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District Court, Denver County Colorado Court Address: 1437 Bannock Street, Room 256; Denver Colorado 80202	<div style="text-align: center;"> <input type="checkbox"/> Court Use Only <input type="checkbox"/> </div>
Plaintiff: Consumer Crusades, Inc. v. Defendants: MBA Financial Group, Inc., a Colorado Corporation, et al.	
Attorney for Defendant Douglas A. Turner, Esq. 602 Park Point Drive, Suite 240, Golden, Colorado 80401 Phone: (303) 273-2923 Fax: (720) 746-3027 E-mail: DTurner@DouglasTurner.com Atty. Reg. No. 22564	Case Number: 04 CV 4841 Division: 5 Courtroom:
DEFENDANT'S REPLY TO MOTION FOR ATTORNEYS FEES	

COMES NOW Defendant, MBA Financial Group, Inc., through counsel, Douglas A. Turner, of Douglas A. Turner, P.C., and files this Defendant's Reply to Motion for Attorneys Fees pursuant to § 13-17-201, C.R.S. and C.R.C.P. 121, Section 1-22 and states as follows:


- Plaintiff asserts or implies that this Court no longer has jurisdiction to hear the motion for attorneys' fees because an appeal has been filed. This is incorrect. Marilyn L. Robertson, *The Civil Litigator: Post-Trial Motions in the Civil Case: An Appellate Perspective*, Colo. Law. Vol. 32, No. 11, Page 71 (November 2003). "A post-trial motion for attorney fees and costs is not considered to be a C.R.C.P. 59 motion. (*citing Roa v. Miller*, 784 P.2d 826 (Colo.App. 1989), *cert. denied* (Colo. Dec. 11, 1989) (*multiple citations omitted*). Consequently, the trial court retains jurisdiction to determine motions for attorney fees and costs during the pendency of the merits appeal. (*citing Roa*) The time limits for filing and determination of C.R.C.P. 59 motions do not apply to post-trial motions for attorney fees, and the filing of a post-trial motion for attorney fees and costs does not affect the time limit for filing a notice of appeal on the judgment itself. (*citing Plank and Gill*, 18 *Colorado Practice, Colorado Appellate Law and Practice* (St. Paul, MN: West Group, 1999) at § 6.15, *Ferrell v. Glenwood Brokers, Ltd.*, 848 P.2d 936 (Colo. 1993), *Baldwin v. Bright Mortgage Co.*, 757 P.2d 1072 (Colo. 1988), *Hierath-Prout v. Bradley*, 982 P.2d 329 (Colo.App. 1999)). *Id.*

2. What is key in Plaintiff's Response is not what plaintiff says, but what it doesn't say. The question is this: If the claim pursuant to the TCPA is not a remedial, compensatory claim for property damage, tort or both, then what is it? Plaintiff says what it thinks the claim is not; but does not say what the claim is – at least in this Response.
3. In Plaintiff's Response to Defendants' Motion to Dismiss, Plaintiff took the position that the TCPA claim is a remedial, compensatory claim sounding in tort. On page 5-6 of that Response, Plaintiff stated "a person who has been injured in fact may bring an action to vindicate that right." On page 7 of the Response Plaintiff stated "the \$500 award for each violation of the TCPA is compensatory and remedial in nature." On page 8 of the Response, Plaintiff takes the position that "Congress obviously permitted junk fax recipients to sue for compensatory damages."
4. Last, and certainly not least, Plaintiff's Complaint, ¶17 specifically requests relief for actual damages believed to be in excess of \$15,000.00.
5. Now, in all fairness to Plaintiff, in Defendant's Motion to Dismiss, Defendant took the position that the \$500.00 award under the TCPA was not remedial or compensatory. In this Motion For Attorneys' Fees, the roles are now reversed. The only difference is that Defendant is being candid about the issues. Plaintiff, however, not wanting to concede its original position about whether the TCPA claim is a penalty hedges. Plaintiff merely cites to one case stating what the TCPA claim is not, but does not take a position regarding what type of claim the TCPA claim is.
6. The challenge with these TCPA cases is that no court addresses the entire picture and interprets the TCPA with consistency, as a whole. In determining the question of venue, the courts may classify the claim as akin to the tort of invasion of privacy. In determining assignability under Colorado law (assuming state law even controls), the claim is given the classification of remedial. Yet, when the issue of Due Process or First Amendment rights is raised, the TCPA claim is classified as penal. This cannot continue. When the court classifies the TCPA claim, the classification must be the same for all the legal issues. The issue still to be decided is (1) whether the TCPA claim is remedial or penal and (2) whose law to use in determining whether the claim is remedial or penal – state law or federal law.

7. The above said, there is an easy way out of this situation. Regardless of whether the TCPA is remedial or penal, Plaintiff requested relief for damages to be proven at trial believed to be in excess of \$15,000.00. See Complaint ¶17 (A). Plaintiff made specific reference to § 227(b)(3)(B) which recites a request for actual monetary loss. See Complaint ¶12. This is what Plaintiff requested – relief for actual monetary loss. On this ground alone, the request for attorneys’ fees should be granted.
8. Regarding the assertion that the fees requested are not reasonable, the Court has the discretion to schedule a hearing on the request. In any event, a fee is owed. The only question is the amount.

WHEREFORE, Defendant respectfully requests judgment be entered against Plaintiff and in favor of Defendant MBA Financial Group, Inc. in the amount of \$2,909.92, and for such other and further relief as this Court deems just and proper.

Dated this 19th day of November 2004.


Douglas A. Turner, Esq. Reg. No. 22564

CERTIFICATE OF MAILING

I certify that on this 19th day of November 2004 a true and correct copy of the foregoing ***Defendant's Reply To Motion for Attorneys' Fees*** was placed in the U.S. mail, postage prepaid, addressed to the following or by electronic filing and/or service:

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