DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO
City and County Building
1437 Bannock Street
Denver, CO 80202

CONSUMER CRUSADE, INC., a Colorado corporation,

Plaintiff,

vs.

MBA FINANCIAL GROUP, INC., a Colorado corporation; and DALE FINNEY,

Defendants.

COURT USE ONLY

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Case No. 04 CV 4841
Courtroom 5

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Plaintiff, Consumer Crusade, Inc., by and through its attorneys, The Demirali Law Firm, P.C., submits the following pursuant to C.R.C.P. 12(b)(5) in response to the Motion To Dismiss filed by MBA Financial Group, Inc. and Dale Finney (hereinafter "Defendants").

FACTUAL AND PROCEDURAL BACKGROUND

In 1991, Congress passed the Telephone Consumer Protection Act (TCPA) which provided, *inter alia*, for the prohibition of unsolicited (i.e. junk) faxes. See, 47 U.S.C. Section 227(b)(1)(c). The Act also set out various remedies which could be pursued as private rights of action, 47 U.S.C. Section 227 (b)(3). The enforcement of these as well as other provisions of the TCPA was contemplated by Congress to take place in state courts, 47 U.S.C. Section 227(b).

On or about June 24, 2004, Consumer Crusade filed its Complaint against MBA Financial Group, Inc. and Dale Finney. The Complaint alleges that Defendants transmitted numerous unsolicited faxes to Plaintiff's assignors in violation of the Telephone Consumer Protect Act. ("TCPA").

Defendants now seek to dismiss the Complaint, alleging:

(1) Damages pursuant to the TCPA are not assignable because claims "arising under a

penalty statute are not assignable." Brief, at page 3.

(2) Colorado law otherwise precludes the aggregation of TCPA claims by assignment.

Brief, at page 16; and

(3) Colorado law prohibits "multiple TCPA claims" by any recipient who fails to take action to remove that person's fax number from the sender's list. Brief, at page 17.

ARGUMENT

Defendants' brief in support of their Motion To Dismiss does not set forth the legal standards applicable to such a motion in Colorado. In addition, the brief combines the concepts

of (a) assignability, and (b) statutory penalties, in much of the text. Because the points raised by Defendants in some instances lack internal structure and coherence, this response shall be organized as follows:

1. Consumer Crusade May Assert Claims Under The TCPA.
2. Colorado Law Permits The Assignment Of TCPA Claims.
3. Treble Damage Awards Pursuant To The TCPA Are Also Assignable.
4. Joinder And Consolidation Of TCPA Claims Are Permitted In Colorado.
5. Recipients Of Unsolicited Faxes Are Not Barred By A "Failure To De-List".

Legal Standards For C.R.C.P. 12(b)(5) Motions To Dismiss

It is axiomatic that pursuant to a C.R.C.P. 12(b)(5) motion, a trial court is obligated to take all of the allegations of the Complaint as true, Behrman Revocable Trust v. Szaloczi, 01CA0775 (Colo. App. 2002). And, the court must also draw all reasonable inferences arising from those allegations in favor of the plaintiff. Medina v. State, 35 P.3d 443 (Colo. 2001). Motions to dismiss for failure to state a claim upon which relief may be granted are uniformly viewed with disfavor, and therefore are rarely granted. Dunlop v. Colorado Springs Cablevision, Inc., 829 P.2d 1286 (Colo. 1992).

Stated otherwise, a complaint may not be dismissed unless it appears that the plaintiff would not be entitled to relief under any set of facts which may be proved in support of the claims. Douglas County National Bank v. Pfeiff, 809 P.2d 1100 (Colo. App. 1991). Thus a complaint cannot be dismissed unless it is beyond doubt that plaintiff would not be entitled to prevail under any facts or circumstances. Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972) ("beyond doubt"). Nelson v. Nelson, 31 Colo. App. 63, 497 P.2d 1284 (1972) ("to a certainty")

1. Consumer Crusade May Assert Claims Under The TCPA.

The Motion To Dismiss initially notes that Consumer Crusade is an "assignee" of the various junk fax recipients, and, as such, may not be a proper party to this action. Motion, at paragraphs 1-3; Brief, at page 2 ("Plaintiff does not claim to have received any faxes from Defendant.")

That position implicitly raises two closely related, but separate issues: (a) standing, and (b) real party in interest. In general, standing requires that a person suffered an injury in fact to a legally protected interest, as contemplated by a statute. A court, therefore, must determine whether a plaintiff has "asserted a legal basis upon which a claim for relief may be predicated." Brotman v. East Lake Creek Ranch LLP, 31 P.3d 886 (Colo. 2001); Olson v. City of Golden, 53 P.3d 747 (Colo. App. 2002). A court's inquiry concerning standing, therefore, involves a two step approach. First, did the legislature (i.e. Congress) intend to create a private right of action for the harm allegedly inflicted? And second, has an "injury in fact" of the type prescribed by the statute occurred?

In contrast, the rule of procedure which addresses "real party in interest" governs who may bring an action based upon that legally protected interest. C.R.C.P. 17(a) requires that "every action be prosecuted in the name of the real party in interest." If a party's status as real party in interest is premised upon an assignment, the plaintiff must, in addition to the other elements of a claim, prove its status as assignee. Alpine Associates, Ind. v. KP&R, Inc., 802 P.2d 1119 (Colo. App. 1990). Therefore, a plaintiff must establish that "by virtue of substantive law, he has a right to invoke the aid of the court in order to vindicate the legal interest in question." Goodwin v. District Court, 779 P.2d 237 (Colo. 1989) (as quoted in Alpine

Associates, supra.).

In this particular case, it is clear that Congress intended to create a legally protected interest (i.e. the right to be free of unsolicited faxes). 47 U.S.C. Section 227(b)(1) (c):

> "(b) Restrictions on use of automated telephone equipment
>
> (1) Prohibitions
>
> It shall be unlawful for any person within the United States –
>
> (c) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine;"

Subsection (b)(3) of the statute provides for a private right of action to seek damages, and injunctive relief as follows:

> "(3) Private right of action
>
> A person or entity may, if otherwise permitted by The laws or rules of court of a State, bring in an appropriate court of that State –
>
> (A)
>
> an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
>
> (B)
>
> an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
>
> (C)
>
> both such actions."

Thus, it is incontrovertible that a legally protected interest has been created, and that a

person who has been injured in fact may bring an action to vindicate that right. Defendants, however, are challenging whether this plaintiff, as an assignee, has been "injured," inasmuch as it was not the original recipient of Defendants' faxes.

In that sense, this prong of the standing issue overlaps or coincides with the "real party in interest" requirement of C.R.C.P. 17(a). Thus, the validity of assignments under the TCPA is the fundamental legal question to be resolved in Defendants' Motion To Dismiss. Accordingly, this Court must consider the substantive law of assignments in Colorado. It is only where Colorado law would prohibit the assignability of TCPA claims that Plaintiff necessarily would fail to meet its twin burdens of establishing injury and showing it is the real party in interest.

It is the position of the Defendants that a complicated analysis of federal and state assignment law is required under a "reverse Erie" calculus. Simply stated, Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) stands for the proposition that a federal court should apply the substantive law of the state in which it sits, but should utilize the procedural law of the federal courts in the adjudication of diversity cases. Because the TCPA gives exclusive jurisdiction to hear such cases to the state courts of America, the argument is made that such courts either must use the procedural rules of the federal courts, or at least consider federal law in other areas of subject matter jurisdiction. See, Brief, at page 5.

Whatever the validity of the "reverse Erie" doctrine, it has no application to the issue of assignments because the right to assign is part of the substantive law of a forum state. See, Michelson v. Eurich International, Inc., 246 F.3d 681 (10th Cir. 2001) (citing Taylor Co. v. Anderson, 275 U.S. 431 (1928). Consequently, Defendants' assertion that "both Federal and Colorado law control for purposes of determining assignability." Brief, page 3, subsection A.) is

patently incorrect.

Furthermore, Defendants attempt, at length, to characterize 47 U.S.C. Section 227 (b)(3) as a statutory penalty. Brief, pages 5-16. Presumably, to the extent the provision may be considered penal in nature, it could be argued that such claims are not assignable.

There are two serious problems with the penalty characterization of the TCPA. First, the overwhelming legal authority with respect to that issue is directly contrary to that view. And, assuming, arguendo, that a portion of the recovery available under the Act may be considered a penalty (i.e. the treble damage award contained in Section 227(b)(3)), Colorado law does not make those claims unassignable. See, subsection 3, infra., for a discussion of penalty assignability in Colorado.

For present purposes, however, it should suffice to state that the language of the statute, its legislative history and overwhelming case authority conclusively establishes that the $500 award for each violation of the TCPA is compensatory and remedial in nature. Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162 (S.D. 1997). A short analysis of the issue follows:

In interpreting a statute, a court has a duty to consider the provisions of the law as a whole, its object and its policy. United States national Bank v. Independent Insurance Agents of Americas, Inc., 508 U.S. 439 (1993). Furthermore, a statute must be construed "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." Pennsylvania Medical Society v. Snider, 29 F.3d 886 (3d Cir. 1994) (quoting 2A Singer, Sutherland Statutory Construction, Section 46.06, at 119-20 (5th ed. 1992)).

The relevant portion of the TCPA which addresses the type of award available to a junk fax recipient is 47 U.S.C. 227(b)(3)(B). It reads:

> "A person or entity may... bring...
>
> ...
>
> an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater;...

47 U.S.C. 227(b)(3)(B) (emphasis supplied)

That provision is not ambiguous as to its meaning. Congress obviously permitted junk fax recipients to sue for compensatory damages. While it is true that the law also permits the collection of $500 per violation as an alternative to actual monetary losses, that fact does not imply the statute is penal in nature. Rather, it reflected, among other things, Congress' difficulty in quantifying the harm caused by the unauthorized use of fax machines. Texas v. American Blastfax, Inc., 121 F. Supp. 1085 (W.D. Texas 2000). The American Blastfax case identified three separate purposes for the damages provision:

(1) to take into account the difficult-to-quantify business interruption costs imposed on recipients of unsolicited fax advertisements; (2) to deter the unscrupulous practice of shifting those costs to unwitting recipients; and (3) to give an adequate incentive for an individual claimant to bring suit. See, also, Kenro, Inc. v. Fax Daily, Inc., 962 F.Supp 1162 (S.D. Ind. 1997).

All of the stated bases for a monetary award pursuant to 47 U.S.C. 227(b)(3)(B) are compensatory or remedial in nature. Thus, despite Defendants' best efforts to re-characterize the law as a penalty (as a predicate to arguing its non-assignability) the private actions envisioned by the Act cannot be designated as penal in nature.

The assignability of such claims under Colorado law, therefore, is the next step in the analysis.

2. Colorado Law Permits The Assignment Of TCPA Claims.

Colorado generally favors the assignment of rights pursuant to a valid contractual agreement. Brown v. Gray, 227 F.3d 1278 (10th Cir. 2000), citing Arvada Hardwood Floors v. James, 638 P.2d 828 (Colo. App. 1981). Colorado law also favors the transfer of claims. Parrish Chiropractic Centers v. Progressive Casualty Ins. Co., 874 P.2d 1049 (Colo. 1994), unless matters of personal trust or confidence are involved. Roberts v. Holland & Hart, 857 P.2d 492 (Colo. App. 1993).

The longstanding rule in Colorado is that assignability and descendability generally go hand in hand. Home Insurance Co. v. Atchison, 19 Colo. 46, 34 P.2d 281 (1934) Statutory law in Colorado has greatly narrowed the common law rule that "personal actions die with the person." Michaletti v. Moidel, 94 Colo. 587, 32 P.2d 266 (1934). In Colorado, only actions that do not survive death are slander and libel. See, C.R.S. 13-20-101. Thus, claims for relief which survive the death of the party entitled to sue may be assigned. Olmstead v. Allstate Ins. Co., 320 F. Supp. 1076 (D. Colo. 1971).

It must be acknowledged that Section 227 of the TCPA does not specifically address the issue of assignability of those rights of action. The Act neither explicitly allows nor prohibits such assignments. If the statute is silent, the common law of Colorado applies to the federal law. Tivoli Ventures, Inc. V. Baumann, 870 P.2d 1244 (Colo. 1994). The case of Tivoli Ventures involved the assignment of a note by the FDIC. The assignee of the note brought an action against the borrower. His claim was challenged, in part, on statute of limitations grounds.

Assignments were not specifically provided for by that federal statute. The Colorado Supreme Court therefore addressed the common law of assignments in determining the applicable statute of limitations. The Supreme Court concluded that:

> "Because the statute is silent regarding the application of the federal statute of limitations to assignees, we apply the common law. As a general principle of common law, an assignee stands in the shoes of the assignor (citations omitted)....
>
> ...
>
> ...Because the assignee supplants the assignor, the assignee may initiate an action so long as the assignor is not barred...."

Tivoli Ventures, at page 1249 (emphasis supplied)

The court in Tivoli Ventures went on to discuss the underlying rationale for its holding. By filling in a federal statutory gap, the court was acting consistently with the intent and purpose of the federal law. There, the intent and purpose for the law was to allow the FDIC to collect on notes that were owed to insolvent institutions. In this action, the Plaintiff is attempting to uphold the intent and pursue the purposes of the TCPA, which are to reduce or eliminate the proliferation of unsolicited faxes in interstate commerce, and to address the substantial cost shifting of marketing expenses from advertisers to recipients. Permitting the assignment of TCPA claims to Consumer Crusade, therefore, can only serve to better effectuate the goals of Congress.

3. Treble Damage Awards Pursuant To The TCPA Are Also Assignable.

Defendants go to great lengths to establish that the entire TCPA is punitive in nature and, therefore, unassignable.

47 U.S.C. 227(b)(3) reads in relevant part:

> "If the court finds that the defendant willfully or knowingly

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

It is the defense position that the above-referenced provision contemplates a penalty. Brief, pages 6-12. Moreover, it is contended that because it is a penalty, it cannot be assigned. Brief, at page 13.

Assuming for the purposes of argument that the TCPA, or some portions thereof, can be considered punitive, Colorado law does not render punitive damage claims unassignable. The vintage case of Credit Mens Adjustment Co. v. Vickery, 62 Colo. 214, 161 P.297 (1916) cogently explains how such damages are to be viewed. In Vickery, the plaintiff assignee sought to obtain statutory fines to be levied upon the officers and directors of a corporation for their failure to file an annual report as required by law. The Supreme Court of Colorado framed the issue as follows:

> "It is the contention of defendants in error that the action to collect a penalty is given by statute to original creditors and that the right to recover a penalty cannot be assigned...."

Vickery, 161 P. at page 297 (emphasis supplied)

The court went on to analyze that statute in the following way:

> The courts of this state have often considered the statute from the side affecting directors, and as to them uniformly held it to be penal in nature. Here the directors liability is admitted and we are now confronted with the question which requires a consideration of the statute from the view-point of creditors in enforcing the liability."
>
> ...
>
> "In some respects the statute is penal, while in others it is

> remedial in character. Penal in nature as to the directors for purpose of determining their liability.... When the liability is clearly shown, it is remedial in nature as to creditors and to be liberally construed in its enforcement."

Id. (citations omitted) (emphasis supplied)

The provision of the TCPA which is allegedly penal in nature relates to a determination, by the court, whether the violations of the Act, once proven, were willful or knowing. Thus, as in Vickery, the court must look to the remedial aspects of the law when determining the legal effect of assignment. The Supreme Court concluded:

> "Having determined that the statute is remedial in character and compensatory as to creditors, the next question is, can Plaintiff as assignee of creditors, enforce the liability against directors... When these claims were assigned to plaintiff, it became a creditor by virtue of its ownership of debts against the corporation. The debts and the remedial right to collect them go together...."

Id., at page 298. (emphasis supplied)

Therefore, Consumer Crusade has not only received the right to collect its assignors' compensatory damages under 47 U.S.C. Section 227(b)(3); it has also received the remedial right to sue for the penalty as an incident to the assignment of the TCPA claim.

4. Colorado Law Does Not Preclude The Aggregation Of TCPA Claims.

Plaintiff is accused by Defendants of attempting to avoid existing Colorado law by its use of "an assignment mechanism." That argument is based upon the contention that Colorado law prohibits the use of class actions to enforce the TCPA, citing Livingston v. U. S. Bank, 58 P.3d 1088 (Colo. App. 2002). Essentially, if class certification is not available under Rule 23, TCPA claims may not be aggregated by assignments. Brief, page 17.

In Livingston, the district court denied a motion to certify a class action for TCPA claims, finding (a) the class was not properly identified, and (b) individual issues would predominate. The Colorado Court of Appeals affirmed, stating that the lower court's conclusions were buttressed by the holdings in two earlier federal district court cases. Thus, the plaintiff in Livingston failed to meet its burden of proof on the subject of certification, and the trial court's determination could not be set aside unless it constituted clear error. Livingston, at page 1090.

Whatever else might be said about the Livingston decision and the appropriateness of class actions, that opinion has no bearing on this Defendants' motion to dismiss. First of all, the Colorado Rules of Civil Procedure govern the joinder or consolidation of claims for purposes of suit. Those rules permit the aggregation of claims by a single plaintiff or a group of plaintiffs suing one defendant. Rule 18 provides in subparagraph (a) (Joinder of Claims) states:

> "A party asserting a claim to relief as an original claim... may join either as independent or as alternative claims, as many claims, legal or equitable, as he has against an opposing party."

As the assignee of multiple claims against these Defendants, Consumer Crusade is the owner of such claims. Consequently, Plaintiff may join claims against these Defendants for purposes of suit in the same way that a single individual or business could assert and aggregate claims based upon its receipt of numerous faxes from the same advertiser.

Moreover, C.R.C.P. 20(a) provides for factual circumstances closely analogous to the instant case. It provides:

> "(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of

> the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all these persons will arise in the action..."

In the instant case, the claims of persons asserting the same right to relief (i.e. the legal and equitable remedies provided for by the TCPA) could clearly have been joined as to these Defendants. Instead, they have been consolidated by assignment to Consumer Crusade. Those claims clearly arise out of the same occurrence or series of occurrences (i.e. sending unsolicited faxes by Defendants). The commonality of law and facts with respect to the claims cannot seriously be contested. The very same provisions of the TCPA are applicable in each instance of violation, and most facts surrounding the time, place and manner of Defendants' fax advertising apply across the board. Thus, the consolidation of claims where efficiencies can be achieved is the same here as where multiple plaintiffs join together for purpose of suit. See, Sutterfield v. District Court, 165 Colo. 225, 438 P.2d 236 (1968) (the broadest possible reading to rule's permissive language is desirable). The purpose of effectuating judicial economy through the rules of civil procedure shall be promoted by Consumer Crusade's consolidation of TCPA claims.

To the extent, however, that this court wishes to consider the class action analogy, the Arizona appellate case of ESI Ergonomic Solutions, Inc. v. United Artists Theatre Circuit, Inc. aptly addresses that issue:

> "Having provided for a private right of action and having decided the appropriate penalty, Congress did not preclude the use of class actions to obtain redress for violations. See 47 U.S.C. Section 227. Rule 23 allows for class actions to 'enhance the efficacy' of any private right of action provided by law. Hawaii v. Standard Oil Co. Of Cal., 405 U.S. 251, 266 (1972). Class action relief is unavailable only if Congress expressly excludes it, Califano v. Yamasaki, 442 U.S. 682, 699-700, 611 L. Ed. 2d 176,

99 S. Ct. 2545 (1979)..."

ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc., 203 Ariz. 94; 50 P.3d 844 (2002)

Assuming, then, that a plaintiff can meet the factual predicate for class actions, that procedural tool would be available for the aggregation of claims. See, Califano v. Yamasaki, 442 U.S. 682 (1979). But for present purposes, it is sufficient to establish that whatever the rule regarding class certifications, Plaintiff would still be permitted to utilize other rules of procedure to consolidate the litigation.

5. Recipients Of Unsolicited Faxes Are Not Barred By A Failure To "De-List".

Finally, Defendants assert that Colorado has pre-empted the TCPA by its passage of a Colorado Consumer Protection Act ("CCPA"). Brief, at page 17. Specifically, C.R.S. 6-1-702 provides that a person engages in a deceptive trade practice when that person solicits a Colorado resident by facsimile

> "without including in the facsimile message a toll free number that a recipient of the unsolicited transmission may use to notify the sender not to transmit to the recipient any further unsolicited transmissions...."

From the statutory language quoted, Defendants assert (a) there is a legal requirement that fax recipients notify junk fax senders, and (b) the failure to notify prevents a recipient from collecting damages for future transmissions. And, the argument goes, that state law modifies or preempts the provisions of the TCPA.

It must first be emphasized that Defendants misconstrue the language and purposes of C.R.S. 6-1-702. The provisions is directed against fax solicitors, not recipients. Secondly, the law does not place any obligations on the fax recipients to call the remove number. And thirdly,

the statutory penalty for a failure to comply is directed at the sender.

But, more significantly, no state law "preempts" a federal statute. In fact, it is quite the reverse. The Supremacy Clause of the U. S. Constitution makes federal laws supreme, anything in state law to the contrary notwithstanding. U. S. Const., Article VI 2. The text of the TCPA specifically addresses the issue of preemption. Subparagraph (e)(1) of Section 227 provides:

> "(e) Effect on State law
>
> (1) State law not preempted
>
> ... [N]othing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations... "

47 U.S. C. Section 227 (e)(1) (emphasis supplied)

Thus, Defendants' argument that Colorado statutory law governing "de-listing" controls federal law, therefore, is misguided and limitations on TCPA claims cannot be implied from the text of the CCPA.

CONCLUSION

This court should not permit this Defendant to dictate the terms of Plaintiff's relationship with its assignors. Nor should it be permitted to obfuscate what is truly at issue in this action: Defendants are alleged to have violated the TCPA numerous times and it did so willfully or knowingly. The instant Motion To Dismiss must be denied for the foregoing reasons.

DATED this 9th day of August, 2004.

/s/ A. M. Demirali
A. M. Demirali

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 2004, a true and correct copy of the foregoing PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS was served on Defendants' counsel via electronic filing and by depositing the same in the United States mail, postage prepaid, addressed to:

Douglas A. Turner, Esq.
602 Park Point Drive, Suite 240
Golden, CO 80401

/s/ Susan L. Beck

Susan L. Beck, Legal Assistant