COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue, 3rd Floor Denver, CO 80203	FILED JUL - 6 2004 Clerk, Court of Appeals
District Court, Arapahoe County, Colorado The Honorable Judge Timothy L. Fasing No. 02 CV 3159	
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; FAX.COM, INC., a Delaware corporation; KEVIN KATZ; and CHARLES MARTIN	▲ COURT USE ONLY ▲ Case Number: 03CA0241
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DEFENDANT-APPELLEE BURT BUICK-PONTIAC-GMC TRUCK, INC.'S ANSWER BRIEF

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Defendant-Appellee Burt Buick-Pontiac-GMC Truck, Inc. ("Burt Buick") respectfully submits its Answer Brief.

ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion under Colorado Rule of Civil Procedure 23 ("Rule 23") by ruling, after analyzing the facts and circumstances of this case, that class certification is not warranted because the liability question of whether each putative class member received an unsolicited facsimile advertisement within the meaning of the federal Telephone Consumer Protection Act of 1991 (the "TCPA") is not common to all members of the putative class and must be determined individually for each claimant?

2. Did the trial court abuse its discretion by ruling, consistent with *Livingston v. U.S. Bank, N.A.*, 58 P.3d 1088 (Colo. Ct. App.), *cert. denied* (Colo. 2002) ("*Livingston*"), that the TCPA requires that Plaintiffs-Appellants ("Plaintiffs"), who complain of receiving allegedly unsolicited fax advertisements, establish as an element of their claim that the faxes were unsolicited—*i.e.*, that they did not invite or permit receipt of those fax advertisements? If so, did that ruling affect the trial court's denial of Plaintiffs' class certification motion?

3. Are Plaintiffs' challenges to the Federal Communication Commission's ("FCC") "established business relationship" ("EBR") rule, which provides that a fax recipient's permission to receive a fax advertisement may be shown by demonstrating an EBR between the fax advertiser and the fax recipient, beyond the scope of this appeal because the court stated that the EBR rule did not form a basis of its order denying class certification? Even if the EBR rule formed a basis of the order denying class certification, did the court abuse its discretion in finding that an EBR may establish permission to receive a fax advertisement under the TCPA?

4. Did the trial court abuse its discretion under Rule 23(b)(3) by ruling that, in this case, individual issues would predominate over any common issues and that a class action would not be superior to other available methods (such as small claims or County Court actions) for the fair and efficient adjudication of Plaintiffs' controversy?

STATEMENT OF THE CASE

This is an interlocutory appeal of the trial court's order denying Plaintiffs' Motion to Certify Class Action ("Class Motion"), which the trial court certified as final pursuant to Colorado Rule of Civil Procedure 54(b).

Plaintiffs Alvin K. Lucero, Douglas M. McKenna, and Mathemaesthetics, Inc. bring this action against Defendants Burt Buick, Fax.com, Inc. ("Fax.com"), Kevin Katz, and Charles Martin (collectively, "Defendants") and seek to convert three separate actions that are appropriate for disposition in County Court into a complex class-action lawsuit for hundreds of millions of dollars in alleged statutory damages. Each Plaintiff claims that he or it received multiple unsolicited fax advertisements from Fax.com on behalf of Burt Buick. (R. II:369-371.)[1] They allege that the TCPA entitles them to $500 in statutory damages for each fax, with up to $1,500 per fax available if the trial court finds a willful or knowing violation. (R. II:365.)

The TCPA provides that "[i]t 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.A. § 227(b)(1) (West 2001 &

[1] The citation format "R. II:369-371" refers to Record Volume II, Record Pages 369 to 371. Burt Buick similarly cites the record throughout this brief.

Supp. 2004). The statute defines the term "unsolicited advertisement" to mean "any 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.A. § 227(a)(4) (West 2001 & Supp. 2004). The essential elements of a claim for violation of the TCPA's prohibition of unsolicited fax advertising are that (1) the defendant used a telephone facsimile machine, computer, or other device (2) to send material advertising the commercial availability or quality of property, goods, or services (3) to the plaintiff's telephone facsimile machine, (4) without the plaintiff's prior express invitation or permission. *See* 47 U.S.C.A. § 227(b)(1)(C) (West 2001 & Supp. 2004).

The TCPA's prescribed minimum damages remedy of $500, with treble damages available, is designed to provide adequate incentive for consumers to bring small claims and similar state court actions on their own behalf, not class actions. *See* 137 Cong. Rec. S16204-01, S16205 (daily ed. Nov. 7, 1991); *see also Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 515, 518 (3d Cir. 1998) (summarizing the legislative history of the TCPA). And each Plaintiff in this case successfully prosecuted individual actions in Colorado courts before filing this putative class action seeking millions of dollars. (*See* Statement of Facts, Part I, *infra.*)

Plaintiffs argue that this case involves "*per se*" violations of section 227(b)(1)(C), (R. V:1264), and requested that the trial court certify a class of all persons who received fax advertisements from Fax.com on behalf of Burt Buick, (R. IV:904). After considering the parties' extensive briefs, proffered evidence, and oral arguments on the class certification issue, the trial court exercised its discretion to deny certification. The trial court concluded, after analyzing Plaintiffs' proffer, that determining whether each fax advertisement was "unsolicited

or not within the meaning of the TCPA would necessarily require an individual examination, individual proof, and determination for each member of the class or putative member of the class" and that such an "extremely expansive individual inquiry of all putative members of the proffered class would predominate resolution of the common issues," precluding class certification under Rule 23(b)(3). (R. VII, 9/2/03 Tr. at 8:1-11.)[2] The court also found that Plaintiffs' proposed class could not be certified because a class action is not superior to other available methods for the fair and efficient adjudication of Plaintiffs' claims. (*Id.* at 8:20-9:14.)

Although Plaintiffs try to convince this Court otherwise, the only question on appeal is whether both of these Rule 23(b)(3) determinations constitute an abuse of discretion.

STATEMENT OF FACTS

I. PLAINTIFFS' INDIVIDUAL CIRCUMSTANCES AND PRIOR TCPA ACTIONS

A. Plaintiff Alvin K. Lucero

Mr. Lucero does business out of his home office under the name A&N Quality Products. (R. IV:1054 at 5:8-6:7.) He owns a fax machine that he uses exclusively for business purposes, and he alleges that Defendants transmitted an unsolicited advertisement to this fax machine on three separate occasions. (R. IV:1055 at 13:6-14; R. II:369.) Each of these advertisements, as well as those allegedly received by Mr. McKenna and Mathemaesthetics, contained a toll-free number that allowed recipients to remove their fax numbers from Fax.com's database. (*See* R.

[2] The citation "R. VII, 9/2/03 Tr. at 8:1-11" refers to Record Volume VII, Reporter's Transcript of September 2, 2003, hearing at page 8, lines 1 to 11. Burt Buick similarly cites the Reporter's Transcript of the July 9, 2003, hearing on Plaintiffs' motions.

I:20-22 at ¶ 25; R. I:28 ("To have your number removed from our database, please call our automated toll-free center at 800-443-7628."); *id.* at 29-38 (same).)

When Mr. Lucero allegedly received fax advertisements from Burt Buick, he had an EBR with one of Burt Buick's affiliates, Burt Chevrolet. (R. IV:1056 at 17:4-18:20; R. IV:1081 at ¶ 9.) Mr. Lucero was with his wife when she purchased a new Chevy Suburban from Burt Chevrolet in 1996, and he repeatedly visited the dealership to obtain service for the Suburban. (R. IV:1056 at 17:6-20:3; R. IV:1082-1112.) Moreover, Mr. Lucero never contacted anyone at Burt Buick or Fax.com to request that his fax number be removed from the contact list. (R. IV:1058 at 26:10-27:24.) Instead, as he had several times before, Mr. Lucero sued for statutory damages for the faxes he allegedly received. By the time Mr. Lucero was deposed in this case, he had asserted individual TCPA claims against approximately six entities other than Burt Buick. (R. IV:1057 at 23:11-24:22; R. IV:1059 at 35:10-16.) In each case, Mr. Lucero was represented by Plaintiffs' counsel Andrew L. Quiat and had obtained what Mr. Lucero considered to be a satisfactory settlement. (R. IV:1057 at 24:11-19; R. IV:1061 at 44:18-21.) Mr. Lucero did not know how much money he had made from those settlements, but he knew the total amount exceeded $1,000. (R. IV:1059 at 35:17-25.)

B. Plaintiffs Mathemaesthetics and Douglas M. McKenna

Mathemaesthetics is a Colorado corporation that operates out of Mr. McKenna's home office. (R. IV:1063-1064 at 8:9-9:25.) Mr. McKenna is the company's sole shareholder, officer, and employee. (*Id.*) Mathemaesthetics alleges that Defendants transmitted five unsolicited fax advertisements to its telephone fax machine. (R. II:370-371.)

Mr. McKenna alleges that he received four unsolicited advertisements at a fax machine that is used at a second home in the mountains, which is owned by "an extended family partnership" known as McKenna Properties, LLP. (R. II:369-370; R. IV:1066 at 18:17-23; R. IV:1067 at 21:5-16, 24:15-21.) The general partners of McKenna Properties are various members of Mr. McKenna's family, (R. IV:1067 at 21:17-21), and the limited partners are Mr. McKenna, members of his family, and two family trusts, (*id.* at 21:22-23:7). Mr. McKenna, his siblings, and his parents all have access to the McKenna Properties' house. (*Id.* at 22:23-25.) Mr. McKenna allegedly registered McKenna Properties' telephone line in his name and leaves the fax machine connected to that line at all times. (*Id.* at 23:8-24:2; R. IV:1068 at 25:2-7.) The fax machine is unattended most of the time, and faxes collect there until Mr. McKenna or another member of his family visits the house.[3] (R. IV:1068 at 28:16-23.)

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[3] These facts illustrate the kinds of factual issues that are relevant to proving the third essential element of Plaintiffs' TCPA claims—*i.e.*, that the plaintiff received a faxed advertisement at his or her telephone fax machine. For example, because Mr. McKenna alleges that he received advertisements at a personal fax machine located in a mountain home owned and regularly used by his extended family members, not in his primary residence, he may be unable to show that he personally owns the fax machine in question, that the telephone line is registered in his name, or that he personally, not his extended family, was damaged by the receipt of any unsolicited advertisement. Even Plaintiffs recognize that these factual inquiries will be necessary. (Pls.' Br. at 24-25.) But any trial of the putative class members' claims necessarily will involve many more individual factual inquiries to determine, for example, whether each class member (i) personally owned the fax machine; (ii) had the telephone line registered in his or her name; (iii) received a fax from Fax.com on behalf of Burt Buick; (iv) received that fax without having invited or permitted the transmission; (v) waived any objection to the fax after the fact (*e.g.*, by purchasing products or services from Burt Buick); (vi) waived any objection to one or more faxes, or failed to mitigate damages, because he or she failed to call the toll-free number to have his or her number removed from the contact list; and (vii) suffered actual damages that exceed the $500 statutory minimum damages. (*E.g.*, R. IV:1019 & n.21 (identifying for the trial court some of the individual questions).)

When Mr. McKenna first began receiving fax advertisements he threw them all away, but later he began saving them so that he could file lawsuits under the TCPA for statutory damages of $500 to $1,500 per fax.[4] (R. IV:1068-1069 at 28:24-29:25.) Mr. McKenna has never called the toll-free number on <u>any</u> fax advertisement, including those he allegedly received from Burt Buick, to request that either his or Mathemaesthetics' fax number be removed from the contact list. (R. IV:1073 at 47:5-24; R. IV:1074 at 49:18-25; R. IV:1075 at 53:4-23.)

Like Mr. Lucero, Mr. McKenna is no stranger to individual TCPA lawsuits. At the time of his deposition, Mr. McKenna had filed six small claims cases in Boulder County Count against advertisers (other than Burt Buick) and had recovered $6,000 in damages in those cases. (R. IV:1069 at 29:23-30:24; R. IV:1070 at 34:14-18.) He also had filed five or six actions in Boulder District Court in which he had recovered approximately $8,000 to $10,000. (R. IV:1069 at 30:7-8; R. IV:1070 at 34:19-25.) Mr. McKenna represented himself in all but four of his suits. (R. IV:1069 at 31:2-23.) In those four suits he was represented by Mr. Quiat.[5] (*Id.* at 31:2-8).

II. PROCEDURAL HISTORY

A. Plaintiffs' Motion to Certify Class Action

Plaintiffs filed their Class Motion on April 11, 2003. (R. IV:903-928.) Although their Amended Complaint requested money damages and injunctive relief, the Class Motion requested

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[4] Mr. McKenna seeks statutory, not actual, damages because his alleged injuries are negligible. He testified that unsolicited fax advertisements cause him to suffer the unauthorized use of his fax paper and the annoyance of receiving advertisements in the privacy of his home. (R. IV:1071 at 38:11-15; *id.* at 40:3-18.)

[5] Mr. Quiat filed an affidavit in the trial court in which he averred that, in the two years preceding April 2003, his law practice had "come to consist principally of matters involving the [TCPA]." (R. III:698 at ¶ 6.)

that the trial court certify only a money damages class, under Rule 23(b)(3).[6] (R. IV:904, 909.) Burt Buick opposed the Class Motion, arguing that Plaintiffs failed to satisfy the requirements of Rule 23(a)(1), (a)(2), (a)(3), and (b)(3). (R. IV:1000-1037.) In response to Burt Buick's opposition, Plaintiffs abandoned their first proposed class definition and requested certification of a money damages class defined as

> All persons to whom the Defendants sent advertisements by telephone facsimile on behalf of Burt Custom Finance. Excluded from the Class are the Defendants, and the affiliates, officers, directors and control persons thereof.

(R. V:1259; R. V:1264.)

B. Plaintiffs' Motion for Partial Summary Judgment

One week after Plaintiffs filed their Class Motion, they filed a Motion for Partial Summary Judgment ("Summary Judgment Motion"). (R. IV:937-953.) Plaintiffs' motion requested that the trial court (i) invalidate the FCC's rule that "prior express invitation or permission" could be satisfied by showing that the parties had an EBR and (ii) dismiss Burt Buick's EBR defense as to all putative class members. (R. IV:938.) Burt Buick opposed this motion, arguing that the trial court did not have jurisdiction to collaterally review the FCC's rule, (R. V:1166-1168), and that Plaintiffs had misconstrued the TCPA, (R. V:1172-1179).

C. The Trial Court's Orders Resolving Plaintiffs' Motions

On July 9, 2003, the trial court heard oral arguments from the parties on both motions. (R. VII, 7/9/03 Tr. at 1:23-56:14.) On September 2, 2003, the trial court orally delivered its orders denying Plaintiffs' Class Motion and Summary Judgment Motion. (R. VII, 9/2/03 Tr. at

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[6] Plaintiffs abandoned their equitable claim because Burt Buick terminated its advertising campaign in April 2002, (Pls.' Br. at 2), well before Plaintiffs filed this action, (R. I:16).

1:23-10:11; *id.* at 4:19-22.) With respect to Plaintiffs' Summary Judgment Motion, presiding Judge Timothy L. Fasing stated:

> First, in addressing the plaintiffs' motion for partial summary judgment, they are alleging, in part, that the invitation-permission for consent of the subject faxed advertisements must be expressed. They can't be shown by prior business relationship.
>
> The Court notes as follows: First, the Court finds that it is the plaintiffs' burden to show that the subject faxed advertisements were unsolicited by each plaintiff and each putative class member. And that's the plaintiffs' burden. That can't be shifted [to Defendants]. [Plaintiffs] must show the lack of consent, the fact that it was unsolicited. . . . And also, the issue comes in as a subissue, whether that can be shown, that consent can be shown, by a prior business relationship.
>
> * * * * *
>
> And in looking at the facts and circumstances presented by this case and the standards under Rule 56, the Court denies plaintiffs' motion for partial summary judgment.
>
> In addition to the foregoing reasons, the Court finds that there are numerous issues of dispute and material fact that preclude summary judgment under the circumstances presented in this action.

(*Id.* at 5:10-7:2.)

Judge Fasing then delivered his order denying Plaintiffs' Class Motion. (*Id.* at 7:3-9:20). He first addressed Rule 23(b)(3)'s predominance requirement, stating as follows:

> Concerning the class allegation and certification motions and opposition, the Court notes, first, that the plaintiff must submit an identifiable class that's properly certifiable; and in making a determination of the propriety of recognizing and allowing that certification, the Court cannot get into the merits of the case. The Court must determine proper class status without getting into the merits.
>
> We spent a lot of time—or Counsel spent a lot of time in argument going over the *Livingston* case. I believe that cite is 58 P.3d at 1088. 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, [are] without a difference—it's really squarely the same kind of case we have here, the same basic issues. And as in *Livingston*, the determination has to be made whether the subject advertisements were unsolicited or not under the TCPA.

> And the Court finds that that resolution of those issues necessarily does, as it did in *Livingston*, overwhelm and subsume the common issues at the heart of the case. Whether the ads were unsolicited or not within the meaning of the TCPA would necessarily require an individual examination, individual proof, and determination for each member of the class or putative member of the class. And this extremely expansive individual inquiry of all putative members of the proffered class would predominate resolution of the common issues, and that would—that, the Court finds, does preclude class certification under C.R.C.P. 23.
>
> Even assuming that the class is properly defined, the Court finds that that is—that pales by comparison to the issue of the subsuming of the individual inquiry of each member to get—we'd have to be getting into the merits. And whether or not we get into the issues of established business [relationship] rule or not, that still would involve individual inquiry, which would just overwhelm any common issues.

(R. VII, 9/2/03 Tr. at 7:3-8:19.) Next, Judge Fasing stated his findings regarding Plaintiffs' failure to satisfy Rule 23(b)(3)'s superiority requirement:

> For those reasons, and for all—and under the facts and circumstances presented by this case, the Court further states that it is unable to find, as required by Rule 23, that class action relief is superior to other available methods for fair and sufficient adjudication of this type of claim. It simply isn't. This is not the most—it certainly is not superior to other methods that are available for fair and efficient ad[judications].
>
> There was some mention made in argument that there had been fewer—just maybe a very few, maybe just one individual—other individual action brought in county court [against Burt Buick]. But notwithstanding that, the Court finds that there are proper and other available avenues for relief by any potential plaintiffs alleged to have been injured by violations of this federal act, and that to get into the individual determination of whether or not individual putative class members were solicited or unsolicited, that just simply overwhelms the case.

(R. VII, 9/2/03 Tr. at 8:20-9:14.)

D. The Trial Court Certified for Appeal Its Order Denying Class Certification, But Not Its Order Denying Summary Judgment

Pursuant to Rule 54(b), the trial court certified as final its order denying class certification, thereby enabling Plaintiffs to take this interlocutory appeal. (R. VI:1767.) Plaintiffs did not seek leave of the trial court to take an interlocutory appeal of the order denying summary judgment, (R. VI:1763-1765), and that order is not on appeal here, (R. VI:1767).

SUMMARY OF ARGUMENT

Plaintiffs' principal argument—that the trial court failed to exercise its discretion and denied class certification as a matter of law—is contradicted by Judge Fasing's statements in his order denying certification. Judge Fasing stated that he considered the facts and circumstances of Plaintiffs' case and concluded that, with respect to the Rule 23(b)(3) predominance analysis, Plaintiffs' action is materially indistinguishable from *Livingston*. In addition, unlike *Livingston*, Judge Fasing also denied certification on Rule 23(b)(3) superiority grounds. Plaintiffs' characterization of this as abandonment of discretion is baseless.

Plaintiffs make a similarly flawed challenge to the trial court's ruling regarding their burden of proof under the TCPA. As an initial matter, the trial court's order denying class certification does not incorporate the court's ruling on Plaintiffs' burden of proof, which was made in the court's order denying summary judgment. Further, Plaintiffs' burden-of-proof argument does not change the individual nature of a core liability question—the plaintiff's consent or lack thereof. Regardless of whether Plaintiffs or Defendants carry the burden of proving consent, it is the predominant question of law and fact in this case. Still further, the trial court correctly ruled that it is Plaintiffs' burden to prove that the faxes at issue are unsolicited.

Other issues Plaintiffs raise are extraneous to the sole question in this appeal, which is whether the trial court abused its discretion in denying Plaintiffs' Class Motion. Most prominently, Plaintiffs contend that Judge Fasing's class certification order is based on an erroneous "determination" that an EBR defense is available to Burt Buick. The record, however, reveals that Judge Fasing expressly stated that the EBR rule does not underpin his denial of

Plaintiffs' Class Motion. Therefore, the EBR issue is beyond the scope of this appeal. Further, Plaintiffs' substantive arguments regarding the EBR defense are fundamentally flawed.

Finally, Plaintiffs improperly suggest that this Court should conduct a *de novo* review of the Rule 23 questions. In this appeal, the findings and conclusions in the trial court's order denying class certification should be reviewed for an abuse of discretion; Plaintiffs cannot relitigate their Class Motion as if it had not been resolved by the trial court. Yet, even if Plaintiffs could relitigate their Class Motion here, their arguments fail on the merits and reinforce the conclusion that Judge Fasing correctly denied class certification.

ARGUMENT

I. STANDARD OF REVIEW

The party seeking class certification must establish Rule 23's requirements. *Borwick v. Bober*, 529 P.2d 1351, 1354 (Colo. Ct. App. 1974). If Plaintiffs failed to meet any requirement of Rule 23(a) or (b)(3), the trial court was required to deny class certification. *See* 529 P.2d at 1353. "The decision whether to certify a class action lies within the discretion of the trial court and will not be disturbed unless the decision is clearly erroneous and an abuse of discretion." *Friends of Chamber Music v. City & County of Denver*, 696 P.2d 309, 317 (Colo. 1985) (en banc).

II. THE TRIAL COURT ANALYZED THE FACTS AND CIRCUMSTANCES OF THIS CASE AND THE RELEVANT RULE 23 FACTORS AND PROPERLY EXERCISED ITS DISCRETION TO DENY CLASS CERTIFICATION

In their Opening Brief, Plaintiffs evade the only issue properly before this Court: whether Judge Fasing abused his discretion when he declined to certify the proposed class.

Instead, Plaintiffs quote selectively from his order in the hope that they will convince this Court that Judge Fasing failed to exercise his discretion at all. (*See* Pls.' Br. at 6.)

A. Judge Fasing's Order Expressly Contradicts Plaintiffs' Argument That He Denied Class Certification as a Matter of Law

Judge Fasing's order leaves no doubt that he considered both the facts and circumstances of Plaintiffs' case and concluded that, with respect to Rule 23(b)(3)'s predominance analysis, this case is materially indistinguishable from *Livingston*. (Statement of Facts, Part II.C, *supra*.) For instance, Judge Fasing stated that "under the facts and circumstances of this case, we're still under the basic situation that was squarely addressed by the *Livingston* case," (R. VII, 9/2/03 Tr. at 9:15-18), and "under the facts and circumstances presented by this case, the Court further states that it is unable to find, as required by Rule 23, that class action relief is superior to other available methods for fair and [e]fficient adjudication of this type of claim," (*id.* at 8:20-25). Even Plaintiffs' selective quotation of the certification order indicates that the court examined the facts of this case, compared Plaintiffs' alleged facts to the *Livingston* facts, and determined, in its discretion, that *Livingston*'s predominance rationale applied with equal force here. (*See* Pls.' Br. at 6.) Plaintiffs' failure to quote any other text from the certification order highlights the unfounded nature of their argument. Further, Plaintiffs cannot and do not point to any statement by Judge Fasing evincing a belief on his part that TCPA cases cannot be certified as class actions or that he could deny Plaintiffs' Class Motion without considering the unique facts

and circumstances of this case. And, in light of Burt Buick's arguments in the trial court, it is extremely unlikely that Judge Fasing held such a belief.[7]

More importantly, Judge Fasing denied certification on a second ground that was not even addressed in *Livingston*: Plaintiffs' failure to satisfy Rule 23(b)(3)'s superiority requirement. (R. VII, 9/2/03 Tr. at 8:20-9:14.) His superiority analysis shows, beyond a doubt, that Judge Fasing did not blindly adopt *Livingston*'s holding as dispositive in this case. Also, in his superiority analysis, Judge Fasing discussed unique facts that support his ruling in this case. He overtly referenced evidence that Plaintiffs and putative class members successfully prosecuted individual TCPA actions, including a suit against Burt Buick, and concluded that this evidence demonstrated the existence of "proper and other available avenues for relief by any potential plaintiffs alleged to have been injured by violations of this federal act." (*Id.* at 9:4-14.)

Finally, Judge Fasing's quoted statements also show that he analyzed (i) Rule 23(a)(1)'s requirement that Plaintiffs propose an adequate class definition, (R. VII, 9/2/03 Tr. at 7:3-11, 8:12-19); (ii) Rule 23(b)(3)'s requirement that questions of law or fact common to the members

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[7] In the trial court, Burt Buick repeatedly emphasized that the class certification decision was a matter of discretion. (*E.g.*, R. IV:1011-1012 ("[t]he decision whether to certify a class ultimately is within the Court's discretion"); R. VII, 7/9/03 Tr. at 21:19-24 ("And I want to make it clear, because I think [Plaintiffs' counsel] has suggested otherwise by arguing that we seek some ruling as a matter of law. I fully expect that this Court will exercise its own discretion about whether or not to certify a class in this case. And I believe that is completely appropriate, and we urge the Court to do so."); *id.* at 48:20-22 ("As I say, exercising . . . your discretion in this matter, we believe you should deny class certification.").) These arguments in the record show that Judge Fasing did not deny certification as a matter of law. *See Serna v. Kingston Enters.*, 72 P.3d 376, 380 (Colo. Ct. App. 2002) ("On appeal, a party may defend the judgment of the trial court on any ground supported by the record, regardless of whether that ground was relied upon or even contemplated by the trial court."), *cert. denied* (Colo. 2003).

of the class predominate over any questions affecting only individual members, (*id.* at 7:12-8:19); and (iii) Rule 23(b)(3)'s requirement that a class action be superior to other available methods for the fair and efficient adjudication of the controversy, (*id.* at 8:20-9:14).

B. Judge Fasing Correctly Relied on *Livingston*'s Predominance Analysis

The *Livingston* case concerned facts that are nearly identical to the facts alleged here. In that case, an employee of U.S. Bank purchased a database of names, addresses, and telephone fax numbers for 8,000 persons and businesses in the Denver area, and U.S. Bank then contracted with a third party to send fax advertisements to persons and businesses listed in the database. *Livingston*, 58 P.3d at 1089. The plaintiffs received fax advertisements and filed a TCPA action on behalf of themselves and the following proposed class:

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

Id. at 1090. The case was filed in Denver District Court and assigned to Judge Morris B. Hoffman. Judge Hoffman denied the plaintiffs' request for certification of a money damages class, determining that individual issues predominated over common issues. (R. V:1116.)

This Court affirmed Judge Hoffman's ruling, holding that "because individual issues predominated over common issues, the court did not err in denying class certification." *Livingston*, 58 P.3d at 1091. The Court noted that Judge Hoffman's order was supported by two federal cases, *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1169 (S.D. Ind. 1997), and *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 404 (E.D. Pa. 1995), which denied class

treatment of TCPA claims, in part, because the plaintiffs did not establish predominance of common questions.[8] *Livingston*, 58 P.3d at 1090-91. The Court also agreed that the TCPA's definition of "unsolicited advertisement" permits an advertiser to send a fax to a consumer if that consumer "had invited or given permission for the transmission of the fax." *Id.* at 1091. Further, the Court agreed that because "the TCPA does not require consent to be given in writing, and it may be given orally, determination of this [consent] issue would involve examining whether each potential class member had invited or given permission for the transmission of the fax." *Id.* Still further, the Court limited its analysis to predominance because the plaintiffs' failure to satisfy that requirement, taken alone, precluded class certification. *Id.* Neither this Court nor Judge Hoffman addressed the FCC's EBR rule in denying certification because an EBR is an additional way, not the only way, for a consumer to give permission to receive a fax.[9]

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[8] Although the Court correctly found that *Kenro* and *Forman* are persuasive authority, *Livingston*, 58 P.3d at 1090-91, Plaintiffs attack those cases as being "of questionable merit" because the courts may not have had jurisdiction over TCPA private actions, (Pls.' Br. at 22). Plaintiffs also allege that in *Hammond v. Carnett's, Inc.*, 596 S.E.2d 729 (Ga. Ct. App. 2004), the Georgia court criticized *Livingston*, *Kenro*, and *Forman*, but that court did <u>not</u> do so. *See* 596 S.E.2d at 733 (citing, but not criticizing, *Livingston*, *Kenro*, and *Forman*). Plaintiffs, however, make no substantive argument, based on Rule 23, the TCPA, or otherwise, that *Kenro* or *Forman* were decided incorrectly. (*Id.*) To the contrary, *Kenro* and *Forman* are the only federal cases to have resolved private plaintiffs' efforts to certify "unsolicited fax" classes, were decided correctly, and are persuasive authority in Colorado, *State v. Buckley Powder Co.*, 945 P.2d 841, 844 (Colo. 1997) (en banc), unlike Georgia's (or any other state's) class certification decisions.

[9] *See, e.g.*, R. V:1119 (assuming, without deciding, that the *Livingston* plaintiffs' narrow interpretation of "prior express invitation or permission" was correct and finding that "individual inquiries into the facts and circumstances of each recipient's 'invitation' and 'permission' must not only be made, but [the plaintiffs] will have the burden of proving the absence of such 'invitation' and 'permission' as an element of their case"); *accord Kondos v. Lincoln Prop. Co.*, 110 S.W.3d 716, 722 (Tex. App. 2003) (reversing certification of TCPA class because, even if

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In this case, Judge Fasing expressly found that, with respect to the predominance analysis, there are no material differences between *Livingston*'s facts and Plaintiffs' alleged facts.[10] (*See* R. VII, 9/2/03 Tr. at 7:14-23.) Because the individual inquiry of whether a recipient had given "prior express invitation or permission" lies at the core of Plaintiffs' claim, Judge Fasing concluded, as had this Court in *Livingston,* that the individual issues of the recipient's consent would overwhelm any common questions of law or fact in this action. (*Id.* at 7:24-8:11.)

Because the fact and liability issues in *Livingston* so closely resemble the issues in this case, Judge Fasing's reliance on *Livingston*'s predominance analysis is proper. Indeed, if Judge Fasing had not looked to *Livingston* for guidance, he would have shirked his responsibilities as a Colorado trial court judge. *See, e.g.*, C.A.R. 35(f) ("Those opinions designated for official publication shall be followed as precedent by the trial judges of the state of Colorado.").

C. Plaintiffs' Argument That the Certification Order Must Be Reversed for Failure to Analyze the Rule 23(a) Factors Is Frivolous

Inexplicably, Plaintiffs argue that the trial court was "duty-bound to consider each of the various factors pertinent to a Rule 23 certification" and that because the certification order did not discuss whether Plaintiffs satisfied Rule 23(a)'s factors, the order "warrants reversal." (Pls.' Br. at 8.) Colorado law does not require a trial court to expressly rule on each Rule 23(a) and (b) factor when the court has concluded that certification is inappropriate because the plaintiff failed

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permission must be express, not implied, making the EBR rule irrelevant, individual issues predominate over common issues to be tried).

[10] This finding is correct. *Compare Livingston*, 58 P.3d at 1089-91, *with* R. II:365-371, *and* Pls.' Br. at 1-3.

to satisfy one or more of those factors. *E.g.*, *Livingston*, 58 P.3d at 1091 ("In light of our [predominance] determination, we need not address plaintiffs' contention that the trial court erred in its alternative holding that they failed to identify the class properly."); *Borwick*, 529 P.2d at 1354 ("In view of this determination [regarding Rule 23(a)(3)'s typicality requirement], it is not necessary to consider whether any of the requirements of C.R.C.P. 23(b) were met."). Because Plaintiffs failed to satisfy both prongs of Rule 23(b)(3), the trial court was not required to state its findings regarding Rule 23(a).

For all these reasons, the Court should reject Plaintiffs' argument that the trial court failed to exercise its discretion under Rule 23 and denied class certification as a matter of law.

III. PLAINTIFFS' BURDEN-OF-PROOF ARGUMENT IS IRRELEVANT TO THIS APPEAL AND IS WRONG

Plaintiffs contend that the trial court's "second error of law was construing the TCPA to place the burden on the recipient of the faxed advertisement to prove that the recipient had not given, in advance, an express invitation or permission to the sender of the faxed advertisement." (Pls.' Br. at 9.) Moreover, Plaintiffs assert that "[s]addling Plaintiffs with such a burden would create the unique and almost unheard of proposition of forcing the Plaintiff to prove that consent was not given." (*Id.* at 12.) These arguments are irrelevant and plainly wrong.

A. The Trial Court's Burden-of-Proof Ruling Is Beyond the Scope of This Appeal and Should Not Be Considered by the Court

In attacking the trial court's ruling that they carry the burden of proof on the "unsolicited" element of their TCPA claims, Plaintiffs disregard the fact that the trial court's order denying class certification does not incorporate the burden-of-proof ruling. (*See* R. VII, 9/2/03 Tr. at 7:3-9:20.) Instead, the trial court made its burden-of-proof ruling as part of its order

denying summary judgment. (*Id.* at 5:15-20.) The summary judgment order, however, was not certified for appeal. (*See* R. VI:1767.) Further, it is the order certified for interlocutory appeal—*i.e.*, the order denying class certification, (*id.*)—that defines the scope of this appeal, not the issues identified in Plaintiffs' Notice of Appeal, (R. VI:1775-1780).[11] *See* C.A.R. 3(a) ("Content of the notice of appeal shall not be deemed jurisdictional"). Thus, because the order denying class certification is the only order before this Court on appeal, and because the trial court's burden-of-proof ruling does not underpin its order denying class certification, that ruling is beyond the scope of this interlocutory appeal and should not be considered.[12]

B. The Trial Court's Burden-of-Proof Ruling Is Irrelevant to the Trial Court's Rule 23(b)(3) Certification Analysis

Although the statute itself and Colorado law both support Judge Fasing's conclusion that Plaintiffs bear the burden of proof that a given fax was unsolicited, as we demonstrate below, the determination whether Judge Fasing properly exercised his discretion under Rule 23(b)(3) is not affected by his resolution of the burden-of-proof issue. In fact, both *Livingston* and Plaintiffs' Class Motion were decided without any express determination of which party shouldered the

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[11] As the Supreme Court of the United States held in *United States v. Stanley*, 483 U.S. 669 (1987), when a trial court certifies an order for interlocutory appeal to materially advance the ultimate termination of the litigation, the appellate court should follow "sound judicial practice" and confine its jurisdiction "to the particular order appealed from" and refrain from considering "any other orders that may have been entered in the case." 483 U.S. at 676-77. "'[T]he scope of the issues open to the court of appeals is closely limited to the order appealed from [and] [t]he court of appeals will not consider matters that were ruled upon in other orders.'" *Id.* at 677 (quoting 16 Charles Wright *et al.*, Federal Practice and Procedure § 3929, at 143 (1977)).

[12] *Cf. Hughley v. Rocky Mountain Health Maint. Org., Inc.*, 927 P.2d 1325, 1332 n.11 (Colo. 1996) (en banc) (declining to consider a legal conclusion because it was beyond the scope of the appeal); *People ex. rel. C.K.G. v. C.D.G.*, 505 P.2d 979, 982 (Colo. Ct. App. 1972) (declining to consider contention that was "beyond the scope of this appeal").

burden of proof on consent. *See Livingston*, 58 P.3d at 1090-91; R. VII, 9/2/03 Tr. at 7:3-9:20. Whether consent is an element proved by Plaintiffs or an affirmative defense proved by Burt Buick, "this extremely expansive individual inquiry of all putative members of the proffered class would predominate [over] resolution of the common issues, and . . . preclude class certification under C.R.C.P. 23."[13] (R. VII, 9/2/03 Tr. at 8:7-11.) Simply stated, every fax recipient must be examined as to whether he or she gave oral or written consent to receive the fax, regardless of which party has the burden of proof. *Cf. Livingston*, 58 P.3d at 1091.

The plain language of Rule 23(b)(3) supports this conclusion. The rule states that class actions are maintainable if "the court finds the questions of law or fact common to the members of the class predominate over any questions affecting only individual members . . . ." The rule does not differentiate between questions that form elements of the plaintiff's *prima facie* case and questions that support an affirmative defense. (*Cf.* note 13, *supra.*) Accordingly, Plaintiffs' burden-shifting argument is a red herring that does not alter the Rule 23(b)(3) analysis.

C. The Trial Court Correctly Ruled That the TCPA Requires Plaintiffs to Show That the Fax Advertisements at Issue Are Unsolicited

Even if Plaintiffs' burden-of-proof argument were relevant to this appeal, it is wrong. Not only does the plain language of the TCPA place the burden of proof on Plaintiffs, but the

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[13] *Cf. Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 438 (4th Cir. 2003) (reversing order certifying classes, in part, because the defendants' affirmative defenses of comparative negligence, assumption of risk, and setoff depended on individual facts and precluded a finding of predominance of common issues); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 149 (3rd Cir. 1998) (affirming denial of class certification on predominance grounds, in part, because the defendants' affirmative defense raised individual issues); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 742, 744 (5th Cir. 1996) (reversing class certification, in part, because affirmative defenses presented individual issues of law and fact that precluded a finding of predominance).

Court implicitly agreed with this position in *Livingston*. *See* 58 P.3d at 1090-91. Plaintiffs' assertions that "the issue of 'prior express invitation or permission' is to be determined solely from evidence within the custody or control of the Defendants-Appellees," (Pls.' Br. at 24), and that "[t]he recipient has no obligation, in a *prima facie* case, to show that prior consent from the recipient was not given," (*id.* at 25), are wrong and reveal Plaintiffs' disregard of the TCPA's language and this Court's *Livingston* decision.

1. The plain language of the TCPA requires the plaintiff to prove that he or she received an unsolicited faxed advertisement.

As Plaintiffs correctly note, the TCPA's prohibition regarding fax advertisements is "quite clear: 'It shall be unlawful for any person in the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine . . . .'" (Pls.' Br. at 9 (quoting 47 U.S.C. § 227(b)(1)(C)).) The TCPA defines "unsolicited advertisement" as "any 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). Accordingly, the elements of a section 227(b)(1)(C) claim are that (1) the defendant used a telephone fax machine, computer, or other device (2) to send advertising material (3) to the plaintiff's telephone fax machine, (4) <u>without the plaintiff's prior express invitation or permission</u>.

The burden of proof on these elements must rest with the plaintiff if the TCPA's prohibition on <u>unsolicited</u> fax advertising is to have any meaning at all. Indeed, if the statute is to achieve Congress's intended balance between consumers' right to privacy and businesses'

right to free commercial speech,[14] rather than create a statutory bar prohibiting fax advertising altogether, it must be the plaintiff's burden to show that he or she received a fax advertisement without having invited or permitted the fax. If that were not true, then the plaintiff could establish a TCPA violation by merely proving his or her receipt of a fax advertisement, regardless of the solicited or unsolicited nature of that fax. The federal statute, however, clearly does not outlaw all fax advertising, and there can be no finding of liability where the plaintiff proves only that he or she received a faxed advertisement.

2. *Livingston* implicitly rejects Plaintiffs' burden-shifting argument and strongly supports Judge Fasing's order.

Contrary to Plaintiffs' dramatic assertion, there is nothing "unique" or "unheard of" about Judge Fasing's ruling regarding Plaintiffs' burden of proof.[15] In fact, the *Livingston* decision implicitly established that it is the plaintiff's burden to prove lack of invitation or permission.

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[14] *See* 47 U.S.C.A. § 227 (West 2001), Historical Notes, Congressional Statement of Findings, note 9 (stating congressional intent to protect commercial right to legitimate telemarketing activities).

[15] Plaintiffs' burden-shifting argument primarily is based on one Ohio trial court decision, *Jemiola v. XYZ Corp.*, 802 N.E.2d 745 (Ohio Ct. Com. Pl. 2003). *Jemiola*, like Plaintiffs' brief, completely disregards the plain language of the TCPA and manufactures numerous advertising obligations and rules that simply do not exist under section 227(b)(1)(C). *E.g.*, *Jemiola*, 802 N.E.2d at 748 ("the recipient must be expressly told that the materials to be sent are advertising materials and will be sent by fax." (emphasis in original)); *id.* ("In the absence of each clear prior notice, express invitation or permission to send fax advertisements is not obtained."); *id.* at 749 ("An advertiser has the burden of proof with regard to the issue of 'prior express invitation or permission.' This is plain from the legislative history of the TCPA."); *id.* ("[A] fax advertiser has an obligation . . . to keep and maintain records of such consent."). For example, there is no requirement that fax advertisers must "keep and maintain records" of fax recipients' consent in the statute. *See* 47 U.S.C.A. § 227 (West 2001 & Supp. 2004).

See 58 P.3d at 1090-91 (adopting the reasoning of *Forman*[16]). Judge Fasing cannot be faulted for remaining faithful to the TCPA and this Court's earlier decision. *See* C.A.R. 35(f).

IV. PLAINTIFFS' ARGUMENTS REGARDING THE FCC'S EBR RULE ARE BEYOND THE SCOPE OF THIS APPEAL AND ARE WRONG

Plaintiffs also take issue with Judge Fasing's recognition that the FCC ruled that an EBR with a fax advertiser constitutes permission to receive faxes. Judge Fasing's order denying class certification, however, expressly states that it does not depend on the EBR rule. Thus, the EBR issue is beyond the scope of this appeal. In any event, Plaintiffs' EBR arguments are wrong.

A. The EBR Issue Is Beyond the Scope of This Appeal

Plaintiffs devote six pages of their brief to an issue that is beyond the scope of this appeal and to which the trial court's certification order makes a single reference: the FCC's EBR rule. (*Compare* Pls.' Br. at 13-20, *with* R. VII, 9/2/03 Tr. at 8:16-19.) Judge Fasing expressly stated that his ruling did not depend on the existence of the EBR rule: "whether or not we get into the issues of established business [relationship] rule . . . , that still would involve individual inquiry, which would just overwhelm any common issues."[17] (*Id.*) Thus, Judge Fasing recognized that the EBR rule presents an additional, not an essential, reason to deny class certification.[18] (*Id.* at

[16] In *Forman*, the court explicitly found that it was each potential plaintiff's burden to prove whether a specific fax was without express invitation or permission. 164 F.R.D. at 404.

[17] The trial court's other comments regarding the EBR rule are contained in its summary judgment order. (R. VII, 9/2/03 Tr. at 5:23-6:19.) These comments show that whether an EBR establishes permission is subordinate to the question of whether the fax recipient has given his or her "prior express invitation or permission." (*See id.* at 5:15-6:1 ("And also, the issue comes in as a subissue, whether . . . consent can be shown, by a prior business relationship.").)

[18] *Livingston*'s reasoning fully supports Judge Fasing's exercise of discretion in this regard. *See* 58 P.3d at 1090-91. That is, this Court affirmed the trial court's denial of class

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7:3-9:20.) Because the EBR rule did not form a basis of the court's order denying class certification, the rule is beyond the scope of this appeal. (*See* note 11, *supra*.)

B. Plaintiffs' EBR Arguments Are Fundamentally Flawed

As we demonstrated to the trial court in Burt Buick's Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment, (R. V:1161-1180), Plaintiffs' arguments regarding the EBR rule should be rejected for a number reasons.

First, neither the trial court nor this Court has jurisdiction to collaterally review the FCC's determination that an EBR between a fax sender and a fax recipient constitutes "prior express invitation or permission." (*See* R. V:1166-1168.) If Plaintiffs wish to challenge the FCC's determination, they must first petition the FCC to reconsider its determination and, if the FCC is unwilling to do so, they must seek review in the United States Court of Appeals for the Tenth Circuit or the United States Court of Appeals for the District of Columbia Circuit. (*Id.*; *see also* 28 U.S.C.A. § 2343 (West 2004).) Plaintiffs ask this Court to do something it cannot properly do.

Second, Plaintiffs' attempt to obtain summary judgment on one of Burt Buick's classwide defenses should be denied because it improperly requests the Court to decide the

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certification without addressing the EBR rule at all because, irrespective of the EBR rule, highly individual factual inquiries would be required to determine liability with respect to each class member's claim. *See id.* at 1091. As Judge Fasing recognized, if an EBR is, in fact, one of the ways in which consumers can give their permission to receive a fax, then the EBR rule introduces additional questions of individual fact to be tried and further weakens Plaintiffs' predominance arguments. And Burt Buick repeatedly advanced this argument in the trial court. (*E.g.*, R. IV:1008-1009; R. IV:1018-1019; R. VII, 7/9/03 Tr. at 24:21-25:5; *id.* at 47:15-25.)

merits of Burt Buick's defense, and to dismiss one of Burt Buick's affirmative defenses, before a final determination has been made as to whether this matter can be maintained as a class action and before putative class members have been notified of the pendency of this action. (*See* R. V:1168-1172.) At the class certification stage the trial court's inquiry is limited to whether the requirements of Rule 23 have been satisfied, and the merits of the defendant's classwide defenses are not to be judged. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). The requirement that the trial court refrain from determining the merits of Burt Buick's classwide defenses prior to class certification is not merely a technical requirement of Rule 23, but a matter of procedural due process. (R. V:1169-1172.)

Third, Plaintiffs' interpretation of the TCPA is substantively incorrect. (*See* R. V:1172-1175.) Throughout their Opening Brief, Plaintiffs assume, without once explicitly stating so, that "express invitation or permission" was intended to mean "express invitation or express permission." (Pls.' Br. at 13-20.) A plain reading of section 227(a)(4), however, reveals that (i) the word "express" modifies "invitation," but not "permission," in the phrase "prior express invitation or permission"; (ii) a fax advertisement is "unsolicited" only if it is transmitted without the express invitation of the recipient <u>or</u> without the permission of the recipient; and (iii) permission to receive a fax advertisement can be granted in multiple ways, including implied through the recipients' conduct and through an EBR. (*See* R. V:1172-1175.)

Fourth, Plaintiffs' statutory interpretation contradicts the FCC's interpretation of the TCPA, and the FCC's EBR rule is entitled to deference as a proper exercise of the FCC's rulemaking authority. 47 U.S.C.A. § 227(b)(2) (West 2001 & Supp. 2004). (R. V:1175-1179.)

In sum, Plaintiffs' arguments regarding the trial court's comments on the EBR rule are incorrect as a matter of fact, irrelevant to this appeal, and wrong as a matter of law.

V. PLAINTIFFS ARE NOT ENTITLED TO A *DE NOVO* ANALYSIS OF THE RULE 23(B)(3) PREDOMINANCE AND SUPERIORITY ANALYSIS

Plaintiffs' remaining arguments are tantamount to an invitation to this Court to conduct a *de novo* analysis of the Rule 23(b)(3) factors. (*See* Pls.' Br. at 22-30.) The trial court's certification order, however, must be reviewed for an abuse of discretion. *See Friends of Chamber Music*, 696 P.3d at 317. Even if Plaintiffs' extraneous arguments are examined on the merits, the court properly exercised its discretion to deny certification. Because Burt Buick already established that the court's predominance finding is both correct and consistent with this Court's precedent, Burt Buick addresses only Plaintiffs' superiority arguments below.

A. The Trial Court Did Not Abuse Its Discretion in Finding That Plaintiffs Failed to Satisfy Rule 23(b)(3)'s Superiority Requirement

Plaintiffs ask this Court to reverse the trial court's finding that Plaintiffs and the putative class members can vindicate their rights under the TCPA, if any, by filing small claims or County Court actions. (*Compare* Pls.' Br. at 26-30, *with* R. VII, 9/2/03 Tr. at 8:20-9:19.) None of Plaintiffs' arguments, however, supports the position that Judge Fasing abused his discretion.

1. A class action is not a necessary or preferable vehicle for the prosecution of Plaintiffs' claims.

First, as for factor (A) in Rule 23(b)(3), "[t]he interest of members of the class in individually controlling the prosecution or defense of separate actions," the "necessity for a class action is reduced" when individual relief is readily available to aggrieved consumers. *See Parker v. Time Warner Entm't Co.*, 198 F.R.D. 374, 384 (E.D.N.Y. 2001), *vacated on other grounds*, 331 F.3d 13, 21 (2d Cir. 2003) (vacating and remanding order denying class

certification on predominance and superiority grounds because the order was based on "assumptions of fact rather than on findings of fact"). The superiority prong is undermined where, as here, there is a readily available individual remedy. 198 F.R.D. at 385 (denying class certification on superiority grounds in putative class action brought under the federal Cable Communications Policy Act); *Levine v. 9 Net Ave., Inc.*, No. A-1107-00T1, 2001 WL 34013297, at *6 (N.J. Super. Ct. App. Div. June 7, 2001) (affirming denial of class certification on superiority grounds in putative class action brought under the TCPA).

Plaintiffs seek to avoid this superiority problem by contending that individual TCPA actions are "negative value suits," (Pls.' Br. at 29), and that "[m]ost individual putative class members would be hard pressed to pursue their claims separately as the expense, inconvenience and distraction of a lawsuit could not be justified for a $500 TCPA award without attorney's fees," (*id.* at 27). Plaintiffs' argument strains credibility: not only are their allegations unsupported in fact or law, they are contradicted by Plaintiffs' own experiences.

With respect to the TCPA itself, the statutorily prescribed damages remedy of $500, with treble damages available, is designed to provide adequate incentive for individual plaintiffs to bring small claims and other actions on their own behalf, not class actions. *Forman*, 164 F.R.D. at 404-05. According to the TCPA's legislative history, the private-action remedy was intended to encourage consumers to appear, without attorneys, to recover damages:

> The substitute bill contains a private right-of-action provision that will make it easier for consumers to recover damages . . . . The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court. . . .

> Small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this bill.

137 Cong. Rec. at S16205-S16206 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings).

Not only is the statute designed to allow small claims actions, but Plaintiffs' own practices of bringing numerous individual actions in Colorado courts demonstrates that the TCPA's private remedy is efficient and effective as a practical matter. (*See, e.g.*, R. IV:1057 at 23:11-24:22; R. IV:1059 at 35:10-25; R. IV:1069 at 29:23-30:24; R. IV:1070 at 34:14-25.) Indeed, on the very page of their brief in which they claim that individual TCPA actions are not economically feasible, Plaintiffs quote Mr. McKenna's admission that he recovered $2,500 in an individual action in which he invested approximately 30 hours of his time as *pro se* plaintiff. (Pls.' Br. at 27.) This represents a rate of return of $83.33 per hour, but Plaintiffs apparently expect this Court to find that the TCPA's individual remedy is insufficient because the putative class members' "time is worth a whole lot more." (*Id.*) Likewise, Mr. Lucero invested virtually no time in his individual lawsuits and recovered thousands of dollars, all to his personal satisfaction. (R. IV:1057 at 24:11-19; R. IV:1061 at 44:18-21.) Perhaps more importantly, Mr. Quiat admitted that he has built his entire litigation practice on the pursuit of TCPA claims during the past several years. (R. III:698 at ¶ 6.) Clearly, any putative class member who believes, like Plaintiffs, that he or she was injured by the receipt of a faxed advertisement has a readily available means to enforce his or her rights that is more fair and efficient than Plaintiffs' purported class action. *Cf. Levine*, 2001 WL 34013297, at *4 (finding that the record showed that private litigants can readily succeed in individual TCPA actions); *Valentino v. Carter-*

Wallace, Inc., 97 F.3d 1227, 1234-35 (9th Cir. 1996) (reversing class certification, in part, on superiority grounds and noting that "[a] class action is the superior method for managing litigation <u>if no realistic alternative exists</u>" (emphasis added)). That is especially true in this case where Plaintiffs allege that they each received multiple faxes.

Judge Fasing agreed with Burt Buick's superiority argument, and he is not alone. As the *Levine* court stated, "[u]nder the TCPA private action provision, the proofs are simple, the costs low, the injury small, and the $500 damage award is attractively disproportionate to the extent of the actual injury."[19] *Levine*, 2001 WL 34013297, at *6. In such circumstances, a class action is "inconsistent with the specific and personal remedy provided by Congress to address the minor nuisance of unsolicited facsimile advertisements." *Forman*, 164 F.R.D. at 405. Consequently, Plaintiffs cannot fairly characterize Judge Fasing's superiority ruling as an abuse of discretion.

2. Plaintiffs' putative class action will be unmanageable and, therefore, inferior to other available methods of adjudication.

Second, Rule 23(b)(3)(D)'s manageability concerns also defeat Plaintiffs' arguments on superiority grounds. (*See* R. VII, 9/2/03 Tr. at 9:4-14 (discussing manageability concerns).) Where a purported class promises to cause serious manageability problems, as would be the case here because of the individual issues, "courts do not hesitate to dismiss based on manageability concerns alone." *Parker*, 198 F.R.D. at 384.

[19] Indeed, the $500 statutory remedy "most likely exceeds any actual monetary loss in paper, ink or lost facsimile time suffered by most plaintiffs in such a case," *Forman*, 164 F.R.D. at 404, just as it exceeds Mr. McKenna's alleged damages, (*see* note 4, *supra*).

3. Colorado law prohibits the use of class actions to recover statutory damages for transmissions of fax advertisements.

Third, the Colorado Consumer Protection Act (the "CCPA") evinces Colorado's policy to prohibit class actions seeking recovery of statutory damages for alleged transmissions of unsolicited fax advertisements. *See* C.R.S. § 6-1-113(2) (2003). The CCPA discourages unsolicited fax advertisements by defining as a deceptive trade practice the solicitation of a consumer by a fax transmission without including in the advertisement a toll-free telephone number that can be used to notify the sender not to transmit additional faxes. C.R.S. § 6-1-702(1)(b)(I) (2003). In any class action brought under section 6-1-702, however, the CCPA prohibits the recovery of statutory damages; it limits class recoveries to actual damages caused by unsolicited fax transmissions. C.R.S. § 6-1-113(2); *Robinson v. Lynmar Racquet Club, Inc.*, 851 P.2d 274, 278 (Colo. Ct. App. 1993).

The reason for this limitation is clear: If class-action plaintiffs were authorized to recover class damage awards pursuant to section 6-1-113(2)(a)(II) or (2)(a)(III), such recovery would be grossly disproportionate to the class members' actual damages and the defendants' offenses. Indeed, a class damage award premised on a $500 statutory minimum per transmission would bankrupt all but the wealthiest corporations. Thus, Colorado's public policy against class actions for statutory damages is one <u>additional</u> factor showing that a class action is inferior to other available, non-class remedies and that Judge Fasing properly exercised his discretion. For this reason alone, the Court should affirm the trial court's order denying class certification.

CONCLUSION

For the reasons set forth above, the trial court's September 2, 2003, order denying class certification should be affirmed in its entirety and costs of appeal awarded to Burt Buick.

Dated this 6th day of July, 2004.

By: [signature]

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2004, a true and correct copy of the foregoing **DEFENDANT-APPELLEE BURT BUICK-PONTIAC-GMC TRUCK, INC.'S ANSWER BRIEF** was deposited in the United States mail, postage prepaid, properly addressed to:

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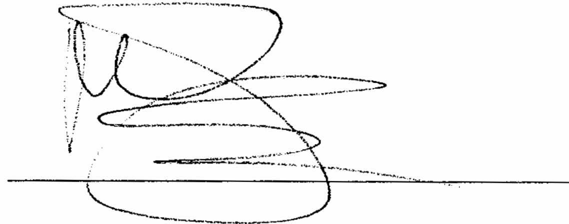

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