEMENT OF THE CASE

A. Nature Of The Case

This is a class action brought by the Plaintiffs-Appellants on behalf of themselves and all others similarly situated to remedy the Defendants-Appellees' uniform practice of bombarding telephone facsimile machines of persons and/or entities with unsolicited advertisements ("junk faxes"). This mass sending of junk faxes is a *per se* violation of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (2004) ("TCPA").

Enacted by Congress in 1991, the TCPA regulates telemarketing activities, including junk faxing. It prohibits the sending of an "unsolicited" facsimile advertisement, 47 U.S.C § 227(b)(1)(C), which is defined as one sent without the sender having the recipient's "prior express

invitation or permission." As a remedy, the TCPA grants the junk fax recipient a private right of action for $500 per violation, $1,500 if "knowing" or "willful."

The Defendants-Appellees sent 587,592 unsolicited faxed advertisements to the Plaintiffs-Appellants and members of the Class in the 303 and 720 area codes from May 9, 2001 through April 18, 2002. Defendants-Appellees conducted this advertising campaign without obtaining from any recipient an express invitation or permission prior to the sending of faxed advertisements.

B. Course of the Proceedings and Disposition Below

After the case was at issue, the Plaintiffs-Appellants moved to certify as a class action. The Trial Court denied the motion. An order pursuant to C.R.C.P. 54(b) was then entered certifying as final the Trial Court's denial of the motion to certify.

STATEMENT OF FACTS

Fax.com, Inc. ("Fax.com") claims to have the largest database of telephone numbers of facsimile machines in the world to which it sends unsolicited fax advertisements for various advertisers. According to its web site, Fax.com boasts that "it has the world's largest database of fax numbers catalogued by location." (R. 536.)

Defendant Burt Buick-Pontiac-GMC Truck, Inc. ("Burt Buick") entered into a contract with Fax.com to send a massive number of unsolicited facsimile advertisements to facsimile machines in Colorado, including facsimile machines owned by the Plaintiffs-Appellants. (R. 545-46.) Burt Custom Finance was a name used by Burt Buick for this advertising campaign. (R. 560, Transcript of John H. Held, 39:2-12.) This faxing began at the rate of 50,000 junk faxes per month and, for a period of time, was increased to 120,000 junk faxes per month. (R. 561, Held Tr., 44:3-11.) Under

this contract, Fax.com sent 587,592 advertisements for Burt Custom Finance to various telephone numbers in the 303 and 720 area codes from May 9, 2001 through April 18, 2002. (R. 609-23.) This campaign to send unsolicited faxed advertisements on behalf of Burt Custom Finance resulted in twelve faxed advertisements being sent to Plaintiffs-Appellants. (R. 625-27, 629-31, Affidavits of Alvin K. Lucero and Douglas M. McKenna).

Defendants-Appellees conducted this advertising campaign without first obtaining any recipient's express invitation or permission prior to sending their facsimile advertisements to those facsimile machine owners. Despite written discovery specifically directed at determining the existence of any record of persons from whom Defendants-Appellees had obtained "prior express invitation or permission" for faxed advertisements, Fax.com flatly refused to respond. (R. 634-49.) Burt Buick did respond but could not produce any such record. (R. 652-69.) As the Defendants-Appellees could not or would not produce any record of having obtained prior express invitation or permission from any person or entity, the only conclusion permitted is that every faxed advertisement sent by the Defendants-Appellees to telephone facsimile machines of members of the putative Class throughout Colorado was unsolicited within the meaning of the TCPA.

From the beginning, the Defendants-Appellees knew that their campaign of sending unsolicited faxed advertisements violated the law. First of all, Fax.com had been sued for TCPA violations before it contracted with Burt Buick to provide junk faxing services. *See e.g. Aronson v. Fax.com,* 2001 WL 1202609 (Pa.Com.Pl., February 28, 2001).

Secondly, the following language appears in the Fax.com–Burt Buick contract:

> [Burt Buick] acknowledges that [Burt Buick] is aware that [Fax.com's] faxing of [Burt Buick's] commercial messages/advertisements on behalf of [Burt Buick] presents significant legal issues and risks. [Burt Buick] acknowledges that [Fax.com] has made no representations, promises or assurances to [Burt Buick] in this regard, and [Burt Buick] has had the opportunity to consult with its own legal counsel with respect to the federal Telephone Consumer Protect [sic] Act and applicable state law regarding transmissions by fax of unsolicited commercial messages/advertisements and the risks attendant thereto.

(R. 546, ¶ 11.) Notwithstanding this explicit warning, Burt Buick proceeded. Even after receiving objections from recipients of these faxed advertisements, Burt Buick continued. Some 9 days after the faxing started, on May 17, 2001, one recipient faxed back a message informing Burt Buick that the sending of unsolicited junk faxes was in violation of federal law. (R. 691.) By that time, some 21,977 faxed advertisements had been sent but the warning went unheeded; thereafter, 565,615 junk faxes were sent until the program was halted on April 18, 2002. (R. 609-23.)

SUMMARY OF THE ARGUMENT

1. A case brought under the TCPA can be certified as a class action provided that the requirements of C.R.C.P. 23 are met.[1] In denying the Plaintiffs-Appellants' motion to certify, the Trial Court made three errors of law:

(a) The Trial Court considered *Livingston v. U.S. Bank,* 58 P.3d 1088 (Colo. App. 2002), *cert. denied,* (Colo. 2002) to be controlling, even though the class definition here is quite different. Similar to this case, *Livingston* was brought under the TCPA, but the

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[1]A private right of action created by Congress may, as a matter of law, be certifiable if Rule 23 requirements are met, unless Congress clearly indicates it cannot be, which is not the case here. *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979).

similarity ended there. As the Trial Court denied the Plaintiffs-Appellants' motion to certify without a careful analysis of the Rule 23 factors but, rather, based upon the fact that *Livingston* was also brought under the TCPA, the denial of the motion to certify in this case was tantamount to deciding the motion as a matter of law.

(b) Secondly, the Trial Court ruled that the burden was on the Plaintiffs-Appellants to show that the subject faxed advertisements were unsolicited. A correct reading of the TCPA places the burden on the Defendants-Appellees to show that they had "prior express consent or permission" before sending the faxed advertisements. The prohibition against junk faxes contained in the TCPA includes but one defense: that the sender of the fax had the recipient's "prior express invitation or permission." This is an affirmative defense that places the burden on the sender to show that express consent had been obtained before sending the faxed advertisement.

(c) Finally, the Trial Court ruled that an established business relationship could be used to satisfy the requirement under the TCPA that express invitation or permission be obtained by the sender of a faxed advertisement. This is directly contrary to the TCPA as the "invitation or permission" must be express; it may not be implied. The term"express" is used in the TCPA; thus, any invitation or permission relied on by the sender of a faxed advertisement in order to escape the statutory prohibition may not be implied by any established business relationship between the sender and recipient.

2. The predominance of common issues in this case is clear. The Defendants-Appellees admitted that they had no evidence that they obtained the "prior express invitation or permission"

of any recipient of any of the almost 600,000 junk faxes that they sent. And, of the five affirmative defenses that have been asserted by the Defendants-Appellees, each one has class-wide application.

3. Had the Trial Court not made the errors of law referred to above, it would have been clear that the common issues predominate over any individual issue.

4. A class action under the TCPA is superior to other available means of a fair and efficient adjudication. Litigation of TCPA claims in small claims court is uneconomic, demonstrated by the fact that here, out of 600,000 illegal faxed advertisements sent, Defendants-Appellees received written protests from 786 recipients of faxed advertisements but only one filed suit.

ARGUMENT

A. The Trial Court, Without Analysis of Rule 23 Factors, Cited *Livingston* as Requiring Denial of the Motion to Certify Class. However, *Livingston* Does Not Stand for the Proposition That a TCPA Case Can Never Be Certified as a Class Action. Because the Trial Court Followed *Livingston* Without Due Consideration of the Pertinent Facts or Proper Construction of the TCPA, Class Certification Was Improperly Denied as a Matter of Law.

The Trial Court's first error of law was to treat *Livingston* as requiring denial of the motion to certify class. This case was cited without considering that the class definition here is vastly different. Then, citing *Livingston* as dispositive, the Trial Court paid scant attention to Rule 23.

That the Trial Court treated *Livingston* as disposing of the Plaintiffs-Appellants' motion to certify as a matter of law is clear from the record. Specifically, the Trial Court stated as follows:

> [A]lthough there have been some attempts to distinguish the *Livingston* case, the Court finds that it is, in fact, dispositive, that any distinguishing features or distinctions, without a difference – it's really squarely the same kind of case we have here, the same basic issues.

(Transcript, Hearing of September 22, 2003, p. 7.)

What the decision of the Court of Appeals in *Livingston* turned on was the proposed definition of the class there, which was as follows:

> All persons who received U.S. Bank facsimile advertisements sent on U.S. Bank's behalf by ACS, *who did not, prior to receiving the facsimile advertisements, contact U.S. Bank or ACS to request that they be added to the facsimile advertisement recipient database.*

Livingston, 98 P.3d at 1090 (emphasis added).[2] Here, the proposed definition was quite different:

> All persons to whom the Defendants sent advertisements by telephone facsimile on behalf of Burt Custom Finance.

(R. 1264.)

After noting the observation of the *Livingston* trial court that the determination of whether a recipient had given "prior express invitation or permission" would require an inquiry of each class member, the Court of Appeals held that the trial court was correct in refusing to certify the case as the individual issues predominated over common issues. *Id.* However, the Court of Appeals in *Livingston* did not hold that, as a matter of law, a TCPA case never could be certified. Clearly, the Court of Appeals in *Livingston* weighed the common issues implicit in the class definition against the individual issues and held that the class, as it was defined, did not pass muster under C.R.C.P.

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[2]Obviously, the class definition in *Livingston* does not comport with the requirements of the TCPA. There is no requirement in the TCPA that, to avoid faxed advertisements, one must make a request to the sender of any faxed advertisement to remove one's fax number from the database. Nor is it an element of a claim under the TCPA that the recipient of an unsolicited faxed advertisements did not make a request to be added to a data base of those who wanted advertisements. Rather, the TCPA places an obligation on the sender of faxed advertisements to have the express invitation or permission of the intended recipient before the fax is sent.

23. It is an unsupported conclusion that because *Livingston* was not certified, this case should suffer the same fate.

It is of significance that there is no genre of cases where, as a matter of law, a class action can never be certified. *See Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). To be sure, some are more difficult to certify than others. For example, the most difficult are income tax cases. See *Kuhn v. Dept. of Revenue,* 817 P.2d 101, 105 (Colo. 1991), *citing* J. Moore & J. Kennedy, *Moore's Federal Practice* 23.02 [2-23] (2d ed. 1991). But the reluctance to certify income tax cases does not mean that short shrift is given to the analysis required under C.R.C.P. 23. For example, in *Kuhn*, the Colorado Supreme Court, in reversing the trial court's denial of a motion to certify, noted that, "it is generally true that class actions are disfavored in cases adjudicating federal tax issues . . . ." *Kuhn*, 817 P.2d at 105. After citing a string of cases – some involving approval, others denial – of class certification, the Court observed that the trial court had characterized the case as a tax case when "it declined to certify the class and, thus, did not make an in-depth analysis of Rule 23's certification requirements." *Id.* The Court made it clear that inquiry was required in each of the C.R.C.P. 23 factors. *Id.*

If trial courts are required to make an in-depth analysis of an income tax case in connection with a Rule 23 motion to certify, then surely this case warrants at least the same treatment. In short, C.R.C.P. 23 applies and the Trial Court was duty-bound to consider each of the various factors pertinent to a Rule 23 certification. That it did not warrants reversal.

B. The TCPA Places the Burden on the Sender of Faxed Advertisements to Have the Recipient's Prior Express Invitation or Permission. The Court Placed the Burden on the Recipients to Prove That Express Invitation or Permission Had Not Been Given. This Construction of the Statute is Erroneous.

The Trial Court's second error of law was construing the TCPA to place the burden on the recipient of the faxed advertisement to prove that the recipient had not given, in advance, an express invitation or permission to the sender of the faxed advertisement.

The TCPA requires the sender of a faxed advertisement to have the express consent of the recipient before the sending of a faxed advertisement. The prohibitions of the TCPA are quite clear: "It shall be unlawful for any person in the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine . . . ." 47 U.S.C. § 227(b)(1)(C). The term "unsolicited advertisement" is defined as:

> [A]ny material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

47 U.S.C. § 227(a)(4).

The term "prior express invitation or permission" is not defined in the TCPA, but Black's Law Dictionary defines "express" as:

> Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with "implied."

Black's Law Dictionary, p. 691 (4th ed. rev. 1968)(internal citations omitted).

Thus, there is but one defense under the TCPA, which is that the sender of a faxed advertisement had the prior express invitation or permission of the recipient. 47 U.S.C. § 227(a)(4). This was recognized by the Defendants-Appellees in that they set up affirmative defense of invitation or permission. That evidence, if it exists, necessarily is in the hands of Defendants-Appellees. It is not a matter of the recipient proving that consent was not given; rather, it is incumbent on the sender of the advertisement to prove that the requisite consent had been obtained.

The plain language of the TCPA sets forth a complete ban, without exceptions, for an "unsolicited advertisement" sent by fax. This clarity of intent is important in the burden of proof analysis as it leaves no doubt that it was the purpose of Congress to ban unsolicited fax advertising by creating a statute with a deterrent effect. Placing the burden on the plaintiffs with the requirement of proving that consent was not given inappropriately lessens the force of the statute and that deterrent effect. Simply stated, it is the potential defendant who has the appropriate incentive, means and need to maintain such records. *See eg*, 9 John H. Wigmore, *Evidence* § 2486 (J. Chadbourne rev. ed. 1981)(burden of proof of a particular fact may be assigned to "party who presumably has peculiar means of knowledge" of the fact). If someone was conducting mass legitimate fax advertising they would, of course, be beyond careless to not keep records of the specific contacts they made to fax targets and of the "prior express invitation or permission" they obtained to transmit each fax advertisement.

Defendants-Appellees seek to benefit from an affirmative defense by relying upon it to justify their conduct. As Defendants-Appellees have the means, incentive and better access to information to maintain evidence of those from whom they have obtained express invitation or permission, they

should bear the burden of proof. Whether it is one claimant under the TCPA or all 600,000 of them, suing individually or as a class, the question is whether the Defendants-Appellees had in their possession or under their control, before any offending faxed advertisement was sent, the express invitation or permission of the intended recipients. This information is totally within the possession or under the control of Defendants-Appellees. None of the evidence relevant to these issues will come from the Plaintiffs-Appellants or members of the Class.

Second, the Defendants-Appellees have no evidence that any of them had obtained "prior express invitation or permission" to send the faxed advertisements. Burt Buick could not identify a single person from whom it had obtained prior express invitation or permission. Fax.com flatly refused to answer the question.

The U.S. Supreme Court has spoken repeatedly and clearly: "the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948). Moreover, "When a proviso like this carves an exception out of the body of a statute or contract, those who set up such exception must prove it." *Javierre v. Central Altagracia,* 217 U.S. 502, 508 (1910). There can be no mistake that Defendants-Appellees, not the Plaintiffs-Appellants, claim the benefits of the "prior express invitation or permission" affirmative defense. Because Defendants-Appellees have asserted the affirmative defense, they must prove it.

> First is the question whether the burden of proof is on the defendant banks to establish that an anticompetitive merger is within the exception of 12 U.S.C. § 1828(c)(5)(B) or whether it is on the Government. We think it plain that the banks carry the burden. That

> is the general rule where one claims the benefits of an exception to the prohibition of a statute.

U.S. v. First City National Bank, 386 U.S. 361, 366 (1967). There is also no question that federal law governs the analysis of the rights conferred by the federal TCPA cause of action and the burden of proof issue:

> Since we proceed on the premise of the existence of a federal cause of action, it is clear that "our decision is not controlled by *Erie R. Co. v. Tomkins*, 304 U.S. 64 ... and state law does not operate of its own force.
>
> . . . .
>
> Legal rules which impact significantly upon the effectuation of federal rights must, therefore, be treated as raising federal questions.

Burks v. Lasker, 441 U.S. 471, 476-77 (1979).

Saddling Plaintiffs with such a burden would create the unique and almost unheard of proposition of forcing the Plaintiff to prove that consent was not given. Recently, the court in *Jemiola v. XYZ Corp.*, 802 N.E.2d 745 (Ohio Misc. 2003) addressed this issue, finding that the advertiser has the burden of proof with regard to the issue of "prior express invitation or permission." The Court held:

> The House Report on the TCPA discusses the phrase "prior express invitation or permission" and makes clear that advertisers have a duty to "establish specific procedures for obtaining prior permission and maintaining appropriate documentation with respect to such permission." U.S. House Rep. 102-317, at 13. This responsibility "is the minimum necessary to protect unwilling recipients from receiving fax messages that are detrimental to the owner's uses of his or her fax machine." U.S. Senate Rep. No. 102-178, at 8. Hence, a fax advertiser has an obligation to obtain prior express consent from the recipients of its advertisements and to keep and maintain records of such consent.

Jemiola v. XYZ Corp., 802 N.E.2d 745, 759 (Ohio Misc. 2003).

This is in accord with Colorado law. In *Atlantic & Pacific Insurance Co. v. Barnes,* 666 P.2d 163 (Colo. App. 1983), the Court said, "The proper allocation for the burden of proof is a substantial right of the parties. It is reversible error if the trial court allocates the burden of proof to the wrong party." 666 P.2d at 165. The Court went on to explain:

> [T]he burden of proof rests upon the party who asserts the affirmative of an issue. . . . The test is to determine which party would be successful if no evidence were given and then place the burden of proof on the adverse party.

Placing the burden on the recipient to prove the converse of an affirmative defense is contrary to the express terms of the TCPA, it is contrary to the body of the law of evidence and it flies in the face of common sense. There is no hint in the TCPA that Congress intended this construction. It was error for the Trial Court to read it in that fashion. And in so doing, the Trial Court mistakenly concluded that each recipient of a faxed advertisement would be required to prove that the invitation or permission was not given. This the TCPA does not so provide. As a result of this error of law, the Trial Court concluded that, because of the burden of proof rested with each fax recipient, individual issues predominated over common issues.

C. The Trial Court Improperly Found that Invitation or Permission May be Implied by an Established Business Relationship.

The Trial Court's third error of law was to misread the TCPA's requirement that any invitation or permission must be express. An established business relationship does not imply invitation or permission because the TCPA clearly requires any such consent to be expressly obtained.

It is significant that Congress expressly included language in the TCPA creating an "established business relationship" exemption for telemarketing calls. 47 U.S.C. § 227(a)(3). However, Congress declined to do so with respect to advertisements sent to fax machines.

1. FCC Regulations Defining an Established Business Relationship Pertain to Telemarketers and Not to Fax Advertisers.

The regulations promulgated by the FCC under the TCPA define "established business relationship" as follows:

> The term "established business relationship" means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

47 C.F.R. 64.1200(f)(4)(2004).

While "established business relationship" is certainly defined, its only use in the regulation is to provide an exemption for telephone solicitations to residential telephone subscribers. 47 C.F.R. § 64.1200(c)(3). The regulation has no provision whatsoever that an established business relationship will satisfy the express invitation or permission requirement of the TCPA for faxed advertisements.

2. The FCC, in Footnote 87 to an Order, Has Commented That a Faxed *Transmission* May Be Sent to a Recipient with an Established Business Relationship, but That it Was Without Discretion to Extend the Exception to Faxed *Advertisements*.

While the FCC has issued no regulation on the matter, it did comment in footnote 87 to its Report and Order adopted September 17, 1992 and released October 16, 1992 that:

> In banning telephone facsimile advertisements, the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition (see § 227(b)(1)(C)); thus, such transmissions are banned in our rules as they are in the TCPA. § 64.1200(a)(3). We note, however, that facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient.

Report and Order, *In the Matter of Rules and Regulations Implementing the TCPA of 1991*, 51 FR 48333 (Adopted September 17, 1992 and Released October 16, 1992), note 87 ("Report and Order").

Paragraph 34 of the Report and Order, to which footnote 87 refers, states in its entirety:

> Although the TCPA does not explicitly exempt prerecorded message calls from a party with whom the consumer has an established business relationship, it provides an exemption for commercial calls which do not adversely affect residential subscriber privacy interests and do not include an unsolicited advertisement. We conclude, based upon the comments received and the legislative history, that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. Moreover, such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship. Additionally, the legislative history indicates that the TCPA does not intend to unduly interfere with ongoing business relationships; barring autodialer solicitations or requiring actual consent to prerecorded message calls where such relationships exist could significantly impede communications between businesses and their customers. Thus, we are not persuaded that the TCPA precludes the use of prerecorded messages to make solicitations to a party with whom the telemarketer has an established business relationship. In view of the support in the record for the exemption and the legislative history, we conclude that the TCPA permits an exemption for established business relationship calls from the restriction on artificial or prerecorded message calls to residences. We decline to create more specific business relationship exemptions as requested by several commenters, such as utility companies, in favor of an exemption broad enough to encompass a wide range of business relationships. Finally, consistent with our conclusions at para. 24

> supra, we find that a consumer's established business relationship with one company may also extend to the company's affiliates and subsidiaries.

Id. (internal citations omitted). This language, obviously, speaks only to telephone solicitations. It makes no reference whatsoever to faxed advertisements.

The net result of the above is that the regulation issued by the FCC does not permit the statutorily required prior express invitation or permission for a faxed advertisement to be satisfied by an established business relationship. In footnote 87 to the Report and Order issuing the regulation, the FCC did comment that an established business relationship can be deemed to amount to an invitation or permission. However, this same footnote makes clear that: "In banning telephone facsimile advertisements, the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition."

3. The FCC Has Acknowledged That it Does Not Have Discretion to Create an Established Business Relationship Exception to the Express Invitation or Permission Requirement of the TCPA. Any Comment by the FCC to the Contrary Is Not Entitled to Due Deference by this Court.

While agencies are given discretion to interpret their organic statutes, they are limited by the express provisions of the applicable statute. Here, the TCPC is clear in that the "invitation or permission" must be express. The canons of statutory construction require one to conclude that Congress deliberately intended that there be no established business relationship exemption for unsolicited fax ads. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally

and purposely in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). In determining congressional intent:

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.
>
> . . . .
>
> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 n.9 (1984).

Here, congressional intent is unmistakably clear: the established business relationship exemption was included for telephone solicitations but excluded for faxed advertising. Based upon fundamental principles of statutory construction, it was impermissible for the Trial Court to read into the TCPA an established business relationship exemption for faxed advertisements. *See Id.* The FCC made that much clear in the footnote that the Trial Court misread: (1) the FCC stated that it was "without discretion to create exemptions from or limit the effects of the prohibition . . ." and (2) a facsimile *transmission*, as opposed to a facsimile *advertisement*, could be deemed to be invited or permitted by virtue of an established business relationship. Report and Order, note 87.

The U.S. Supreme Court has frequently given "zero deference" to interpretations of statutes by the FCC and other federal agencies. *See Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991)("[A]dministrative interpretation of a statute contrary to language as plain as we find here is not entitled to deference."); *see also Gregory v. Ashcroft,* 501 U.S. 452, 485 n.3 (1991)("no deference is due to agency interpretations at odds with the plain language of the statute itself.");

Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 170 (1989)("But, of course, no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language."); *Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 837 (1983)("Even if that interpretation could be characterized as consistent, it would not be entitled to deference, for, as we have noted above, it is inconsistent with the statutory language."); *Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992)("Of course, a reviewing court should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms."); *United States v. Locke*, 471 U.S. 84, 95-96 (1985)("Nor is the Judiciary licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result."); *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979)("But this deference [to agency interpretation] is constrained by our obligation to honor the clear meaning of a statute . . ."); *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 109 (1993)("no deference is due to agency interpretations at odds with the plain language of the statute itself"), *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979)("Although an agency's interpretation of the statute under which it operates is entitled to some deference, 'this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history.'")

As demonstrated, at least four times in the last decade and at least eight times in the past two, our highest court has held and reaffirmed that agency interpretations like the one here that contradict the clear intent of Congress do not control; the statutes do. Of course, the fact that the FCC correctly

acknowledged that it is "without discretion to create exemptions from or limit the effects of the prohibition [on unsolicited fax ads]" further discredits any attempt to engraft an established business relationship as an exemption. This the Congress specifically excluded and the FCC dutifully complied.

4. There Is No Evidence That Any of the Defendants-Appellees Had Any Established Business Relationship from Which the Requirements of the TCPA for an Express Prior Invitation or Permission Could Be Satisfied.

Even if an express invitation or permission can be permissibly implied by an established business relationship, there is no evidence of such in this case. In fact, Plaintiffs-Appellants have sent written discovery to the Defendants-Appellees on this point, requesting the identity of persons from whom any of the Defendants had obtained express invitation or permission prior to sending faxed advertisements. Burt Buick refused to provide the requested information, specifically stating as follows: "[I]t is Plaintiffs' burden to establish the applicability of the TCPA and the lack of invitation or permission within the meaning of the TCPA." (R. 663-64, ¶ 8.) Fax.com flatly refused to respond at all. (R. 646-48.)

Burt Buick's senior vice president and general counsel testified that Burt Buick did not have any list or database of persons from whom prior express invitation or permission had been obtained:

> If you mean is there a list of people who had signed and said, "It's okay for you to send us faxes," the answer is "no."

(R. 558, Held Depo., 31:4-6.) As this admission makes clear (as well as the total refusal to even answer by Fax.com), there is no evidence in this case that any Defendants-Appellee obtained from

any Plaintiff or member of the Class any prior express invitation or permission before sending faxed advertisements.

Further, an established business relationship, in and of itself, does not give the sender any authority to send faxed advertisements. Assuming, *arguendo*, that an established business relationship can satisfy the statutory requirement that the express invitation or permission be obtained before advertisements are faxed, certainly more is required than Mr. Lucero taking his wife's car in for an oil change. (R. 1056-57, 17:1-21:15.; R. 1082-1112.) Nor is there any requirement on the part of the recipient to show that they did not call the sender to request that faxed advertisements not be sent. There is not one shred of evidence from any of the Defendants-Appellees that would even suggest that they obtained express invitation or permission from anyone before the advertisements were faxed.

D. The Trial Court Found That Individual Issues Predominate over Common Issues. This Was Based upon a Misreading of the Requirements of the TCPA. Had the TCPA Been Properly Construed, it Would Have Been Clear That Common Issues Predominate.

1. Had the Trial Court Not Erred in Construing the TCPA, it Would Have Been Clear That Common Issues Predominate over Individual Issues.

The decision of the Trial Court that common issues lacked predominance was based upon a misconstruction of the TCPA. In construing the provisions of the TCPA, the Trial Court made three errors of law. From these three errors flowed the Trial Court's ruling that the case could not be certified as a class action.

In sum, these errors of law consist of the following:

a. Concluding that *Livingston* mandated a denial of the motion to certify;

b. Concluding that the TCPA places the burden of proof on the Plaintiffs-Appellants to prove that they had not given an express invitation or permission to the Defendants to be sent faxed advertisements; and

c. Concluding that the TCPA allows the requisite prior express invitation or permission to be implied from an established business relationship.

2. A Correct Reading of the TCPA Mandates Class Certification.

The TCPA clearly provides that:

a. The sender of the faxed advertisement must have the prior express invitation or permission of the recipient in order to comply with the law.

b. The burden is placed on the sender of the faxed advertisement to show that, before a faxed advertisement is sent, the sender has the invitation or permission from the recipient to do so.

c. As the statute requires the express invitation or permission, such may not be implied by an established business relationship.

Had the TCPA been properly construed: (1) it would have been clear to the Trial Court that it is the burden of the sender, prior to the sending of a faxed advertisement, to have the express invitation or permission of the recipient to be sent such advertisements; (2) it is not the burden of the recipient of the faxed advertisement to disprove an affirmative defense; and (3) the invitation or permission must be express and not implied by any relationship.

3. The Predominance Requirement of C.R.C.P. 23.

Courts generally treat the predominance requirement of Rule 23(b)(3) as subsuming the commonality requirement of Rule 23(a)(2), and any plaintiff who meets the predominance test will satisfy the commonality test. *Hallaba v. Worldcom Network Servs.*, 196 F.R.D. 630, 635 (N.D. Okla. 2000).

Only four courts, including the *Livingston* court, that have considered class certification motions in TCPA cases have denied them on the basis that the individual issues predominate over common issues. The import of the holdings of the two federal cases cited by the *Livingston* court, *Kenro, Inc. v. Fax Daily,* 962 F.Supp. 1162 (S.D. Ind. 1997) and *Forman v. Data Transfer,* 164 F.R.D. 400 (E.D. Pa. 1995) are of questionable merit in that it has been overwhelmingly determined that jurisdiction over TCPA claims rests with state courts. *Chair King v. Houston Cellular Corp.*, 131 F.3d 507 (5th Cir. 1997). Other than *Livingston*, the only other case in which a court found that individual issues predominated over common issues was the Texas Appellate Court case of *Kondos v. Lincoln Prop. Co.,* 110 S.W.3d 716, 722 (Tex. App. 2003). More recently, the decisions of these courts denying class certification were criticized in the Georgia Court of Appeals case of *Hammond v. Carnett's, Inc.*, 2004 Ga. App. LEXIS 350 (Ga. App. 2004), in which the court found that the issue of whether a fax was unsolicited was in fact a common issue.

The issues of predominance and commonality are often considered together. *Hallaba,* 196 F.R.D. at 635*; see also Kohn v. American Housing Foundation, Inc.,* 178 F.R.D. 536, 541 (D. Colo. 1998). Under Rule 23(b)(3), common issues must predominate over any questions affecting individual members of the class. *Cook v. Rockwell Int'l Corp.*, 181 F.R.D. 473, 480 (D. Colo. 1998).

"In determining whether common issues predominate, the court may look to whether a 'common nucleus of facts' exists." *Satsky v. Paramount Communications, Inc.*, 1996 WL 1062376, at *13 (D. Colo. 1996).

Implicit in the determination of predominance is an identification of the relevant factual and legal issues, and the elements of the claims and defenses in the case. *Joseph v. General Motors Corp.*, 109 F.R.D. 635, 641 (D. Colo. 1986). The Colorado Court of Appeals has recognized that:

> A "predominant" issue need not be one that is determinative of a defendant's liability. Rather [w]hen one or more of the central issues in the action are common to the class and can be said to predominate, the action is proper under 23(b)(3), even though other matters will have to be tried separately. Thus, resolution of common issues need not guarantee a conclusive finding on liability.

Villa Sierra Condo. Ass'n v. Field Corp., 787 P.2d 661, 665 (Colo. App. 1990). Importantly, the court in *Villa Sierra* recognized that distinctions among the underlying legal claims may be of little significance where the factual issues are common to each claim. *Villa Sierra,* 787 P.2d at 665. If an action includes multiple claims, one or more of which may qualify as a certifiable class claim, the court may in its discretion separate such claims from other claims in the action and certify them individually. *In re Synergen, Inc. Secs. Litig.*, 154 F.R.D. 265, 266-67 (D. Colo. 1994). Moreover, the fact that there may be differences in the degree of injury and damages suffered by individual class members does not mean that individual issues predominate or that class certification is inappropriate. *In re General Motors Corp. Pick-up Truck Fuel Tank Litig.*, 55 F.3d 768, 817 (3d Cir. 1995).

Easily established facts related to membership in the class, even if technically individual, do not defeat predominance. *Heastie v. Community Bank of Greater Peoria*, 125 F.R.D. 669 (N.D. Ill.

1989). "Factual differences in the individual claims . . . are not fatal," particularly where "the actions or inactions of defendants are not isolated or discrete instances but, rather, form a pattern of behavior that commonly affects all of the proposed class members." *Marisol A. v. Giuliani*, 929 F.Supp. 662, 690-91 (S.D.N.Y.1996), *citing Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

4. Common Issues in This Case Clearly Predominate.

Here the common issues overwhelmingly predominate. Most importantly, the issue of "prior express invitation or permission" is to be determined solely from evidence within the custody or control of the Defendants-Appellees. If the statute is to be followed, the burden is not on the Plaintiffs-Appellants or on the members of the Class to make this showing; rather, it is a burden placed on the Defendants-Appellees that they had consent from the recipients of the faxed advertisements before they were sent. As this burden is on the Defendants-Appellees and not the Plaintiffs-Appellants to show prior consent, the defects in the class definition that bothered the Court of Appeals in *Livingston* are not present here.

The claims set forth in the Amended Complaint present many common issues. The common nucleus of fact, giving rise to these common issues, is that all of the class members were sent essentially identical unsolicited facsimile advertisements in the same manner through a course of conduct common to everyone. These common issues, factual as well as legal, arising from the Defendants-Appellees' actions in sending unsolicited faxed advertisements to the Plaintiffs-Appellants and to each of the class members weighs heavily in favor of class treatment. That is so for the reason that, as to each Plaintiff and member of the Class, the issues of fact and law are identical (except, of course, the need for each member of the Class to make a reasonable showing

that they possess the fax number to which the particular junk faxes were sent). *See e.g. Villa Sierra*, 787 P.2d at 665 (if factual issues relating to the alleged claim are all questions common to each claim, such commonality militates in favor of class treatment).

Any individual issue which may exist certainly does not predominate over the plethora of common issues. *See Carrao v. Health Care Svcs. Corp.*, 454 N.E.2d 781 (Ill. App. 1983) (individual issues did exist, but did not predominate over common issue of contract construction). Class certification can not be avoided "by [the defendant's] dreaming up a theoretical defense requiring individual inquiries, for which there is little basis in fact." *Hurt v. Midrex Div., Midland Ross Corp.*, 556 P.2d 1337, 1339 (Or. 1976).

Defendants-Appellees cannot defeat class certification by claiming an individual issue of "prior express permission or invitation" exists with each member of the putative class. As the TCPA clearly provides, the issue is whether the sender had the prior express invitation or permission of the fax recipient. 47 U.S.C. § 227(a)(4). The recipient has no obligation, in a *prima facie* case, to show that prior consent from the recipient was not given; rather, to escape liability, the sender must show that the recipient's express invitation or permission had been obtained before the faxed advertisement was sent.

The purported individual issue of prior invitation or permission is analogous to the individual issue of "reliance" on false or misleading statements made by a broker in securities litigation. Just as in such securities cases, the possibility that the defendants would engage in the "futile" exercise of attempting to disprove reliance by each class member does not militate against class certification. *In re LTV Secs Litig.*, 88 F.R.D. 134, 143 n.4 (N.D. Tex. 1980); *see also Weinberger v. Jackson*, 102

F.R.D. 839 (N.D. Cal. 1984). Similarly, in an antitrust suit brought on behalf of a class of franchisees, the "speculative" need to "examine the circumstances of each individual franchise" was no basis for denying class certification. *Martino v. McDonald's System, Inc.*, 86 F.R.D. 145 (N.D. Ill. 1980); *see also Miner v. Gillette Co.*, 428 N.E.2d 478, 484-85 (Ill. 1981)(alleged individual issues of reliance, satisfaction, waiver and lack of consideration did not defeat class action based on failure to fulfill promotional offer).

E. The Class Is Composed of Almost 600,000 Claimants with $500 Claims. As These Claims Represent Negative Value Suits, the Trial Court Improperly Found That a Class Action Is Inferior to Individual Actions.

The Trial Court held that "it is unable to find, as required by Rule 23, that class action relief is superior to other available methods for fair and efficient adjudication of this type of claim." (Reporter's Transcript of September 2, 2003 Hearing, 8:20-8:25.) Although the Trial Court recognized that very few, if any, individual actions had been brought in county court seeking damages for the Defendants-Appellees' violations of the TCPA, he still found that "there are proper and other available avenues for relief for any potential plaintiffs alleged to have been injured by violations of the [TCPA] . . . ." (Reporter's Transcript of September 2, 2003 Hearing, 9:8-11.) The case law on the issue of superiority with respect to class actions belies the Trial Court's findings; the simple fact remains that management of this litigation through class treatment is far superior to any alternative management technique.

The reason why it is neither feasible or realistic to expect aggrieved recipients to file in small claims court was explained by one of the Plaintiffs-Appellants, Mr. McKenna, who testified regarding his unsatisfactory experience in pursuing an individual claim:

> Well, I had this idea that using small claims court, which was, of course, what the TCPA was designed to enable, would be easy. Unfortunately, it's not and costs a lot of time to prosecute it. And the moment that a defendant hires an attorney, the case gets bumped up to county court. The first time that happened to me, I probably spent 30 hours on it. I was asked to brief the judge or magistrate. There were three or four separate hearings; I had to travel to court for all of that. I won 2500 bucks, and 30 hours of my time is worth a whole lot more. So I was unhappy with that. The magistrate is not willing to increase the award beyond the statutory minimum except for maybe a token amount, so that certainly doesn't help at all. The single fax I sued the CPA for, which I had to appeal over, cost me a hundred hours in my time. I had to write my own briefs, I did it all pro se. For 500 bucks, 300 bucks in costs. TCPA lawsuits in claims are negative return lawsuits.

(R. 1070, McKenna Depo. 35:11-36:4.) Mr. Lucero expressed similar sentiments. (R. 1058, Lucero Depo. 26:1-9.)

Most individual putative class members would be hard pressed to pursue their claims separately as the expense, inconvenience and distraction of a lawsuit could not be justified for a $500 TCPA award without attorney's fees. The facts of this case make this abundantly clear. Out of the advertisements faxed to some 600,000 Coloradans (R. 609-23.), Defendants-Appellees received written protests from 786 recipients (R. 1280, ¶ 4.); yet, only one person filed suit (R. 1024, ¶ 1.) This hardly demonstrates that small claims court is a viable venue for individuals who want to sue for statutory damages. As the Supreme Court held in *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997), a major goal of class relief is to provide a vehicle for consumers to recover on claims that are too small to justify the filing of an individual suit. That is precisely the case here.

A class action may be superior where members of the class are likely to have little interest in prosecuting separate actions because the potential damages awards are too small. *Parker v. Time Warner Entertainment Co.*, 198 F.R.D. 374, 384 (E.D.N.Y. 2001). The court in *Parker* held that:

> [T]he argument that class actions should be available because subscribers may be discouraged from bringing individual actions is less persuasive where, as here, the statute under which recovery is sought specifically provides for "reasonable attorney's fees and other litigation costs reasonably incurred."

Parker, 198 F.R.D. at 385. Senator Hollings, the TCPA sponsor, also made the point: "[I]t would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages." *Erienet, Inc. v. Velocity Net*, 156 F.3d 513, 515 (3d Cir. 1998), *citing* 137 Cong. Rec. S16205-06 (daily ed. Nov. 7, 1991). Thus, the consideration is not necessarily on a readily available remedy as much as the economics of litigation. *Parker*, 198 F.R.D. at 385. As no provision for attorneys fees or costs is in the TCPA, the necessity for class treatment is of even greater import.

In this particular case, if a class action is not certified, the result will likely be that the Defendants-Appellants will reap the rewards of their misdeeds without any consequences. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device"); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Class actions . . . permit plaintiffs to pool claims which would be uneconomical to litigate individually. . . . [In such

a case] most of the plaintiffs would have no realistic day in court if a class action were not available").

The lack of pre-existing litigation may indicate that many of the putative class members may be ignorant of their TCPA rights, thereby calling for class relief. *See Demitropolous v. Bank One Milwaukee, N.A.*, 915 F. Supp. 1399 (N.D. Ill. 1996). It may also indicate the existence of "negative value suits." *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 420 (5th Cir.1998); *Castano v. American Tobacco Co.*, 84 F.3d 734, 748 (5th Cir.1996). A negative value suit is one in which the "stakes to each member are too slight to repay the cost of the suit." *In re Rhone-Paulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir.1995).

The fact that Defendants-Appellants have but one lawsuit arising out of 600,000 illegal faxed advertisements, which produced 786 written protests, indicates that the individual claims are not worth pursuing. In a case where the trial court's denial of a motion to certify was reversed, the Arizona Court of Appeals, finding the class action to be superior to adjudicate TCPA claims, stated:

> The lack of other suits would also be consistent with circumstances when a claim is not economically feasible. Such would be the case when the claim involves a small potential recovery, whereby the cost and inconvenience of pursuing individual litigation would exceed the benefit even if victorious. Under such circumstances the ability to combine claims in a class action permits the vindication of rights theat would otherwise to unprosecuted.

ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc., 50 P.3d 844, 848 (Ariz. App. 2002). "Class actions are often the most suitable method for resolving suits to enforce compliance with consumer protection laws because the awards in an individual case are usually too small to

encourage the lone consumer to file suit." *Colbert v. Trans Union Corp.*, 1995 WL 20821, at *3 (E.D.Pa., Jan. 12, 1995).

Accordingly, this class action is superior to any other available method for the adjudication of the issues here.

CONCLUSION

The Plaintiffs-Appellants request this Court reverse the order of the Trial Court denying class certification. This case should be remanded to the Trial Court for certification as a class under C.R.C.P. 23(b)(3) and further adjudication of the claims of each of the Plaintiffs-Appellants and members of the Class.

Dated this 2 day of June, 2004.

HEAD & ASSOCIATES, P.C.

By: _____
John F. Head

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was placed in the U.S. Mail, postage prepaid, this June 2, 2004, addressed as follows:

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