COLORADO COURT OF APPEALS Colorado State Judicial Building 2 East Fourteenth Avenue Denver, Colorado 80203 Case No. 03 CA 2041 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' REPLY 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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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

INTRODUCTION

The Trial Court denied class certification based upon an erroneous interpretation of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (2004) ("TCPA"). The errors of law were twofold. First, the Trial Court ruled that:

> [I]t is the plaintiffs' burden to show that the subject faxed advertisements were unsolicited by each plaintiff and each putative class member. . . . They must show lack of consent, the fact that it was unsolicited.[1]

The second error of law was a ruling that invitation or permission could be implied from an established business relationship. On this point the Trial Court stated, "[C]onsent can be shown, by a prior business relationship."[2] It is clear that both ideas played roles in the Trial Court's denial of class certification: "And whether or not we get into the issues of established business rule or not, that still would involve individual inquiry, which would just overwhelm any common issues.[3]

On both points, the Trial Court made substantial errors of law. The TCPA provides that the sender of the faxed advertisement must have the recipient's invitation or permission before sending the advertisement. There is nothing in the statute that even suggests that the plaintiffs must prove lack of consent. But, this issue is much ado about nothing because here there is no evidence

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[1]Record, Volume VII, Transcript, Hearing of September 2, 2003, p. 5.

[2]*Id.*, pp. 5-6.

[3]*Id.*, p. 8.

whatsoever that Burt Buick or Fax.com had any consent whatsoever from any plaintiff or any member of the putative Class.[4]

Second, the TCPA requires the invitation or permission to be express. The plain language of the statute does not permit an invitation or permission to be implied from an existing business relationship. On this point, the argument is also much ado about nothing because there is no evidence whatsoever that Burt Buick or Fax.com had any existing relationship with any plaintiff or any member of the putative Class. The closest these parties came to any relationship whatsoever was that one plaintiff, Mr. Lucero, drove his wife's Suburban to the service department of an affiliated company, Burt Chevrolet, for an oil change. This is as close to an existing business relationship as Burt Buick and Fax.com was able to show with anyone.

Further, without any recognition that the class definition in *Livingston* was totally different from this case, the Trial Court, without any serious analysis, ruled that this Court's decision in *Livingston* disposed of the matter:

> And although there have been some efforts 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.[5]

Burt Buick spent a considerable portion of its Answer Brief arguing that the standard of review is abuse of discretion and that the errors of law are irrelevant. This argument is unsustainable

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[4]See Appellants' Opening Brief, p. 3.

[5]*Id.*, p. 7 (emphasis added).

because matters of law that form the basis of a certification decision are reviewed *de novo*. And the Trial Court's erroneous interpretation of the TCPA is certainly relevant because the decision to deny class certification was based upon its multiple errors of law.

In addition to these legal errors, the Trial Court was clearly erroneous in disregarding the fact that the proposed class definition was quite different from that rejected by the Court in *Livingston.* Here, the proposed class was: "All persons to whom the Defendants sent advertisements by telephone facsimile on behalf of Burt Custom Finance." This is quite different from the proposed class in *Livingston*, which included those *"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."*[6] For the Trial Court to say that these two class definitions, markedly different as they are, to amount to no difference at all is telling indeed.

The final thrust of Burt Buick's argument is that a recent amendment to the Colorado Consumer Protection Act evinces a public policy to prohibit class actions under the TCPA. This argument flies in the face of *Califano v. Yamasaki,* 442 U.S. 682 (1979). *Yamasaki*, of course, provides that 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. What a state may do (in distinction to Congress) is to choose to opt out of the TCPA. Colorado has not done so.

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[6]*Livingston v. U.S. Bank,* 58 P.3d 1088, 1090 (Colo. App. 2002), *cert. denied,* (Colo. 2002).

The Trial Court's interpretation of the TCPA was erroneous as a matter of law and these errors formed the basis for the Trial Court's denial of class certification. The statute plainly states that the sender of the faxed advertisement must have the prior express permission or consent from the recipient before a faxed advertisement is sent. The issue in this case, therefore, is whether Burt Buick or Fax.com had such consent, not whether the plaintiffs or any member of the class had given it. When this case is measured against a correctly interpreted TCPA, it will be clear that C.R.C.P. 23 in all respects has been more than adequately satisfied. This case should be reversed and remanded to the Trial Court for that evaluation.

ARGUMENT

1. Errors of Law Are Reviewed *De Novo*. The Trial Court Misinterpreted the TCPA and this Misinterpretation Formed the Basis of the Denial of Class Certification. Therefore, the Trial Court's Decision Must Be Reviewed *De Novo*.

To be sure, class certification rulings are reviewed for abuse of discretion. But, if a class certification decision was based upon a contested legal determination, then the point of law is reviewed *de novo*. Recently, the Second Circuit Court of Appeals explained:

> A district court vested with discretion to decide a certain matter is "empowered to make a decision - of its choosing - that falls within a range of permissible decisions. A district court 'abuses' or 'exceeds' the discretion accorded to it when (1) its decision rests on an error of law . . . or a clearly erroneous factual finding, or (2) its decision - though not necessarily the product of a legal error or a clearly erroneous factual finding - cannot be located within the range of permissible decisions."[7]

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[7] *Parker v. Time Warner Entertainment Co.*, 331 F.3d 13, 18 (2nd Cir. 2003), quoting *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 168-69 (2d Cir. 2001).

This Court has held likewise. In *Toothman v. Freeborn & Peters*, a recent case involving denial of class certification that was based upon an erroneous application of the law, this Court has stated, "An abuse of discretion includes an erroneous application of the law."[8] There, the issue on appeal was the standard of review. In finding that the Trial Court's denial of class certification was based upon an erroneous interpretation of the law, the Court of Appeals stated, "Findings of fact are generally reviewed under a clear error or abuse of discretion standard, whereas conclusions of law are generally reviewed under a de novo standard."[9] Applying *Toothman* to the instant case, the contested interpretations of the TCPA are to be determined *de novo*.

And just because the Trial Court's mistaken interpretation of the TCPA led it to conclude that individual issues predominate over common ones does not escape *de novo* review. As in *Toothman*, the standards of certification under C.R.C.P. 23 must applied in light of a correct statement of the law. There, the Court held, "In light of our conclusion that the trial court misapplied the law when ruling that the individual issues in this case predominate over the common ones, we must remand for the trial court to apply the legal conclusions set forth in this opinion. "[10] The same outcome should obtain here.

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[8]*Toothman v. Freeborn & Peters*, 80 P.3d 804, 809 (Colo. App. 2002)

[9]*Id.* at 811.

[10]*Id.* at 816.

2. For a Faxed Advertisement to Be Permissible under the TCPA, the Sender Must Have the Recipient's Prior Invitation or Permission. The Trial Court Ruled That the Plaintiffs must Show That Consent Was Withheld. On this Erroneous Construction of the Law, the Trial Court Found That Individual Issues Predominate. Consequently, this Issue Is Relevant.

Burt Buick and Fax.com argued below that the burden is on each recipient of the 600,000 faxed advertisements to prove that they did not give consent. The Plaintiffs argued otherwise. The Trial Court sided with Burt Buick and Fax.com on this argument, ruling that the burden is on the plaintiffs and each one of the recipients to show that consent was not given.[11]

As pointed out in the Appellants' Opening Brief, the TCPA provides that before a faxed advertisement can be sent legally, the sender must have the recipient's invitation or permission and that this burden is clearly on the sender.[12] If the statute did in fact place the burden on recipients of advertisements to show that consent has not been given (as the Trial Court ruled it did), Congress would have used language to so provide. But Congress did not. Rather, the statute provides that to avoid a violation of the TCPA, the sender must have an invitation or permission from a recipient before the advertisement is sent. This puts the burden on the sender of the faxed advertisement to show that invitation or permission had been obtained. Case law supports this.[13]

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[11]Record, Volume VII, Transcript, Hearing of September 2, 2003, p. 5.

[12]The TCPA defines "unsolicited advertisement" 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).

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

It is obvious that the plaintiffs in *Livingston*, in constructing their proposed class definition, had an incorrect view of the TCPA when they defined the class to include those *"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."*[14] This definition did not comport with the language of the TCPA. And neither does this definition square with the proposed class definition in this case.

By seizing upon the proposed definition in *Livingston* instead of reviewing the actual language of the TCPA, the Trial Court decided that plaintiffs had the burden of showing that consent had been withheld. This is an erroneous view of the law and cannot stand.

3. The TCPA Requires That Any Consent Relied upon by the Sender of a Faxed Advertisement Must Be Express. The Trial Court's Ruling That the an Established Business Relationship Could Amount to Consent Is Contrary to the Statute. As this Determination Formed Part of the Basis for Denying Class Certification, this Issue Is Relevant.

As pointed out before, the TCPA requires the sender of a faxed advertisement to obtain an *express* invitation or permission in order to comply with the statute.[15] But this requirement was ignored by the Trial Court in ruling that an established business relationship could amount to consent and that this "would involve individual inquiry, which would just overwhelm any common issues."[16]

This is not an irrelevancy, as Burt Buick argues. Finding that an established business relationship would amount to consent is an erroneous reading of the TCPA, supplies an affirmative

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[14]*Livingston,* at 1090.

[15]47 U.S.C. § 227(a)(4).

[16]Record, Volume VII, Transcript, Hearing of September 2, 2003, p. 8.

defense when there is none, and affects both analysis and application of C.R.C.P. 23. And using this as a basis for finding that the individual issues would "overwhelm any common issues" makes it very relevant. *Toothman* requires that the TCPA be determined correctly and the matter sent back to the Trial Court for a proper application of C.R.C.P. 23 standards.

4. If the Colorado Legislature Wanted to Opt out of the TCPA, it Could Have Done So. Since it Did Not, Colorado Courts Remain Available for All TCPA Actions, Including Class Actions.

Colorado certainly has not prohibited class actions under the TCPA. Even if the Colorado Legislature wanted to do so, it could not have prohibited class actions in such a back-handed way. The TCPA provides that, "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 . . . an action to . . . receive $500 in damages for each such violation . . . ."[17]

Since the enactment of the TCPA, Federal decisions have made clear that Congress intended the TCPA to confer a private right of action in state court.[18] Federal Courts have also stated in dicta that the TCPA authorizes various states to proceed with private rights of action in the absence of limiting legislation.[19]

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[17]47 U.S.C. § 227(b)(3).

[18]*International Science & Technology Institute, Inc. v. Inacom Comm., Inc.*, 106 F.3d 1146 (4th Cir. 1997); *Foxhall Realty Law Offices v. Telecom Prem. Serv.*, 156 F.3d 432 (2nd Cir. 1998); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287 (11th Cir. 1998); *Murphy v. Lanier*, 204 F.3d 911 (9th Cir. 2000); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507 (5th Cir. 1997).

[19]See, e.g., *International Science & Technology Institute, Inc. v. Inacom Comm., Inc.*, 106 F.3d 1146, 1156 (4th Cir. 1997)(by enacting 227(b)(3) "Congress authorized state courts to

If the Colorado legislature had wanted to "opt-out" of the TCPA, it would have done so by clear language expressing that choice. Defining an unsolicited faxed advertisement as a deceptive trade practice under the Consumer Protection Act, with an argument that the remedy section somehow expresses public policy affecting a totally different statute is attenuated, to say the least.

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 10 day of August, 2004.

HEAD & ASSOCIATES, P.C.

By: _____
John F. Head

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enforce the right it created.") And the clause "if otherwise permitted by the laws or rules of court of a State recognizes that States may refuse to exercise the jurisdiction authorized by the statute."); *Foxhall Realty Law Offices v. Telecom Prem. Serv.*, 156 F.3d 432, 438 (2nd Cir. 1998) (The clause in §227 (b)(3) that states "if otherwise permitted by the law or rules of court of a State: does not condition the substantive right to be free from unsolicited faxes on state approval but states may refuse to exercise the jurisdiction authorized by the statute.); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 513 (5th Cir. 1997) (Congress enacted the TCPA as a supplement to state efforts to regulate telemarketing activities).

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 August 10, 2004, addressed as follows:

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