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<tr><td>DISTRICT COURT, JEFFERSON COUNTY, COLORADO
Court Address: 100 Jefferson County Parkway, Golden, Colorado 80401
Phone Number: (303) 271-6215</td><td rowspan="2">▲ COURT USE ONLY ▲</td></tr>
<tr><td>Plaintiff(s):
iHIRE, INC. n/k/a VALUE ASSET LEASING, INC. and iHIRE, LLC

Defendant(s):
BOSTON MARKET CORPORATION</td></tr>
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Div.: Ctrm.:</td></tr>
<tr><td colspan="2">MOTION TO DISMISS</td></tr>
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The Defendant, Boston Market Corporation (“Defendant”), by and through its counsel of record, Law Offices of Frank J. Ball, moves this Court for an Order dismissing the Complaint filed by the Plaintiffs, iHire, Inc., n/k/a Value Asset Leasing, Inc., and iHire, LLC (“Plaintiffs”), pursuant to Colorado Rules of Civil Procedure (“C.R.C.P.” and/or “Civil Rules”), Rule 12(b)(5), for failure to state a claim upon which relief can be granted, and as grounds therefore, Defendant states as follows:

I. INTRODUCTION

Defendant is a Delaware Corporation which operates approximately 630 company-owned restaurants nationwide in 28 states. On October 31, 2003, Defendant entered into a contract with U.S. Fax Law Center, Inc. (“USFLC”), wherein Defendant agreed to assign its unsolicited facsimile advertisements (“junk faxes”) as well as any rights and/or claims to which it may be entitled under any applicable laws with respect to the junk faxes it receives, in exchange for certain undertakings of USFLC ("Assignment"). Said Assignment is attached to Plaintiffs' Complaint, identified therein as Exhibit A, and incorporated herein by reference, pursuant to C.R.C.P. Rule 10(c).

USFLC is a Colorado corporation formed in 2001, whose primary purpose is to pursue legal claims involving telemarketing against violators of state and federal law. The company's founders strongly believe in consumer protection, and like many others in Colorado, had been the victim of abuse by telemarketers who used others' facsimile (fax) machines, at home and at work, to advertise their products or services without permission. Moreover, most if not all of these advertisers, transmitted their unsolicited faxes in large numbers to the public at large. The rationale for this approach was obvious: by using the recipient's fax machines, paper, toner, employee time, and by seeking broad exposure in a workplace having numerous employees, advertisers were able to effectively market at little or no cost.

USFLC encourages persons or businesses directly harmed by the junk faxes of advertisers to *aggregate* their claims under the federal Telephone Consumer Protection Act ("TCPA") 47 U.S.C. Section 227 et seq., which prohibits the transmission of unsolicited facsimile advertising ("junk faxing"). Using that method, a claimant could join with others who had received the very same faxes from the very same advertiser in order to streamline and make more efficient the efforts to (a) stop the incessant flow of junk faxes from being sent (injunctive relief), (b) obtain damages to compensate them for violations (compensatory damages), and (c) deter all junk fax advertisers' future violations (remedial damages). Thus, USFLC has taken assignments of these claimants' rights under the TCPA, and pursues those claims in, among other places, the federal and state courts of Colorado.

In the Assignment, Defendant represented and warranted to USFLC that any junk faxes forwarded by Defendant to USFLC, would, in each instance, to the best of Defendant's knowledge: (i) have been received on a facsimile machine located in or on a premises operated by Defendant in connection with the conduct of its business, (ii) be a true copy of the junk fax received by Defendant, and (iii) not have been solicited or authorized in advance by Defendant, *i.e.*, shall have been received by Defendant without its prior express invitation or permission. The Assignment also required Defendant, from time to time, to appoint one or more of its agents or employees to review the facsimile advertisements that it receives before forwarding them to USFLC to make sure that they are indeed junk faxes.

Plaintiffs, iHire, Inc., n/k/a Value Asset Leasing, Inc., a Maryland corporation, and iHire LLC, a Delaware limited liability company, are notorious violators of the TCPA. Plaintiffs have been named in multiple law suits around the country for violations of the TCPA and similar consumer state law violations. The unlawful faxing activities of Plaintiffs have been the subject of lawsuits in Missouri, Ohio, Colorado, Illinois, Indiana, Arizona, New Jersey, Pennsylvania, and Michigan, and numbers of official state investigations in Washington, Wisconsin, Tennessee, Maryland, North Carolina, and Florida.

Because of the nationwide scope of its unlawful activities, and the resulting litigation, one of Plaintiffs' own insurance carriers filed a declaratory judgment action in federal court against Plaintiffs, identifying fourteen (14) separate lawsuits filed against Plaintiffs, and seeking an order that it was not required defend or indemnify Plaintiffs in those suits or in any future litigation based upon violations of the TCPA. (*See* Exhibit 1, attached hereto.) A court in Missouri has recently entered a nationwide injunction against Plaintiffs to enjoin the unlawful faxing activity finding that the faxes at issue in that matter were advertisements for property, goods, or services under the federal law and that an employer's publishing an advertisement for job applicants did not constitute express permission or invitation by the employer to receive faxes promoting Plaintiffs' services. (*See* Exhibit 2, attached hereto.)

Plaintiffs are parties to a lawsuit brought by USFLC, which was removed by Plaintiffs' counsel from Arapahoe County District Court to the United States District Court for the District of Colorado based on diversity jurisdiction. Defendant is not a party in the federal action but a number of unsolicited fax advertisements that Defendant received from Plaintiffs are involved in the federal litigation. Plaintiffs' only purpose in bringing this action in state court is a blatant attempt to pass on the costs incurred by Plaintiffs for having to defend against their own unlawful activities in the federal action.

Plaintiffs do not allege any general duty of care that is owed by Defendant, but Plaintiffs base this unwarranted litigation on the tenuous argument that they are entitled to maintain a negligence action based upon Defendant's alleged breach of the Assignment. Because Plaintiffs are not parties to the Assignment, they seek to invoke the benefits of the Assignment as third-party beneficiaries. As demonstrated below, Plaintiffs are not third-party beneficiaries because there was no intention to benefit Plaintiffs. Moreover, even if this Court were to decide Plaintiffs were third-party beneficiaries, Plaintiffs' Complaint for negligence can not be maintained under the economic loss rule and must be dismissed.

II. LEGAL STANDARDS

A. MOTIONS TO DISMISS

C.R.C.P. Rule 12(b) provides, in part, that: "[e]very defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) insufficiency of process; (4) insufficiency of service of process; (5) failure to state a claim upon which relief can be granted; (6) failure to join a party under Rule 19." Defendant is seeking to dismiss this action under C.R.C.P. Rule 12(b)(5).

In considering a motion to dismiss, all averments of material fact in a complaint must be accepted as true. *Board of County Commissioners v. City of Thornton*, 629 P.2d 605, 609 (Colo.1981). Further, in ruling on a motion to dismiss a complaint for failure to state a claim, the trial court must view the allegations of the complaint in a light most favorable to the plaintiff. *Bell v. Arnold*, 175 Colo. 277, 281, 487 P.2d 545, 547 (Colo. 1971); *McDonald's Corp. v. Rocky Mountain McDonald's, Inc.*, 42 Colo. App. 143, 144, 590 P.2D 519, 521 (Colo. App. 1979). However, C.R.C.P. Rule 12(b)(5) motions should be granted where it appears beyond doubt that the plaintiff cannot prove any facts in support of the claim that would entitle the plaintiff to relief. *See Schoen v. Morris*, 15 P.3d 1094, 1096 (Colo. 2000), *citing Dunlap v. Colo. Springs Cablevision*, 829 P.2d 1286, 1290 (Colo.1992). Where it is clear that plaintiffs have no standing to assert a claim upon which relief can be granted, the action is properly dismissed under C.R.C.P. Rule 12(b)(5). *See Clark v. City of Colorado Springs*, 162 Colo. 593, 428 P.2d 359 (1967).

B. NEGLIGENCE

To maintain a negligence action, the plaintiff must show that the defendant breached a duty of care owed to the plaintiff and thereby caused the plaintiff's damages. *E.g., Franklin v. Wilson*, 161 Colo. 334, 422 P.2d 51 (1966); *Roessler v. O'Brien*, 119 Colo. 222, 201 P.2d 901 (1949). "The court determines, as a matter of law, the existence and scope of the duty -- that is, whether the plaintiff's interest that has been infringed by the conduct of the defendant is entitled to legal protection." *Metropolitan Gas Repair Service, Inc. v. Kulik*, 621 P.2d 313, 317 (Colo. 1980); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 209 (Colo. 1984).

Whether there is such a duty is a question of law to be decided by the court based on the facts presented. It is not a matter to be decided by a jury. *Roessler v. O'Brien, supra*; *Turner v. Grier,* 43 Colo. App. 395, 97-398 (Colo. App. 1979). The Colorado Supreme Court has recognized a court's duty to determine, at the outset of a lawsuit, the type of duty that has allegedly been breached. *See Town of Alma v. Azco Construction, Inc.*, 10 P.3d 1256, 1264 (Colo. 2000). "In determining whether the law imposes a duty on a particular defendant many factors are to be considered." *See Taco Bell, Inc., v. Lannon,* 744 P.2d 43, 46 (Colo. 1987). The Colorado Supreme Court has stated that these factors may include:

> the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the [defendant's] conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden upon the [defendant]. Other considerations may also be relevant, depending on the circumstances of each particular case. No one factor is controlling, and the question of whether a duty should be imposed in a particular case is essentially one of fairness under contemporary standards - - whether reasonable persons would recognize a duty and agree that it exists.

Lannon, 744 P.2d at 46 (internal citations omitted). However, in a negligence action arising out of an alleged breach of contract, a trial court is first required to examine whether the contract created and contained the duties that a defendant is alleged to have breached, and where the duties are contained in the contract alone, the action must be dismissed. *See BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 74 (Colo. 2004) (upholding trial court's order dismissing negligence claims under the economic loss rule).

III. ARGUMENT

The Complaint must be dismissed because Plaintiffs do not alleged any duty of care owed by Defendants and, as a matter of law, there is no duty of care arising out of any alleged business relationship between Plaintiffs and Defendant. Rather, Plaintiffs seek to invoke the benefits of the Assignment as third-party beneficiaries. However, under controlling Colorado law, Plaintiffs clearly are not third-party beneficiaries and, even assuming that they were, Plaintiffs negligence claim would fail as a matter of law under the economic loss rule.

A. PLAINTIFFS ARE NOT THIRD-PARTY BENEFICIARIES

This Court should dismiss the Complaint because Plaintiffs can prove no set of facts establishing their right to maintain this negligence action against Defendant. It is apparent from the factual averments in the Complaint that Plaintiffs' negligence claims are solely premised upon the alleged breach of duties contained within the Assignment entered into between Defendant and USFLC. (*See* Complaint, paras. 66-71.) Because Plaintiffs are not parties to the Assignment, Plaintiffs can only invoke the benefits of the Assignment as third-party beneficiaries.

C.R.C.P. 17(a) requires that every action shall be prosecuted in the name of the real party in interest. *National Advertising Co. v. Sayers*, 144 Colo. 356, 356 P.2d 483 (1960); *Elk-Rifle Water Co. v. Templeton*, 173 Colo. 438, 484 P.2d 1211 (1971). The real party in interest is the party who, by virtue of the substantive law, has the right to invoke the aid of the court to vindicate the legal interest in question. *Ogunwo v. American Nat'l Ins. Co.*, 936 P.2d 606 (Colo. App. 1997). Parties are not real parties in interest because they are not aggrieved in a legal sense. *Academy of Charter Schools v. Adams Cnty. School Dist. No. 12*, 994 P.2d 442, 447 (Colo. App. 1999), *rev'd on other grounds*, *Academy of Charter Schools v. Adams Cnty. School Dist. No. 12,* 32 P.3d 456 (Colo. 2001) (association lacked standing where the association was not a party to the charter contract).

A basic rule of contract law is that "a person not a party to an express contract may bring an action on such contract if the parties to the agreement intended to benefit the non-party, provided that the benefit claim is a direct and not merely an incidental benefit of the contract." *E.B. Roberts Construction Co. v. Concrete Contractors, Inc.*, 704 P.2d 859, 865 (Colo. 1985). The intent to benefit the third party must be "apparent from the terms of the agreement, the surrounding circumstances, or both." *Id*. at 865; *Jefferson County School Dist. No. R-1 v. Shorey*, 826 P.2d 830, 843 (Colo. 1992). The third-party beneficiary analysis contained in *E.B. Roberts Construction, supra,* is dipositive to the issue of Plaintiffs' lack of standing to bring an action based upon an alleged breach of contract entered into between Defendant and USFLC.

In *E.B. Roberts Construction,* a general contractor and a third party entered into a contract which obligated the third party, as a subcontractor, to perform site concrete, building foundation and asphalt paving work on a commercial construction project. The third party earlier had submitted to the general contractor a bid proposal to do this and other work, in which the third party estimated unit prices for the various components of the job. One provision of the contract obligated the third party to furnish a performance bond guaranteeing to the general contractor that all of the third party subcontractors, laborers, and material suppliers would be paid. The third party could not obtain the necessary bonds.

The general contractor, the third party, and the subcontractor entered into a subcontract whereby the subcontractor was substituted for the third party as the subcontractor in the earlier contract. The subcontractor was able to acquire the necessary bonds. Despite the fact that the subcontractor had been substituted for the third party as the subcontractor, the third party performed the work, billed the general contractor for progress payments, and received such payments from the general contractor. The general contractor terminated the contract, asserting that the subcontractor had breached the contract by failing to perform in a timely manner. The third party and the subcontractor filed suit against the general contractor, alleging *inter alia*, breach of contract, and seeking damages for lost profits because the general contractor wrongfully terminated the contract. The trial court found that the general contractor breached the contract when it terminated the third party, and awarded damages for lost profits because the third party was not allowed to perform the balance of the work required by the contract. The Court of Appeals affirmed the judgment of the trial court.

The general contractor sought certiorari review of the judgment affirmed in favor of the third party and subcontractor, arguing that the third party could not enforce the subcontract because it was not a party to that agreement and that the subcontractor, although a party to the subcontract, did not suffer or prove any damages. The Colorado Supreme Court affirmed the judgment, finding that the third party was a beneficiary of the agreement between the general contractor and the subcontractor when the subcontract was intended to benefit both the third party and the general contractor and the course of dealing affirmed and evidenced that understanding. In reaching this conclusion, the Supreme Court stated as follows:

> The trial court found that the sole reason for the substitution of [the subcontractor] for [the third party] as a party to the subcontract was to enable compliance with the contract requirement that a performance bond be obtained. [The subcontractor] could secure such a bond, but [the third party] could not. [The general contractor], [the subcontractor] and [the third party] all understood that [the third party] was to perform the work and be the ultimate recipient of the compensation. The course of dealing during performance of the contract evidenced and affirmed that understanding.
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> [The general contractor] and [the subcontractor] entered into the agreement to benefit both [the general contractor] and [the third party]. [The general contractor] obtained the protection of a performance bond, which [the third party] was unable to provide. [The third party] achieved the ability to go forward with the work required under the subcontract and, upon doing so, to receive the agreed-upon compensation, an opportunity that it would otherwise have been denied because of its inability to obtain the requisite bond. This benefit to [the third party] was direct, not incidental. [The subcontractor] made this possible by assuming the obligation for contract performance and the obligation as principal on the performance bond, all for the sole purpose of enabling [the third party] to go forward with the work. These were the unusual circumstances under which the [subcontract] was executed.

F.B. Roberts Construction, 704 P.2d at 865-866. The Supreme Court concluded that the trial court's findings on those matters adequately supported the court of appeals' conclusion that third party contractor was a third-party beneficiary of the subcontract between the general contractor and the subcontractor. *Id.*

With these principles in mind, under the facts of this case, it is clear that Plaintiffs are not third-party beneficiaries of the contract between Defendant and USFLC. The Assignment is a contract between Defendant and USFLC wherein, in exchange for payment and certain undertakings of USFLC, Defendant has assigned its rights to the junk faxes it receives on company fax lines, and also has warranted that it would take certain actions to ensure that the junk faxes forwarded to USFLC were unsolicited. None of the promises and duties contained in the Assignment were intended to benefit Plaintiffs. The terms of the Assignment do not reference Plaintiffs in any manner, neither express nor implied. Further, there are no factual averments in the Complaint demonstrating any course of dealing between Defendant and USFLC which would indicate an intent that Plaintiffs were to benefit from the terms of the Assignment. Finally, even if this Court was able to find, either in the express terms of the Assignment or in the course of conduct between Defendant and USFLC, an intention to benefit Plaintiffs, the claimed benefit would merely be incidental and not a direct benefit of the Assignment itself. *See Parrish Chiropractic Centers, P.C. v. Progressive Casualty Insurance Co.,* 874 P.2d 1049 (Colo. 1994).

In *Parrish Chiropractic Centers, supra,* a health care provider brought an action against an insurance company to recover unreimbursed chiropractic fees. The insurance company denied all claims arguing that the health care provider was not in intended third-party beneficiary of the insurance policies but rather merely received an unintentional, incidental advantage from the policies. The trial court granted partial summary judgment in favor of the insurance company which was affirmed on appeal. On certiorari review, the Colorado Supreme Court found that the healthcare provider was only one of many health care providers from which the insurance company's insureds could have received treatment. Therefore, the Supreme Court concluded the health care provider was only an incidental beneficiary of the insurance company's insurance policy with their insureds, and as such was not entitled to recovery in a direct action to enforce the terms of the insurance policies. *See Parrish Chiropractic Centers*, 874 P.2d 1056-1057.

Under the facts of this case, any indirect benefit to any third-party that could arise out of Defendant's duty under the Assignment to review the facsimile advertisements received on its company's facsimile machines to ensure that the junk faxes forwarded to USFLC were unsolicited would apply to any individual, business, or other entity, which transmitted said advertising with prior express invitation or permission, and not just Plaintiffs. Accordingly, any claimed benefit to Plaintiffs would merely be an incidental advantage and not a direct benefit of the Assignment.

Therefore, under *F.B. Roberts Construction* and *Parrish Chiropractic Centers*, accepting all averments of material fact contained in the Complaint as true, Plaintiffs can not show that they are entitled to maintain this action against Defendant as third-party beneficiaries to the Assignment between Defendant and USFLC. Accordingly, Plaintiffs do not have standing to bring this action and the Complaint must be dismissed.

B. NEGLIGENCE CLAIM IS PRECLUDED UNDER ECONOMIC LOSS RULE

Even if this Court determines that Plaintiffs are third-party beneficiaries to the Assignment between Defendant and USFLC, Plaintiffs are prevented from pursuing their negligence claim based upon the economic loss rule. The economic loss rule provides that a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law. *See Town of Alma v. Azco Construction, Inc.*, 10 P.3d 1256, 1264 (Colo. 2000).

In *Town of Alma, supra*, a municipal corporation and a construction company entered into a contract for the construction of improvements to a distribution system. The contract called for the construction company to install new water mains, and to tie those water mains to existing water service lines which served residential properties in the town. Pursuant to the contract, the construction company agreed to furnish all labor, equipment, and materials for the connection of the existing water service lines with the new water mains.

The contract contained two separate warranty provisions. The first guarantee stated that the construction company would guarantee all materials and equipment furnished and work performed for a period of one (1) year from the date of completion. The second guarantee stated that the construction company would make at its own expense, any repairs or replacement made necessary by defects in materials or workmanship supplied by it that become evident within one year after the date of final payment. After the one-year warranty provision had expired, leaks in water service line connections were discovered but the construction company refused to repair these leaks. The leaks were repaired at the expense of individual town residents.

The municipal corporation and the town residents filed suit against the construction company asserting claims for, *inter alia*, breach of contract and negligence. The trial court dismissed the negligence claim. The Court of Appeals affirmed the dismissal of the negligence claim relying on the economic loss rule. The town residents sought certiorari review of the judgment affirmed in favor of the construction company, arguing that they could maintain their suit for negligence and as third-party beneficiaries at the same time to recover for their economic loss.

The Colorado Supreme Court determined that the economic loss rule applied to prohibit the town residents' duplicate claims under tort and contract theories. *See Town of Alma,* 10 P.3d at 1264. Specifically, the Supreme Court held that: "... a party suffering only economic loss from the breach of an express or implied contractual duty *may not assert a tort claim for such a breach absent an* ***independent duty of care under tort law***. Economic loss is defined generally as damages other than physical harm to persons or property." *Id.* (Emphasis added.) The Supreme Court also advised that the scope of the economic loss rule included third-party contract beneficiaries who may have a cause of action for breach of contractual duties. *Id.* at n. 12.

In affirming the judgment of the Court of Appeals, the Supreme Court stated as follows:

> the contract in the instant case expressly assigned a duty of care to [the construction company] in the installation of the water system it [sic] was this contractual duty that [the construction company] allegedly breached. The provisions contained within the contract demonstrate that [the construction company] guaranteed its workmanship when it installed the water system. [The guarantee] provided, "[the construction company] shall guarantee all materials and equipment furnished and WORK performed for a period of one (1) year ... [The construction company] warrants and guarantees ... that the completed system is free from all defects due to faulty materials or workmanship." ... In addition, [the special guarantee] provided, "[the construction company] hereby guarantees that the entire work constructed by [it] under the contract will fully meet all requirements of the contract as to quality of workmanship and materials ...." These contractual provisions demonstrate that [the construction company] expressly assumed the duty to guarantee its quality of workmanship and its materials when it undertook to install the water system. As such, [the municipal corporation and the town residents] have failed to demonstrate that

> [the construction company] breached any duty independent of its contractual obligations.
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> Moreover, the town and the individual landowners are only seeking damages for the cost of repair and replacement of the water lines that were the subject of the contract. Damages for the cost of repair and replacement of property that were the subject of the contract constitute economic loss damages that must be supported by an independent duty of care to be recoverable in a negligence action. As there is no independent duty to support [the municipal corporation and the town residents'] negligence claim, the economic loss rule bars this claim.

Town of Alma, 10 P.3d at 1264. In *Grynberg v. Agri Tech, Inc.,* 10 P.3d 1267 (Colo. 2000), the Supreme Court further explained the analysis under the economic loss rule. The Supreme Court stated: "the proper focus in an analysis under the economic loss rule is on the source of the duties alleged to have been breached. Thus, our formulation of the economic loss rule is that a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law." *Id.*, at 1269.

In *Grynberg*, *supra*, the petitioners sought the same relief in both their contract and negligence claims: damages for the alleged failure of the respondents to properly manage a cattle investment program. The duties allegedly breached by the respondents were created by the contracts. The contracts between the parties imposed a duty of care on the respondents to care for the cattle according to the customary standards of the industry. The duty of care was created by, and completely contained in, the contractual provisions. The Supreme Court determined that absent the duties imposed by the contractual relationship between the parties, there was no independent duty of care owed to the petitioners by the respondents. The Supreme Court held that the economic loss rule barred the petitioners' negligence claim because the petitioners alleged the breach of contractual duties only resulting in purely economic loss. *See Grynberg*, 10 P.3d at. 1269-1271.

Under *Town of Alma* and *Grynberg*, trial courts are required to focus first on the contractual context between the parties to see whether there was a contractual relationship that established the duty of care alleged to have been breached. *See Grynberg*, 10 P.3d at 1269. *Grynberg* recognized three factors that aid in determining the source of the duty at issue: (1) whether the relief sought in negligence is the same as the contractual relief; (2) whether there is a recognized common law duty of care in negligence; and (3) whether the negligence duty differs in any way from the contractual duty. *Id*. at 1269-70; *See also BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 74 (Colo. 2004). In *BRW, Inc., supra*, the Supreme Court again found that the duty of care owed by the petitioner and the respondent was memorialized in their contracts. The Supreme Court concluded that the petitioner had not shown any duty independent of the interrelated contracts and that the economic loss rule barred the tort claim. *Id.* at 75.

With these principles in mind, under the facts of this case, it is clear that if Plaintiffs were considered to be proper third-party beneficiaries of the Assignment between Defendant and USFLC, their negligence claim would be barred by the economic loss rule.

In its Complaint Plaintiffs allege as follows:

> 67. Pursuant to the Assignment, Boston Market affirmatively agreed:
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> a. To appoint one or more of tis agents ore employees to review any facsimiles received before forwarding them to USFLC;

> b. To review each facsimile received to make sure that they were indeed unsolicited advertisements and not the result of a commercial relationship, prior express invitation or permission or an established business relationship;
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> c. To provide USFLC with only facsimiles that are not the result of express invitation or permission or an established business relationship.

> 68. Based on the Assignment, Boston Market represented and warranted to USFLC that it would only forward facsimiles that were unsolicited advertisements and were not received by Boston Market without its prior express invitation or permission.
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> 69. Boston Market had an affirmative duty to review and assess all facsimile advertisements received, including facsimiles received from iHire, and to only provide USFLC with those facsimiles that constituted unsolicited advertisements as defined under the TCPA and applicable law interpreting the TCPA.
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> 72. Accordingly, Boston Market owed an affirmative duty of care to iHire to review and assess all facsimiles sent by iHire to Boston Market prior to providing them to USFLC and to only provide USFLC with those facsimiles that constituted unsolicited advertisements under the TCPA and applicable law interpreting the TCPA.
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> 74. iHire has incurred and will continue to incur damages, including but not limited to labor expenses, attorneys fees and litigation costs in defending against the State Action and Federal Action in an amount to be established at trial.

Plaintiffs allege that Defendant owes an affirmative duty of care to Plaintiffs to review and assess all facsimiles sent by Plaintiffs to Defendant prior to providing them to USFLC and to only provide USFLC with those facsimiles that constituted unsolicited advertisements under the TCPA and applicable law interpreting the TCPA. *See* Complaint, para. 72. However, this is the identical duty that Defendant owes to USFLC as stated in paragraph 69 of the Complaint, wherein Plaintiffs allege that Defendant has an affirmative duty to review and assess all facsimile advertisements received, including facsimiles received from Plaintiffs, and to only provide USFLC with those facsimiles that constitute unsolicited advertisements as defined under the TCPA and applicable law interpreting the TCPA.

It is clear that the source of the duty alleged by Plaintiffs is contained in the contractual terms of the Assignment itself. Plaintiffs have not alleged any independent duty of care under tort law that would support their claim for negligence against Defendant. Plaintiffs are only seeking damages for their economic losses arising out of an alleged breach of contact between Defendant and USFLC. Therefore, under *Town of Alma*, *Grynberg*, and *BRW, Inc.*, Plaintiffs' negligence claim is barred by the economic loss rule and the Complaint must be dismissed.

C. ALLEGED ESTABLISHED BUSINESS RELATIONSHIP DOES NOT CREATE INDEPENDENT DUTY UNDER TORT LAW

In their Complaint, Plaintiffs allege an established business relationship ("EBR") between Plaintiffs and Defendant. (*See* Complaint, paras. 16-55.) Plaintiffs aver that "facsimile transmissions from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient." *See* Complaint, para. 19, *quoting Report and Order, In Re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCCR 8752, para. 54, n. 87 (October 16, 1992). However, based on statutory construction and legislative intent, it is clear that there is no EBR defense to junk faxing under the TCPA.

The junk faxing provision of the TCPA uses the phrase "unsolicited advertisement." *See* 47 U.S.C. Section 227(b)(1)(C). The definition for "unsolicited advertisement" provides only for a "prior express invitation or permission" defense. *See* 47 U.S.C. Section 227(a)(4) and (b)(1)(c). The provisions of the TCPA that use the phrase "telephone solicitation" have, in addition to the "prior express invitation or permission" defense, a separate and distinct EBR defense. The EBR defense essentially relieves the defendant of liability if it currently does business with the plaintiff, regardless of whether "prior express invitation or permission" was obtained. The EBR defense is created in the definition for "telephone solicitation." *See* 47 U.S.C. Section 227(a)(3).

The term "telephone solicitation" appears nowhere in the junk faxing provision of the TCPA, but only in other parts of the statute involving telemarketing calls. Therefore, the EBR defense does not apply to the junk faxing provision because it does not use the term "telephone solicitation." *See* 47 U.S.C. Section 227(b)(1)(C); *see also Rodriguez v. United States*, 480 U.S. 522, 525 (1987) ("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 action intentionally and purposely in the disparate inclusion or exclusion.").

Much of the confusion may stem from the fact that an earlier draft of the TCPA included an EBR defense for junk faxing violations. However, Congress deleted the EBR defense in the final version making it clear its intent that the defense does not apply to junk faxing violations. *See* 47 U.S.C. Section 227(a)(4); s*ee also Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 200 (1974) (deletion of a provision from a bill strongly militates against a judgment that Congress intended a result that it expressly declined to enact).

Accordingly, despite prior recognition by the Federal Communications Commission ("FCC") of an EBR defense to junk faxing under the provisions of the TCPA, based on statutory construction and legislative intent, this regulatory interpretation will not be given deference in a court of law. A federal agency's interpretation of a federal statute is not to be given controlling weight where the regulations are arbitrary, capricious, or manifestly contrary to the statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). The FCC has already recognized their mistake and have changed their rules to conform to the intent of the United States Congress by requiring advertisers to obtain express written consent prior to transmitting any facsimile advertising.

Numerous courts have addressed the EBR issue and have correctly concluded that although an EBR is a defense to telemarketing calls under the TCPA, it is not a defense to junk faxing. The court in *Biggerstaff v. Website University.Com, Inc.*, Case No. 00-SC-86-4271, March 23, 2001 (said decision is attached hereto, designated as Exhibit 3, and incorporated herein by reference), explained that:

> "Defendants also aver that 'Plaintiff maintained a prior business relationship with defendant ...' ... Even if true, this does not constitute a valid defense to Plaintiff's cause of action. Congress saw fit to include an "established business relationship" as a defense to a cause of action arising out of **telemarketing calls**, by including that exception in the definition of 'telephone solicitation' in the TCPA. <u>See</u> 47 U.S.C. [section] 227(aa)(3). The unsolicited fax provisions, however, provides for a defense only if the fax advertisement was sent with 'prior express invitation or permission.' <u>Cf</u>. 47 U.S.C. [section] 227(a)(3)." (Emphasis and underscore in original.)

In discussing the EBR exception under the TCPA, the court in *Biggerstaff vs. Low County Drug Screening Inc.*, Case No. 98-SC-86-5519 (S.C. Ct., Charleston Co., S. Carolina, Nov. 29,

1999) (said decision is attached hereto, designated as Exhibit 4, and incorporated herein by reference), stated that:

> In general, the TCPA restricts or prohibits three types of solicitations: 1) unsolicited fax advertisements to homes and businesses, 2) telemarketing solicitation by an artificial or prerecorded voice, and 3) telemarketing solicitations by live agents. It is worth noting that the restriction on unsolicited fax advertisements are the most rigid of the three. In addition to an exemption for prior express consent, the restriction of voice telemarketing solicitation generally exempts calls to businesses, provide exemptions for charities, and provide for an established-business-relationship exemption under certain circumstances. 47 U.S.C. [section] 227(a)(3). These and other additional exemptions are not available to fax advertisements. Compare [section] 227(a)(3) with [section] 227(a)(4). The maxim casus omissus pro omisso habendus est instructs us that such an exclusion is intentional. 'Where Congress includes particular language in one section of a statue 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.' *Rodriguez v. United States,* 480 U.S. 522, 525 (1987).

Biggerstaff, supra, at pgs. 4-5. (Emphasis and underscore in original.) Another court, in *Kondos v. Lincoln Property Co.,* Cause No. 00-08709-H (Dist. Ct., Dallas Cnty, Texas, July 12, 2001) (said decision is attached hereto, designated as Exhibit 5, and incorporated herein by reference), reversed on other grounds in *Kondos v. Lincoln Property Company,* 110 S.W.3d 716 (2003), discussed the EBR defense under the TCPA. The *Kondos* court noted that: "the FCC's interpretation of the EBR defense would act to amend the TCPA's definition of unsolicited advertisement from a fax sent without the recipient's 'prior express invitation or permission,' to a fax sent without the recipient's prior express *or implied* invitation or permission." *Id.*, page 4. (Emphasis in original.)

The *Kondos* court found that such an interpretation conflicted with the plain language of the statute and held that there is no "EBR" or "implied permission" exception to the definition of unsolicited advertisement for faxes under the TCPA. *Id.*, at page 5. *See also Girards v. Inter-Continental Hotels Corporation*, Case No. 01-3456-K (Dist. Ct., Dallas Cnty, Texas, Apr. 10, 2002) (holding there is no established business relationship exemption under the TCPA); *ESI Ergonomic Solutions LLC v. United Artists Theater Circuit Inc.*, CV 1999-020649 (Super. Ct., Maricopa Cnty, Arizona, July 11, 2003) (finding EBR is not a defense to junk-faxing advertising violations under the TCPA). (Said decisions are attached hereto, designated as Exhibit 6, and Exhibit 7, respectively, and incorporated herein by reference).

Because an established business relationship is not a defense to junk faxing under the TCPA, as a matter of law, there is no independent duty of care arising under tort law based upon any alleged business relationship between Plaintiffs and Defendant. *See Weggen v. Elwell-Parker Elec. Co.*, 510 F. Supp. 252, 254 (S.D. Iowa 1981) (no duty of care arises from a vendor-vendee relationship); *accord Oman v. Johns Manville Corp.*, 482 F. Supp. 1060, 1063 (E.D. Va. 1980); *Peak Drilling Co. v. Halliburton Oil Well Cementing Co.*, 215 F.2d 368, 370 (10th Cir. 1954).

IV. CONCLUSION

As discussed herein, Plaintiffs bring this unwarranted action in an attempt to pass on to Defendant the costs incurred by Plaintiffs in having to defend against their own unlawful activities in other state and federal litigation. Plaintiffs assert that they can maintain a negligence action arising out of an alleged breach of the Assignment between Defendant and USFLC even though Plaintiffs are not a party to the Assignment. Plaintiffs do not have standing as third-party beneficiaries to the Assignment because there was no intention to benefit Plaintiffs. Further, even if Plaintiffs were third-party beneficiaries to the Assignment, the source of any duty allegedly breached by Defendant was created by the Assignment itself and Plaintiffs have not alleged any independent duty of care under tort law. As a matter of law, there is no independent tort duty of care arising out of any alleged business relationship between Plaintiffs and Defendant. Accordingly, Plaintiffs' negligence claim is barred by the economic loss rule and the Complaint must be dismissed.

WHEREFORE, Defendant prays for an Order of this Court dismissing the Complaint with prejudice, an award of attorneys fees and costs pursuant to C.R.S. Section 6-1-113(3) for having to defend against Plaintiffs' groundless and bad faith action, and for such further and different relief as the Court may deem just and proper.

Dated this 28th day of April, 2005.

LAW OFFICES OF FRANK J. BALL

Pursuant to C.R.C.P. 121 Section 1-26, this document was E-filed via Lexis/Nexis File & Serve, and a duly signed original is on file at the offices of undersigned counsel.

__/s/ Stephen S. Allen______________

Stephen S. Allen, #31974

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Motion to Dismiss and attachments were served this 28th day of April, 2005, via Lexis/Nexis File & Serve and/or by placing a true and correct copy thereof in the United States Mail, postage prepaid, and properly addressed to the following:

Karen L. Brody, Esq.
Brandee L. Caswell, Esq.
Lowe, Fell & Skogg, LLC
370 Seventeenth Street, Suite 4900
Denver, CO 80202

Pursuant to C.R.C.P. 121 Section 1-26, this document was E-served via Lexis/Nexis File & Serve, and a duly signed original is on file at the offices of Plaintiff's counsel.

_______/s/ original signature on file___________