

DISTRICT COURT, CITY AND COUNTY
OF DENVER, STATE OF COLORADO
City and County Building
1437 Bannock Street
Denver, CO 80202
Telephone: (720) 865-8301

CONSUMER CRUSADE, INC.,
a Colorado corporation,

Plaintiff,

v.

COUNTY COURT IN AND FOR THE
CITY AND COUNTY OF DENVER,

Defendant.

COURT USE ONLY

Attorneys for Plaintiff:
A. M. Demirali
THE DEMIRALI LAW FIRM, P.C.
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Denver, CO 80246
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Attorney Registration No. 10889

Case No. .

Div.

PETITION FOR WRIT OF MANDAMUS

Petitioner, Consumer Crusade, Inc., by and through its attorneys, The Demirali Law Firm, P.C., respectfully requests that this Court issue a Writ of Mandamus compelling the County Court in and for the City and County of Denver to adjudicate cases brought pursuant to the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA"). In support thereof,

itioner states the following:

FACTUAL AND PROCEDURAL BACKGROUND

1. On or about June 22, 2005, the United States District Court for the District of Colorado (per Chief Judge Babcock) in the action *U. S. Fax Law Center, Inc. v. iHire, Inc.*, Case No. 04-cv-00344-LTB-CBS, determined that claims pursuant to the TCPA were unassignable. *See, U. S. Fax Law Center, Inc. v. iHire, Inc.*, 362 F. Supp. 2d 1248 (D. Colo. 2005). The plaintiff in that proceeding has filed an appeal to the United States Court of Appeals for the Tenth Circuit, Case No. 05-1325. It is anticipated that a resolution of that appeal may take up to eighteen months.

2. Petitioner, Consumer Crusade, Inc., filed an action against Instrument Sales & Service, Inc. on March 24, 2005, alleging violations of the TCPA, Case No. 05-C-7717 (Courtroom 3). Defendants thereafter filed a Motion To Dismiss based upon the Babcock ruling in *iHire*. Alternatively, defendants requested a stay in the proceedings until a definitive ruling on assignability could be rendered by the appellate court.

3. On September 22, 2005, counsel for the parties appeared before Judge Satter of the Denver County Court in order to present arguments concerning the assignability of TCPA claims. At the conclusion of the hearing, Judge Satter stated that he would conduct an "omnibus" hearing of sorts, i.e. all pending TCPA cases could be consolidated for purposes of hearing and determining any motions that defendants intended to file. Plaintiff's counsel was then asked to prepare a list of all its pending TCPA cases so that opposing counsel could be notified of the intended procedure. That identification of cases was provided to the County Court later that same week. *See, Exhibit A* (containing a list of pending county court actions).

4. On October 25, 2005, the Denver County Court issued a notice to "Defendant(s) and Defense Counsel" regarding litigation initiated by Consumer Crusade in forty pending cases. (See, Exhibit B). That notice first pointed out that the issue of subject matter jurisdiction had recently been decided in *Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc.*, Case No. 04 CA 1839, ___ P.3d ___ (Colo. App. 2005). The notice went on to state, however, that the *iHire* decision had raised new questions regarding "standing to maintain these TCPA claims" and whether such claims are "assignable to Consumer Crusade" by the original fax recipients. The Denver County Court also noted that one District Court Judge, Judge McMullin, had agreed with Judge Babcock, at least to the extent that TCPA claims were "punitive in nature" and therefore are not assignable.

5. Based upon the foregoing, all three Denver County Court Judges concluded that they would "wait until the Tenth Circuit determines standing and assignability in *U. S. Fax Law Center v. iHire* case" before ruling upon the viability of the pending TCPA cases. See, *Notice*, at page 2, last paragraph.

PETITION

Petitioner asserts that the decision by the Denver County Court Judges to stay all pending TCPA cases violates the letter and spirit of that court's jurisdictional mandate. Moreover, that decision fails to recognize that the issues before Judge Babcock concerned *state* law governing assignability. Thus, the federal trial court opinion had no binding authority upon state court judges. For those reasons, the Denver County Court should be *mandated* to hear TCPA cases unless or until controlling appellate authority determines that such claims may not be brought by an assignee of original fax recipients.

The jurisdiction of Colorado county courts is set forth in Article VI, Section 17 of the Colorado Constitution, which provides in relevant part:

“County courts shall have such civil, criminal, and appellate jurisdiction as may be provided by law, provided such courts shall not have jurisdiction of felonies or in civil cases where the boundaries or title to real property shall be in question.”

Colo. Const. Art. VI, Section 17

C.R.S. 13-6-104 identifies the original jurisdiction of county courts in civil matters. It states in subparagraph (1):

“On and after January 1, 1991, the county court shall have concurrent original jurisdiction with the district court in civil actions, suits, and proceedings in which the debt, damage, or value of the personal property claimed does not exceed fifteen thousand dollars, including by way of further example, and not limitation, jurisdiction to hear and determine actions in tort and assess damages therein not to exceed fifteen thousand dollars. The county court shall also have jurisdiction of counterclaims in all such actions when the counterclaim does not exceed fifteen thousand dollars.”

C.R.S. 13-6-104 (1) (emphasis supplied)

ARGUMENT

It is beyond dispute that Colorado courts have subject matter jurisdiction over TCPA claims. *Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc.*, __ P.3d __ (Colo. App. 2005). As a consequence, the state courts of Colorado have an *obligation* to adjudicate TCPA cases so long as jurisdictional prerequisites, such as the amount in controversy, have been met. Therefore, a clear duty exists for the county courts to exercise its jurisdiction where, as here, plaintiff has filed an action in that court.

Furthermore, the district courts of Colorado have stated repeatedly that TCPA claims *are* assignable. For example, Chief Judge Bayless has specifically rejected the determination by Chief Judge Babcock that TCPA claims are *not* assignable. *See, e.g. Order* dated June 2, 2005, *Consumer Crusade, Inc. v. New York Deli News, Inc.*, Case No. 04 CV 5151 (Courtroom 6), a copy of which is appended hereto as Exhibit C. Based upon that decision, as well as the concurring opinions of District Court Judges Hoffman, Gilman and Mullins of Denver, and Judges Hannen and Post of Arapahoe County, Consumer Crusade has a clear right to bring its TCPA claims in Colorado courts. Therefore, it is incongruous that *county* court judges feel no such obligation to adjudicate TCPA cases.

The third requirement for mandamus relief is that there be no other available remedy. As noted previously, the county court judges issued a notice to all counsel of record that it would stay the forty pending TCPA cases until the Tenth Circuit Court of Appeals ruled on the *iHire* case. That decision, without the issuance of an appealable order, shall frustrate plaintiff's ability to challenge directly this joint conclusion of Denver's county court judges. Therefore, Consumer Crusade has no remedy with respect to their decision.

The conclusion that petitioner has no available remedy is *underscored* by the obvious fact that assignability is a question of *state*, not federal, law. *See, Tivoli Ventures, Inc. v. Baumann*, 870 P.2d 1244 (Colo. 1994) (i.e. where federal statute is silent, state common law used to fill gaps). Consequently, the order by Chief Judge Babcock, as a federal trial court, had no precedential value on the subject of assignability. Similarly, the Tenth Circuit, whether or not it reverses the lower court ruling, shall *limit* its inquiry to what it *thinks* the Colorado Supreme Court would rule if presented with the issue. *See, Rawson v. Sears, Roebuck & Co.*, 822 F.2d

908, 910 (10th Cir. 1987). Thus, even *after* the ruling of the Tenth Circuit, we shall be no closer to a definitive ruling on TCPA assignability than we are now.

In essence, the county court judges have elected to wait for a federal appellate court opinion regarding Colorado state law on the subject of assignments. That approach is not calculated to resolve the issue. Consumer Crusade has no ability to force an expeditious decision, and no power to use even a favorable appellate ruling to cause state county courts to restart adjudication of its cases. Accordingly, petitioner has no available remedy given the present circumstances.

CONCLUSION

Based upon the foregoing, petitioner Consumer Crusade, Inc. is entitled to relief in the nature of a writ of mandamus to compel the Denver county courts to adjudicate TCPA cases regardless of the status of the *iHire* decision.

DATED this 14th day of November, 2005.

Respectfully submitted,


A.M. Demirali

EXHIBIT A



Denver County Court

CIVIL DIVISION, COURTROOM 3
1515 Cleveland Place, 4th Floor
DENVER, COLORADO 80202
303-640-4718

Chambers of
Judge Raymond N. Satter

October 25, 2005

Craig D. Joyce, Esq.
Fairfield & Woods, P.C.
1700 Lincoln Street, Suite 2400
Denver, Colorado 80203

Re: *Consumer Crusade, Inc. v. Instrument Sales & Service, Inc.*
and Sean Kelly, Case No. 05-C-07717; Ctrm. 3

Dear Mr. Joyce:

Since you were the last lawyer to argue the defendants' side in all of these cases on September 22, 2005, I was hoping you could coordinate the defendants' position in these fifteen cases. I enclose a copy of the list of cases that I have in my courtroom as well as counsel. Of course, as you can see from the enclosed letter, we are waiting to see what the Tenth Circuit does in *U.S. Fax Law Center, Inc v. iHire, Inc.*, 362 F.Supp.2d 1248 (D.Colo. 2005)

Cordially,

Raymond N. Satter
RNS/hs
Enclosure

Cc: A.M. Demirali, Esq.
875 S. Colorado Blvd., Box 672
Denver, Colorado 80246

Erin McAlpin Eiselein, Esq.
Davis, Graham & Stubbs, LLP
1550 Seventeenth Street, Suite 500
Denver, Colorado 80202

Re: *Consumer Crusade, Inc. v. Michelin North America, Inc. and TCI Tire Centers, Inc.*, Case No. 04-C-29483; Ctrm. 3

Colin L. Barnacle, Esq.
Otten, Johnson, Robinson, Neff & Ragonetti, P.C.
950 Seventeenth Street, Suite 1600
Denver, Colorado 80202

Re: *Consumer Crusade, Inc. v. Environmental Data Resources, Inc. and Anthony J. Buonicore*, Case No. 05-C-7618; Ctrm. 3

Awilda R. Marquez, Esq.
Hall & Evans, LLC
1125 Seventeenth Street, Suite 600
Denver, Colorado 80202-2052

Re: *Consumer Crusade, Inc. v. Colorado Society of Certified Public Accountants and Mary Medley*, Case No. 04-C-29489; Ctrm. 3

Craig D. Joyce, Esq.
Fairfield & Woods, P.C.
1700 Lincoln Street, Suite 2400
Denver, Colorado 80203

~~Re: *Consumer Crusade, Inc. v. Instrument Sales & Service, Inc. and Sean Kelly*, Case No. 05-C-07717; Ctrm. 3~~

Peter D. Willis, Esq.
Kutak Rock, LLP
1801 California Street, Suite 3100
Denver, Colorado 80202-2626

Re: *Consumer Crusade, Inc. v. Mountain States Employer's Council, Inc. and Michael G. Severns.*, Case No. 05-C-2119; Ctrm. 3

Kimberly A. Bruetsch, Esq.
Robinson, Waters & O'Dorisio, P.C.
1099 Eighteenth Street, Suite 2600
Denver, Colorado 80202-1926

Re: *Consumer Crusade, Inc. v. Ampro Mortgage Corporation, Inc. and James
Munford*, Case No. 05-C-01444; Ctrm. 3

Mr. Richard Stanley, President
Combined Distribution Companies
6280 E. 39th Ave.
Denver, Colorado 80207

Re: *Consumer Crusade, Inc. v. Combined Distribution Companies, Inc. and Rick
Stanley*, Case No. 05-C-02116; Ctrm. 3

William McCaslin, Esq.
Treece, Alfrey, Musat & Bosworth, P.C.
999 Eighteenth Street, Suite 1600
Denver, Colorado 80202-2416

Re: *Consumer Crusade, Inc. v. Evergreen Lodge at Vail, et. al.*, Case No. 05-C-
07270; Ctrm. 3

Scott M. Tarbox, Esq.
Rumler Tarbox Lyden, LCPC
1777 S. Harrison Street, Suite 1250
Denver, Colorado 80210

Re: *Consumer Crusade, Inc. v. All Copy Products, Inc. and Brad R. Knepper*,
Case No. 05-C-07621; Ctrm. 3

Mr. Stephen Vanier
American Process, Inc.
1133 Portland Pl., #108
Boulder, Colorado 80304

Re: *Consumer Crusade, Inc. v. American Process, Inc., etc., et. al.*,
Case No. 05-C-07624; Ctrm. 3

Roger T. Castle, Esq.
1888 Sherman Street, Suite 415
Denver, Colorado 80203

Re: *Consumer Crusade, Inc. v. Business 21 Publishing, LLC and Stephen J. Meyer*, Case No. 05-C-10036; Ctrm. 3

Douglas A. Turner, Esq.
602 Park Point Dr., Suite 240
Golden, Colorado 80401

Re: *Consumer Crusade, Inc. v. Ad-Wares, etc.*
Case No. 04-C-25697; Ctrm. 3

Brett N. Huff, Esq.
White & Steele, PC
950 Seventeenth Street, 21st Floor
Denver, Colorado 80202-2804

Re: *Consumer Crusade, Inc. Pizza Hut of America, etc. et. al.*
Case No. 04-C-31700; Ctrm. 3

Todd L. Vriesman, Esq.
Montgomery, Kolodny, Amatuzio & Dusbabek, LLP
475 Seventeenth Street, 16th Floor
Denver, Colorado 80202

Re: *Consumer Crusade, Inc. v. Trandall Sports, Inc., et. al.*
Case No. 04-C-31820; Ctrm. 3

EXHIBIT B



Denver County Court

CIVIL DIVISION

1515 CLEVELAND PLACE, 4TH FLOOR

DENVER, COLORADO 80202

October 25, 2005

To: Defendant(s) and Defense Counsel

Re: Consumer Crusade, Inc. litigation.

We write to you because your case is one of forty cases pending in our three courtrooms here in the Denver County Court wherein Consumer Crusade, Inc. is a plaintiff and you are either a named defendant or defendant's counsel. The complaint in each case is based upon the allegations of receipt of the plaintiff's assignor(s) of unsolicited faxes from the defendant(s) in violation of the Telephone Consumer Protection Act, 42 U.S.C. §227. Grounds for liability differ from case to case. In addition various cases may be in different stages of litigation in our various courtrooms.

All of these cases have common legal questions:

1. Does the Denver County Court have subject matter jurisdiction over cases where it is alleged that defendants violated the Telephone Consumer Protection Act (TCPA), 42 U.S.C. §227 by sending faxes **prior to** the 2004 revision to the Colorado Consumer Protection Act (CCPA) in C.R.S. §6-1-702(1)? Alternatively, does the Denver County Court have subject matter jurisdiction over cases where it is alleged that defendants violated the Telephone Consumer Protection Act (TCPA), 42 U.S.C. §227 by sending faxes **after** 2004? Based upon the recent holding in *Consumer Crusade Inc. v. Affordable Health Care Solutions, Inc.*, ___ P.3d ___ (Colo.App. 2005) (04CA1839, announced August 25, 2005), it appears that this court has subject matter jurisdiction. Certiorari to the Colorado Supreme Court was not sought in that case.


2. Does Consumer Crusade have **standing** to maintain these TCPA claims? In *U.S. Fax Law Center, Inc v. iHire, Inc.*, 362 F.Supp.2d 1248 (D.Colo. 2005), Judge Babcock ruled that since a similar plaintiff never **received** the faxes in question, it lacks standing to bring these "privacy claims" that seek statutory damages. It is our understanding that this case is on appeal to the United States Tenth Circuit Court of Appeals.

Re: Consumer Crusade
October 25, 2005
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3. Are the TCPA claims of the fax recipients (assignors) assignable to Consumer Crusade? In *U.S. Fax Law Center, Inc v. IHire, Inc.*, 362 F.Supp.2d 1248 (D.Colo. 2005), Judge Babcock further concluded that the TCPA claims were penal in nature and **not** assignable. Upon re-hearing (373 F.Supp.2d 1208) Judge Babcock emphasized this was based upon substantive Colorado law. In the Denver District Court, Judge McMullen recently ruled in *U.S.Fax Law Center, Inc. v. The Barrington Group, et. al.*, (Case No. 05-CV-2090, July 1, 2005) that the TCPA claims are punitive in nature and are not assignable, citing *IHire, supra*. Consumer Crusade has not brought any claims under the Colorado Consumer Protection Act.

We have decided to wait until the Tenth Circuit determines standing and assignability in the *U.S. Fax Law Center v. IHire* case before we rule on the viability of each of these pending cases. We will contact you once there is a definitive ruling.

Cordially,


Raymond N. Satter
Courtroom 3
(303) 640-4715


Melvin Okamoto
Courtroom 4
(303) 640-3478


Herbert H. Galchinsky
Courtroom 5
(303) 640-2366

Cc: A.M. Demirali, Esq.
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Denver, Colorado 80246

EXHIBIT C

DISTRICT COURT

CITY AND COUNTY OF DENVER, COLORADO

Plaintiff:

CONSUMER CRUSADE, INC., a Colorado corporation

Defendants:

NEW YORK DELI NEWS, INC., and ALBERT BELSKY, its officers and directors

▲ COURT USE ONLY ▲

Case Number:

04 CV 5151

Courtroom 6

O R D E R

THIS MATTER comes before the court on the motion of New York Deli News to dismiss based upon C.R.C.P. Rule 12(b)(1), lack of jurisdiction on the part of this court. The case involves the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §227 and the Colorado Consumer Protection Act, C.R.S. §6-1-113 and §6-1-702. The motion alleges that this court has no jurisdiction because plaintiff is an assignee of the claim and never in fact received any unsolicited fax advertisements sent by defendants.

Defendants support their argument with a ruling from the federal trial court in Denver in U.S. Fax Law Center, Inc. v. Ihire, Inc., 04-B-344 (CBS). As much as this court respects Judge Babcock his opinion is the opinion of a federal trial court and not controlling precedent as to this court.

This court also acknowledges that there is a split among Colorado trial judges concerning the applicability of TCPA actions. Certain courts have ruled that there is no jurisdiction for assigned cases and other Colorado trial courts have ruled that there is jurisdiction.

This court has previously denied motions to dismiss in this and other cases involving the TCPA. The federal legislation was designed to address a perceived need for persons who were sent unsolicited faxes by giving them a vehicle to remedy the need. The suggestion has been made that such persons could simply go to small claims court and without the need of expensive hourly charges from lawyers obtain relief. Such a belief is a reflection, in this court's opinion, of a certain level of naiveté. Obviously many of the faxes which are sent fall into the "local" type of claims as is the present case. Certain claims, however, go across state lines and do not lend themselves readily to small claims resolution. Further, the TCPA limits recovery to such an extent that attorney fees would be more than recovery amounts if there were not the ability to

assign a claim and therefore consolidate multiple claims into one action. Finally, the TCPA does not allow the actions to be taken to federal court.

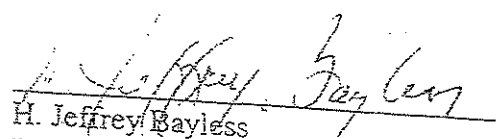
The net of all of this is that until there is appellate authority in each state, and because the various states may come to various conclusions such authority could be inconsistent based on state boundaries only, the trial courts will be left to make their individual determinations. There are no appellate opinions in Colorado on the issue presented in this case.

This court concludes that it does have jurisdiction. There is nothing in the statute that prohibits assigning a claim and indeed in this court's analysis assigning claims is one of the most practical ways of seeking relief under the statute. This court concludes that an assigned claim may be pursued and that this court has jurisdiction.

Accordingly the motion to dismiss is denied.

Done this 2 day of June, 2005.

BY THE COURT:


H. Jeffrey Bayless
District Judge

cc: Lerman
Demirali