DISTRICT COURT, CITY AND COUNTY
OF DENVER, STATE OF COLORADO
City and County Building
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Denver, CO 80202
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CONSUMER CRUSADE, INC., a
Colorado corporation,

vs.

NEW YORK DELI NEWS, INC., *et al.*,

Defendants.

COURT USE ONLY

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Case No. 04CV5151
Courtroom 6

PLAINTIFF'S RESPONSE TO MOTION TO DISMISS AND REQUEST FOR C.R.C.P. 11 SANCTIONS

Plaintiff, Consumer Crusade, Inc., by and through its attorneys, The Demirali Law Firm, P.C., submits the following in response to the Motion To Dismiss And Request For C.R.C.P. 11 Sanctions filed by Defendants:

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, Consumer Crusade, Inc., is a Colorado corporation formed in 2003 in order to pursue legal claims against violators of state and federal law. The idea for such a company was Tom Martino's, a syndicated radio personality who strongly believes in consumer protection.

Like many others in Colorado, Mr. Martino had been the victim of abuse by marketers who used his facsimile (fax) machines, both at home and at work, to advertise their products or services without his permission.

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 a private right of action. 47U.S.C. Section 227(b)(3).

On or about July 1, 2004, Consumer Crusade filed its Complaint against New York Deli News, Inc. and Mr. Albert Belsky (Defendants). That Complaint alleged that Defendants transmitted several unsolicited faxes to Plaintiff's assignors without prior permission or invitation in violation of the TCPA.

Service of a Summons and Complaint was made upon the corporation, New York Deli News, Inc., by delivering a copy thereof to its registered agent (Ms. Eileen Lerman) at her office. The relevant Proof of Service upon Ms. Lerman was filed on July 22, 2004. Mr. Belsky was served by delivery of the Summons and Complaint to his manager (Mr. Mike Mineo) at that Defendant's place of business on June 30, 2004. *See*, Proof of Service (Belsky) filed on July 26, 2004.

Defendants' combined Motion To Dismiss essentially alleges four separate grounds for dismissal. The first basis for dismissal is contained in paragraph 5 of the Motion and alleges the Plaintiff may not maintain this action because it is not the "real party in interest." The second reason stated in the Motion is the alleged failure to properly set forth the name "Albert Belsky" in the Summons. (Motion, at paragraphs 7-8.) Defendants further assert in paragraph 9 of the Motion that averments pled by Plaintiff were insufficient to give rise to a claim (for relief). C.R.C.P. Rule 8(a) is cited as the procedural basis for that conclusion, but is probably more appropriately cast as a motion pursuant to Rule 12(b)(5). *See*, *Middlemist v. BDO Seidman, LLP*, 958 P.2d 486 (Colo. App. 1997). And finally, Defendants argue that the Complaint failed to give Defendants sufficient notice of the existence of a TCPA claim (Motion, at paragraph 11).

In addition, Defendants claim that the Complaint herein was filed in violation of Rule 11 C.R.C.P. because "[t]here is simply no basis under Colorado law for Plaintiff and Plaintiff's counsel to prosecute an action for violation of the Telephone Consumer Protection Act...." Accordingly, the Complaint was not "well founded in fact or warranted by existing law...," as required by C.R.C.P. 11.

RESPONSE

Before addressing each of Defendants' arguments in turn, it would be appropriate to clarify the factual averments contained in paragraphs 1-4 of the Motion. Those paragraphs refer to a previous version of the Complaint and Summons which had been electronically filed, but

rejected by the Clerk of the Court. *See*, email notification from Lexis Nexis dated June 25, 2004, appended hereto as Exhibit 1.

Accordingly, the factual averment concerning service of a Summons and Complaint upon Ms. Lerman on June 15, 2004, is wholly irrelevant to Defendants' present motion. Similarly, the failure by Plaintiff to file the Complaint with the Court has been obviated by the re-service and re-filing of the Complaint herein on June 30, 2004.

More importantly, however, counsel for Defendants has tried to mislead and confuse this Court about the demand letter sent to New York Deli News and the consultations between counsel concerning the factual bases for the Plaintiff's TCPA claims. While a specific refutation of Defendants' C.R.C.P. Rule 8(a)(2) assertion shall be provided below, it should be emphasized here that Defendants New York Deli News and Albert Belsky were both provided with copies of the offending faxes and the assignments of the recipients' TCPA claims to the Plaintiff. *See*, Letter dated April 13, 2004, from The Demirali Law Firm to Ms. Eileen R. Lerman, the Registered Agent for New York Deli News, Inc. That correspondence, which specifically states that the faxes and assignments are enclosed, is appended hereto as Exhibit 2. The records of the Colorado Secretary of State clearly show that the physical address of that Registered Agent was 7105 E. Hampden, Denver, Colorado 80224, the very address to which the faxes and assignments were sent. *See*, Colorado Secretary of State on-line record (printout) appended hereto as Exhibit 3.

The final and most compelling evidence that Defendants actually received the documentation related to their TCPA violations, however, is the confirmation of receipt by Defendant Belsky! On Friday, February 16, 2004, a phone message was received by The Demirali Law Firm from Mr. Belsky which stated that he was calling about the letter he received regarding faxes. *See*, email dated April16, 2004, to Susan Beck of The Demirali Law Firm, concerning an Alphapage message taken for Jim Demirali from Al Belsky, appended hereto as Exhibit 4.

In response to that message, Ms. Beck spoke with Mr. Belsky. As stated in the Affidavit of Susan Beck, which is appended hereto as Exhibit 5, Mr. Belsky alleged at the time that the recipients of the faxes had "okayed" them. But after contacting the assignors, it was clear that they disputed the granting of permission. *See*, notations of contacts with assignors on the Alphapage message (Exhibit 4).

It is therefore incontrovertable that Defendants were provided with the material facts concerning their unlawful activities. Indeed, Defendants have had exactly the same information concerning the TCPA violations that is possessed by the Plaintiff! Any assertion to the contrary, consequently is a deliberate misrepresentation of the facts to this Court.

LEGAL STANDARDS FOR C.R.C.P. 12(b)(5) MOTIONS TO DISMISS

Defendants request that this Court dismiss Plaintiff's Complaint pursuant to C.R.C.P. 12(b)(5) for failure to state a claim upon which relief can be granted. The purpose of a motion to dismiss for failure to state a claim is to test the formal sufficiency of the statement of the claim for relief. *See, Dunlap v. Colo. Springs Cablevision*, 829 P.2d 1286, 1290 (Colo. 1992).

In ruling on a motion to dismiss for failure to state a claim pursuant to C.R.C.P. 12(b)(5), a court may consider only matters contained within the complaint, and must not go beyond the confines of the pleading. *See, Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1099 (Colo. 1995). All averments of material fact contained in the complaint must be accepted as true. *See id.* 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. *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1886 (Colo. 1992).

1. Plaintiff Is The Real Party In Interest.

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, Inc. 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*).

The Telephone Consumer Protection Act (TCPA) was enacted in order to eliminate certain solicitation practices of businesses utilizing various forms of telecommunications. Section 227 of the TCPA provides in relevant part that:

> "It shall be unlawful for any person within the United States... to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."

47 U.S.C. Section 227(b)(1)(c).

Plaintiff's complaint alleges that at various times during the year 2003, Defendants sent one or more faxes to the fax machines of individuals in the State of Colorado for the purpose of advertising the commercial availability of Defendant's property, goods, or services. At differing times, each of the Claimants assigned their original claims under the TCPA to Consumer

Crusade.

The purpose behind the enactment of the TCPA was to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile ([f]ax) machines and automatic dialers." *International Science & Technology Institute, Inc. V. Inacom Communications, Inc.*, 106 F.3d 1146 (1997)(quoting S. Rep. No. 102-178, at 1 (1991).

The legal question, therefore, is: does the TCPA permit or prohibit the assignment of "junk" faxes? Section 227 of the TCPA does not specifically address the issue of assignability. Normally, then, the forum state law governs. *Michelson v. Enrich International, Inc.*, F.3d (10th Cir. 2001). Where, as here, a federal statute is silent regarding assignments, the (state) courts are required to fill the statutory gaps by reference to general principles of common law. *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244 (Colo. 1994).

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 rights of action. *See, Parrish Chiropractic Centers v. Progressive Casualty Ins. Co.*, 874 P.2d 1049 (Colo. 1994).

The longstanding rule in Colorado is that assignability and descendability generally go hand in hand. *Home Insurance Co. v. Atchison*, 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, the only actions which do not survive death are slander and libel, *see*, C.R.S. 13-20-101, or those that involve personal trust or personal services. *Roberts v. Holland & Hart*, 857 P.2d 492 (Colo. App. 1993). And under traditional principles of common law, "an assignee stands in the shoes of the assignor." *Tivoli Ventures, Inc. v. Baumann*, 870 P.2d 1244 (Colo. 1994).

Based upon the foregoing, it is obvious that TCPA claims are, and should be, readily assignable. Defendants can cite no legal authority for their presumption that recipients of faxes are prohibited from assigning their claims.

2. Defendant Belsky Was Properly Served With Summons And Complaint.

It is essentially the position of Defendant Belsky that he was not properly served in this case. That assertion is premised on the fact that the Summons refers only to New York Deli News, Inc., *et al.* (i.e. "and others"). The failure to name Belsky in the Summons purportedly violates C.R.C.P. Rule 4(c).

While Defendants' argument seeks to avoid service upon this technicality, he nevertheless fails to mention that the Summons was served with and attached to the Complaint.

And the Complaint clearly sets forth the name of Albert Belsky. Consequently, the Summons and Complaint must be taken together in considering whether notice of the lawsuit to Mr. Belsk satisfied Due Process requirements. C.R.C.P. 4(c) ("...the complaint shall be served with the summons....") *See, Swanson v. Precision Sales & Service*, 832 P.2d 1109 (Colo. App. 1992). Thus, Defendant should not be permitted to complain that his name was not mentioned in more than one place in connection with the service of process.

3. The Complaint Asserts Claims Upon Which Relief May Be Granted.

Defendants characterize Plaintiff's failure to set out sufficient facts to establish a claim for relief. Although couched in the language of Rule 8(a)(2), the arguments made and authoritie cited refer to Rule 12(b)(5) (i.e. failure to state a claim upon which relief may be granted).

From what has been previously stated with respect to the standards applicable to a Rule 12(b)(5) motion, it should be apparent that a complaint need not set forth all evidentiary facts which may support a claim for relief. Rather, the legal test is whether it appears beyond doubt that Plaintiff could prove no set of facts at trial which would entitle it to relief. *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095 (Colo. 1995).

Thus, the legal issue raised by the Defendants is a relatively straightforward one: has the Plaintiff pled material facts sufficient to establish a claim for relief under Section 227 of the TCPA? And, in determining the adequacy of the Complaint, all such facts are to be accepted as true. *Middlemist v. BDO Seidman, LLP*, 958 P.2d 486 (Colo. App. 1997).

Briefly stated, the Complaint sets forth the following material facts:

(a) during 2003, Defendant New York Deli News, Inc. sent one or more faxe to fax machines (Complaint, paragraph 4);

(b) the faxes were sent for the purpose of advertising Defendants' property, goods or services (Complaint, paragraph 5);

(c) each of the subject faxes was unsolicited (Complaint, paragraph 5);

(d) the original recipients of the faxes ("Claimants") assigned their claims to Plaintiff (Complaint, paragraph 6);

(e) Defendant Belsky directed or participated in the company's actions (Complaint, paragraph 7); and

(f) Defendants have used a telephone facsimile machine to send unsolicited advertisements in violation fo the TCPA (Complaint, paragraphs 13-14).

Subparagraph 3 of 47 U.S.C. Section 227(b) sets forth a private right of action under the TCPA. It states:

> "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.

Plaintiff's Second Claim For Relief alleged that Defendants acted willfully or knowingly, thereby exposing them to up to treble the damages awarded pursuant to the First Claim For Relief. 47 U.S.C. Section 227(b)(3).

It would be difficult to conceive of a Complaint which tracked the language of the TCPA more closely. *See*, 47 U.S.C. Section 227(b)(1)(c) quoted above, at page 4. Whether the specific individuals who first received the faxes are named or not, for example, is irrelevant so long as the Complaint generally avers that Defendants sent out unlawful faxes to anyone. Furthermore, as has been indicated previously, the assignments of those claims follows Colorado law governing the assignability of claims or choses in action. *See, Bankers Trust Co., v. International Trust Co.*, 113 P.2d 656 (Colo. 1941) which provides in relevant part:

> "...it has long been established in Colorado that the assignee of a claim may maintain an action thereon as the real party in interest even though there is annexed to the transfer the condition that when the claim is collected the whole or some part of it is to be paid to the assignor. Such an arrangement provides consideration for the assignment." (citations omitted)

Bankers Trust Co., v. International Trust Co., 113 P.2d 656, 662 (Colo. 1941)

Therefore, the Complaint filed herein sets forth all material facts necessary to establish claims for relief under the TCPA.

4. Defendants Have Sufficient Notice Of Claims Against Them.

Defendants' last allegation concerns the adequacy of notice given by the Complaint herein. It may be the case that Defendants intended this allegation to address their Rule 8(a) concerns. However, Rule 8(a)(2) merely requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

The gravamen of this basis for dismissal is a failure to set forth a factual predicate with greater specificity. In that event, Defendants should have premised this argument upon a need for a more definite statement pursuant to C.R.C.P. 12(e)! That particular grievance might have some validity if the Plaintiff had not sent copies of the faxes and assignments prior to suit. Such is not the case, however, and counsel for Defendants knew or should have known her clients possessed those documents since last February! Consequently, it is at best disingenuous for Defendants to assert that they cannot fathom what the factual bases are for Plaintiff's Complaint

5. Plaintiff Has Not Violated Rule 11.

From the foregoing, it should be obvious that the Plaintiff has done everything possible t (a) notify Defendants of their violations of law, and (b) set forth the factual and legal framework for a TCPA case. To assert that Plaintiff or its counsel have failed to take even the most basic steps to inform themselves of the law and facts relating to unsolicited facsimiles and the TCPA palpably false. Indeed, Plaintiff has filed numerous TCPA cases in virtually every court in the Denver metropolitan area, and has never been cited for a Rule 11 violation.

In contrast, it would appear that the Defendants, along with their counsel, are ignorant of the federal law governing junk faxes, assignments under Colorado law, and procedural rules applicable to the sufficiency of pleadings pursuant to the Colorado Rules of Civil Procedure. It appears, therefore, that if there is to be a Rule 11 sanction in this case, it is the Defendants and their counsel who have demonstrated an absence of good faith in the Motion To Dismiss And Request For C.R.C.P. 11 Sanctions.

CONCLUSION

Based upon the foregoing, the Defendants' Motion To Dismiss And Request For C.R.C.P. 11 Sanctions should be denied.

DATED this 26th day of July, 2004.

/s/ A. M. Demirali

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 2004, a true and correct copy of the foregoi PLAINTIFF'S RESPONSE TO MOTION TO DISMISS AND REQUEST FOR C.R.C.P. 11 SANCTIONS was served electronically, via Lexis-Nexis, on counsel for Defendants:

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/s/ Susan L. Beck