

<b>District Court, Boulder County, State of Colorado</b> 1777 6th Street, PO Box 4249, Boulder, Colorado 80302 Phone: (303) 441-3750	
Plaintiff:  Douglas M. MCKENNA  v. Defendants:  Dale FINNEY, and MBA FINANCIAL GROUP, Inc.; and  John DOES #1 to #100, whose true names are unknown.	<b>▲ COURT USE ONLY ▲</b>
Attorney for Plaintiffs:  The Law Offices of Andrew L. Quiat, P.C. (#1286) 8200 So. Quebec Street, Suite A-3185 Englewood, CO 80112 Tele: (303) 471-8558 Fax: (303) 471-8561	Case Number: 04 CV 0992  Division: 3 Courtroom:
<b>PLAINTIFF'S RESPONSES TO DEFENDANTS MBA AND FINNEY'S  FIRST SET OF INTERROGATORIES</b>	

COMES NOW Plaintiff, by and through counsel Andrew L. Quiat of the Law Offices of Andrew L. Quiat, P.C., and files his response to **Defendants MBA and Finney's First Request for Admissions**, as follows:

### GENERAL OBJECTIONS

1. In general, parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. *See* Rule 26(b)(1), C.R.C.P. Although relevance in the context of discovery is broader than in the context of admissible evidence, it is not without limit; parties to a lawsuit are only entitled under Rule 26(b)(1) to discover information that appears reasonably calculated to lead to discovery of admissible evidence. *See Payne v. Howard*, 75 F.R.D. 465, 23 F.R.Serv.2d 1483 (D.C. Dist. Co. 1977).

2. Any interrogatory which is too general and all-inclusive need not be answered. *See Stovall v. Gulf & Sough American S.S. Co.*, 30 F.R.D. 152, 6 F.R. Serv.2d 38 (S.D. Tex., 1961). Although *Stovall* applies federal law, C.R.C.P. 26 and Fed.R.Civ.P. 26 are identical in many respects and federal cases and authorities interpreting the identical federal rule are highly persuasive authority in the State of Colorado. *See Faris v. Rothenberg*, 648 P.2d, 1091 n.1 (Colo. 1982).

3. Plaintiff objects herein to each and every inquiry, regardless of how designated, that seeks information or records that are publicly available. Discovery need not be required of documents of public record which are equally accessible to all parties. *See Securities & Exchange Com. v. Samuel H. Sloan & Co.*, 369 F.Supp. 994, 17 F.R.Serv.2d 882 (S.D. N.Y., 1973). One party should not be allowed to require another party to make an investigation for him which he might equally as well make for himself. *See Byers Theaters, Inc. v. Murphy*, 1 F.R.D. 286 (D.C. Va., 1940); *accord Reynolds v. Southern R. Co.*, 45 F.R.D. 526, 12 F.R.Serv.2d 801 (N.D. Ga., 1968) (a party will not be required to make available any compilation of data or research efforts equally available to the interrogating party).

4. Plaintiff objects herein to the Instructions and Definitions set out in Defendants MBA and Finney's First Set of Interrogatories to the extent that they seek to impose a greater duty on Plaintiff than that imposed by the Colorado Rules of Civil Procedure.

5. Plaintiff objects herein to each and every inquiry, regardless of how designated, which seeks from Plaintiff specific information, records, documents, or other data from or pertaining to a third person or entity who is not a party to this action and which is not within the possession or knowledge of Plaintiff, or which is equally available to Defendants in public records.

## INTERROGATORIES

INTERROGATORY #1: *State the name, address, telephone number, and relationship to Plaintiff of each person who prepared or assisted in the preparation of the responses to these interrogatories. See INSTRUCTION #1, above. (Do not identify anyone who simply typed or reproduced the responses.)*

**RESPONSE**: Plaintiff, Douglas McKenna, 1140 Linden Ave., Boulder, Colorado 80304, (303) 440-0707, prepared the responses herein. Plaintiff's attorney, Andrew Quiat, at the above-captioned address and telephone number, assisted Plaintiff with respect to all legal Objections, both general and specific, accompanying the responses herein.

INTERROGATORY #2: *Please fully identify all officers, directors and employees of Mathaesthetics, Inc. [sic]. For each officer director and employee, state his or her job description, and any other employment held by each person during the five years preceding the date, hereof.*

**Objection**: Plaintiff objects to the question to the extent that it is overly broad and/or would not likely lead to the discovery of admissible evidence. Plaintiff additionally objects because the information sought is irrelevant and/or not related to an issue in controversy in this action. To the extent that this interrogatory seeks information that is accessible from the Colorado Secretary of State's offices and internet website, that information is equally available to Defendants. Plaintiff

additionally objects because “Mathaesthetics, Inc.” is a non-existent corporation or trade name.

**RESPONSE:** Subject to the foregoing Objection and without waiving any objections herein, Douglas M. McKenna is the president of a Colorado corporation registered under the name “Mathemaesthetics, Inc.”. McKenna is the sole employee, sole officer (president), sole director, and sole shareholder of Mathemaesthetics, Inc., and has been so without change during the last five years.

INTERROGATORY #3: *Fully identify all owners or shareholders of the [sic] Mathaesthetics, Inc. [sic], including the nature and extent of their share hold or other equitable or legal interest, and their respective employment(s) during the last five years.*

**Objection:** Plaintiff objects to the question in its entirety as overly broad, and/or not likely lead to the discovery of admissible evidence. Plaintiff also objects to the extent that the information sought is irrelevant and/or is not related to an issue in controversy in this action. Plaintiff additionally objects because “Mathaesthetics, Inc.” is a non-existent corporation or trade name.

**RESPONSE:** Subject to the foregoing Objection and without waiving any objections herein, see the Response herein to Interrogatory #2.

INTERROGATORY #4: *Describe the nature and extent of the Plaintiff’s business activities, including all business functions or activities and the number of employees employed by the Plaintiff at each location of the Plaintiff’s business operations.*

**Objection:** Plaintiff objects to the question in its entirety as overly broad, unduly burdensome, and/or not likely lead to the discovery of admissible evidence. Plaintiff also objects to the extent that the information sought is irrelevant and/or is not related to an issue in controversy in this action.

**RESPONSE:** Subject to the foregoing Objection and without waiving any objections herein, Plaintiff is an individual who has no employees. Plaintiff is an employee of Mathemaesthetics, Inc., which is an independent developer and publisher of personal computer software, and which also engages in cross-disciplinary research in mathematics and art for the purpose of creating tiling designs. Plaintiff has occasionally purchased certain personal property in the form of unsolicited fax advertisements from a handful of assignors, including but not limited to personal acquaintances, his own company, his ISP, his elderly-and-in-poor-health parents, and other victims of junk faxes, in order to more broadly and strongly enforce the law in Plaintiff’s community, where many fax-owning members of which consider Plaintiff a hero for attempting to do so. Nearly all TCPA defendants characterize such purchases as a business activity. Plaintiff disagrees, and characterizes such assignments as the only possible means of effecting a civic duty in the face of the otherwise overwhelming economic and opportunity costs incurred when privately enforcing a law that does not provide for attorney fees.

INTERROGATORY #5: Describe all litigation, both civil and criminal, to which the Plaintiff has ever been a party, including but not limited to, all TCPA actions ever brought by the Plaintiff for itself or as an assignee. Such description should include the case name, the court where filed (identify the court by level, location, and state), the case or action number, identification of all Plaintiffs and Defendants, identification of respective counsel, a description of the nature of that litigation and the issues involved therein, and the current status or final result/outcome of such litigation.

**Objection:** Plaintiff objects to the question in its entirety as overly broad, unduly burdensome, and/or not likely lead to the discovery of admissible evidence. Plaintiff also objects to the extent that the information sought is irrelevant and/or is not related to an issue in controversy in this action. Plaintiff further objects to the extent that the information sought is in the possession of and/or has already been provided to Defendants. Plaintiff incorporates by reference General Objection at ¶3 hereinabove to the extent that the interrogatory seeks information already accessible from public records, and which information is equally available to Defendants. Information concerning the identification of all TCPA or other litigation to which Plaintiff has ever been a party in the State of Colorado is equally available to Defendants. The website <<http://www.cocourts.com>> contains an online, Colorado statewide, real-time public court record database. Defendants can access the website and obtain detailed information concerning all litigation to which Plaintiff has ever been a party in the Colorado State Courts, and the current status and/or final resolution of that litigation. With the information provided by the website, Defendants can go to those court houses and obtain the court pleadings, orders, or settlement agreements (if filed and that are not sealed), that Defendants deem relevant to the claims and issues involved in the herein litigation.

**RESPONSE:** Subject to the foregoing Objection and without waiving any objections herein, Plaintiff states that there are several suits in which Plaintiff is or has been named as a plaintiff with respect to the junk faxes Plaintiff has been assigned and/or directly received. Defendants are well-aware that the herein action, *Douglas McKenna v. Dale Finney and MBA Financial Group, Inc.*, Case No. 04 CV 0992, in the District Court, City & County of Boulder, Colorado, is one of several of such cases that the Court, upon certain defendants' motion(s) and against the wishes of the Plaintiff, severed discretionally from the original joint complaint. Those cases are listed in the Court's severance order dated 7/29/04, which is part of the record of the herein action. For a description of the nature of the litigation and issues involved, the best information is contained in the pleadings, motions and responsive briefs filed in these actions, all publicly available. Information relating to the current status or outcome of these actions is similarly equally available to Defendants.

INTERROGATORY #6: Identify every person / individual who is or ever was an employee, agent, consultant, expert witness, or representative of the Plaintiff who has ever testified in any of the litigation described in your answer to Interrogatory #5 above, including the case, the date of the testimony, and the nature of the testimony, context of such testimony (trial, hearing or deposition), and the subject matter of that testimony.

**Objection:** Plaintiff objects to the question in its entirety as overly broad, and/or not likely lead to the discovery of admissible evidence. Plaintiff also objects to the extent that the information sought is irrelevant and/or is not related to an issue in controversy in this action. Plaintiff also incorporates by reference General Objection at ¶3 hereinabove, to the extent that the interrogatory seeks information that is accessible from public records that are equally available to Defendants.

**RESPONSE:** Subject to the foregoing Objection and without waiving any objections herein, Plaintiff has never used an employee, agent, consultant, expert witness, or representative to provide testimony in any such court case.

***INTERROGATORY #7:** For each assignment of each assignor at issue in this case (see your COMPLAINT), fully identify each assignor, and any person / individual acting for or on behalf of each assignor with whom the Plaintiff and /or his representatives have had any contact or dealings whatsoever.*

**Objection:** Plaintiff objects to this interrogatory to the extent that it is overly broad, unduly burdensome, and/or would not likely lead to the discovery of admissible evidence. Plaintiff also objects to the extent that the information sought is irrelevant and/or is not related to an issue in controversy in this action. Plaintiff additionally objects to this interrogatory to the extent that the terms “contact” and “dealings” are vague, ambiguous and undefined by Defendants. Plaintiff objects to the extent that the interrogatory includes subparts under C.R.C.P. 33(e) in excess of the number of written interrogatories permitted under C.R.C.P. 26(b)(2)(B). Finally, Plaintiff objects to the extent that the interrogatory seeks from Plaintiff specific information pertaining to a third person or entity who is not a party to this action and which is not within the knowledge of Plaintiff.

**RESPONSE:** Subject to the foregoing Objection and without waiving any objections herein, Plaintiff’s assignors, along with their respective subject assignment agreements, are identified in Plaintiff’s Rule 26(a) disclosures; copies of those Assignments directly relevant to the within action pertaining to Finney and MBA have already been or are about to be provided to Defendants. The best information in the possession of Plaintiff is the information self-evidently contained on the face of the Assignments themselves. The only additional persons or representatives of any corporate assignor in an assignment at issue herein and with whom Plaintiff has had contact or dealings, as Plaintiff understands those terms, other than the signatories to the assignment agreements, are:

Wendy Bellinger, office manager of Assignor Harrington Homes, Inc.;

Kayleigh Wotreich, a former employee of Assignor Indra’s Net, Inc..

Plaintiff does not know their home addresses or home telephone numbers.

***INTERROGATORY #8:** For each assignment of each assignor at issue in this case (see your COMPLAINT), fully identify each and every representative, employee, or agent of the Plaintiff who has engaged in any dealings or communications with that assignor.*

**RESPONSE:** Plaintiff has not engaged any representative, employee, or agent to communicate with any assignor, with the exception of his attorney, Andrew L. Quiat. As of today's date, Mr. Quiat has questioned one assignor, Tim Harrington of Harrington Homes, Inc., in another related defendant, Michael Kruse's, bench trial. Other than that trial, Plaintiff has dealt with and communicated with, as those terms are understood by Plaintiff, all assignors directly.

INTERROGATORY #9: *For each assignment of each assignor at issue in this case (see your COMPLAINT), describe all communications (whether written, verbal or electronic) between any and all representatives of the Plaintiff and any and all representatives of the assignor prior to the time that the assignment was executed and delivered, including the identification of all persons involved in those communications.*

**Objection:** Plaintiff objects to this interrogatory to the extent that it is overly broad, unduly burdensome, and/or would not likely lead to the discovery of admissible evidence. Plaintiff also objects to the extent that the information sought is irrelevant and/or is not related to an issue in controversy in this action. Plaintiff additionally objects to the extent that the interrogatory includes subparts under C.R.C.P. 33(e) in excess of the number of written interrogatories permitted under C.R.C.P. 26(b)(2)(B). Plaintiff further objects to this inquiry to the extent that it seeks communications with assignors pertaining to matters outside any that are relevant to Defendants MBA and Finney herein. Plaintiff further objects to the extent that the interrogatory seeks from Plaintiff specific information pertaining to a third person or entity who is not a party to this action and which is not within the knowledge of Plaintiff.

**RESPONSE:** Subject to the foregoing Objection and without waiving any objections herein, Plaintiff states that the assignment agreements speak for themselves and that there are no other agreements between Plaintiff and any of the Assignors concerning the assigned fax advertisements at issue.

INTERROGATORY #10: *For each assignment of each assignor at issue in this case (see your COMPLAINT), describe all communications (whether written, verbal or electronic) between any and all representatives of the Plaintiff and any and all representatives of the assignor at any time at or after the execution of the assignment, including the identification of all persons involved in those communications.*

**Objection:** Plaintiff objects to this interrogatory to the extent that it is overly broad, unduly burdensome, and/or would not likely lead to the discovery of admissible evidence. Plaintiff also objects to the extent that the information sought is irrelevant and/or is not related to an issue in controversy in this action. Plaintiff additionally objects to the extent that the interrogatory includes subparts under C.R.C.P. 33(e) in excess of the number of written interrogatories permitted under C.R.C.P. 26(b)(2)(B). Plaintiff further objects to this inquiry to the extent that it seeks communications with assignors pertaining to matters outside any that are relevant to Defendants MBA and Finney herein. Plaintiff further objects to the extent that the interrogatory

seeks from Plaintiff specific information pertaining to a third person or entity who is not a party to this action and which is not within the knowledge of Plaintiff.

**RESPONSE:** Subject to the foregoing Objection and without waiving any objections herein, Plaintiff states that all that generally exists is the written Assignment itself, one form letter of general correspondence about current events pertaining to Plaintiff's initiation of litigation, and any affidavits from each assignor of faxes at issue herein. There is no correspondence dealing specifically with defendants MBA or Dale Finney by name, other than to characterize the defendants as "mortgage brokers". Occasionally verbal communication has occurred, since several assignors are friends or relatives that Plaintiff sees on a regular basis. In one case, Plaintiff has communicated with an assignor requesting his presence at a trial. Plaintiff has yet to collect any damages awards to disburse to any assignor. Copies of the relevant Assignments and Affidavits have previously been provided to Defendants as part of Plaintiff's Rule 26(a)(1) disclosures; the general correspondence sent to most of the assignors, which Plaintiff believes is irrelevant to any issue of fact, is provided to these Defendants as Exhibit A hereto. The information sought by this interrogatory, and not objected to, is contained on the face of the Assignments and the Affidavits themselves.

**INTERROGATORY #11:** *For each assignment by each assignor at issue in this case (see your COMPLAINT), specifically state:*

- A) Identify all persons who may benefit financially from each assignment of a fax transmittal.*
- B) Identify all person(s) making such assignment. If the person making the assignment is an entity, please identify the entity making the assignment and the natural person whose signature appears on the assignment, and the basis of their authority to make such assignment. For each such assignor of a facsimile transmittal, please identify all corporate officers and stockholders.*
- C) Any and all consideration given, promised, or exchanged for the assignment.*
- D) Identify the person you allege received the unsolicited facsimile transmittal. If the person is an entity, please identify the entity and the natural person who removed the facsimile transmittal from the fax machine.*
- E) Identify the phone number of the facsimile machine that received the facsimile transmittal, and identify the customer who is billed for such phone service.*
- F) Identify the person / entity who owns the facsimile machine that received the facsimile transmittal including the make, model and year of the facsimile machine.*
- G) Specify date that Assignor alleges the unsolicited facsimile transmittal was received.*
- H) Identify the person at whose instruction or request such facsimile(s) were retained, and the purpose for such retention.*

**Objection:** Plaintiff objects to this interrogatory to the extent that it is overly broad, unduly burdensome, and/or would not likely lead to the discovery of admissible evidence. Plaintiff also objects to the extent that the information sought is irrelevant and/or is not related to an issue in controversy in this action and to the extent any such issue does not relate to defendants Finney and MBA. Plaintiff objects to the extent that the interrogatory includes subparts under C.R.C.P. 33(e)

in excess of the number of written interrogatories permitted under C.R.C.P. 26(b)(2)(B). Plaintiff further objects to the extent that the interrogatory seeks from Plaintiff specific information pertaining to a third person or entity who is not a party to this action and which is not within the knowledge of Plaintiff. Plaintiff additionally objects to the interrogatory to the extent that the information sought is in the possession of and/or has already been provided to Defendants.

**RESPONSE:** Subject to the foregoing Objection and without waiving any objections herein, the assignment agreements that have been provided to Defendants in Plaintiff's Rule 26(a) Disclosures speak for themselves. Plaintiff believes that each assignor, as identified in each agreement, is the owner of his, her, or its fax equipment, and each assignor has testified as much in their respective affidavits. All of Defendants' junk faxes provided the time and approximate date of transmission in the header area of each fax; those sender-supplied dates are specified in the Complaint and shown in Exhibits #1 through #48. The Assignors and Plaintiff have relied upon that sender-supplied information in determining the date of transmission alleged in the Complaint.

INTERROGATORY #12: *For each facsimile transmission which is the basis of Plaintiff's claim, please identify any and all persons who, within a time frame of 120 days prior to the transmittal of the facsimile which is the basis of Plaintiff's claim, had access to inbound or outbound facsimile traffic from the subject fax machine. This question is meant to obtain a complete disclosure of all persons with access, whether employees, officers, contractors, visitors, family members, or other casual / occasional users of the fax facilities.*

**Objection:** Plaintiff objects to the interrogatory in its entirety because the burden of record-keeping and the burden proof for showing that the fax advertisements at issue were unsolicited is upon the Defendants, not upon Plaintiff, *see e.g., Jemiola v. XYZ Corp.*, 802 N.E.2d 745, 749 (2003). Plaintiff further objects to this interrogatory to the extent that it is overly broad, unduly burdensome, and/or would not likely lead to the discovery of admissible evidence. Plaintiff also objects to the extent that the information sought is irrelevant and/or is not related to an issue in controversy in this action and to the extent any such issue does not relate to defendants Finney and MBA. Plaintiff objects to the extent that the interrogatory includes subparts under C.R.C.P. 33(e) in excess of the number of written interrogatories permitted under C.R.C.P. 26(b)(2)(B). Plaintiff further objects to the extent that the interrogatory seeks from Plaintiff specific information pertaining to a third person or entity who is not a party to this action and which is not within the knowledge of Plaintiff.

INTERROGATORY #13: *For each facsimile transmission which is the basis of Plaintiff's claim, please identify and itemize each and every element and item of actual damages incurred, or "detriment" suffered by Plaintiff's Assignors as alleged in rhetorical paragraphs #2.2, #3.0, #3.4, #13.4, #13.6, #13.7, #13.8, #13.9, #15.0, #15.2, and #15.3 of the COMPLAINT.*

**Objection:** Plaintiff objects to the extent that the information sought is irrelevant and/or is not related to an issue in controversy in this action. Plaintiff objects to the extent that the interrogatory includes subparts under C.R.C.P. 33(e) in excess of the number of written

interrogatories permitted under C.R.C.P. 26(b)(2)(B). Plaintiff further objects to the extent that the interrogatory seeks from Plaintiff specific information pertaining to a third person or entity who is not a party to this action and which is not within the knowledge of Plaintiff.

**RESPONSE:** Subject to the foregoing Objection and without waiving any objections herein, total actual damages suffered by any given assignor are unquantifiable. The Assignors all use their fax machine(s) in furtherance of their personal and/or business purposes, with which Defendants' junk faxes interfered. When a fax machine is used to conduct business or other transactions, actual damages due to the interference of any junk fax, such as lost customer goodwill or a lost sale, can be arbitrarily high, yet still an unquantifiable detriment to that fax machine owner. Plaintiff does not expect to be able to show that any Assignor suffered actual damages in excess of the minimum compensatory \$500 statutory damages per violation of the TCPA's statutory language or regulations. Plaintiff seeks only statutory damages as provided by the U.S. Congress, in lieu of actual unquantifiable damages. This renders the interrogatory moot and irrelevant, and thus objectionable.

INTERROGATORY #14: *For each facsimile transmission which is the basis of Plaintiff's claim, please set forth each and every basis for Plaintiff to claim, as asserted in rhetorical paragraph #13.9, that Defendants have violated the TCPA "in a knowing and willful manner."*

**Objection:** Plaintiff objects to the question in its entirety to the extent that he is being asked to provide a legal opinion, conclusion, interpretation, or analysis, which is neither germane nor probative to the facts at issue or the discovery of any evidence relevant to this action.

**RESPONSE:** Subject to the foregoing Objection and without waiving any objections herein, Defendants knew or should have known that they were transmitting unsolicited fax advertisements, and it was their intended goal to cause the transmission of such faxes. Defendants appear to have contracted with and paid one or more fax "blasters" to transmit huge numbers of unsolicited fax advertisements in conjunction with and/or on Defendants' behalf to fax owners in the metropolitan Denver/Boulder area, including the assignors herein. Alternatively, Defendants have done so themselves and/or paid for special equipment to do so themselves. Defendants, for instance, regularly updated the mortgage rates on many of the unsolicited fax ads that they sent, as Exhibits #1 through #48 facially demonstrate. Such actions are plainly willful and knowing as those terms are defined and interpreted in FCC law. Furthermore, Defendants have expressly stated in several of their own fax ads (i.e. Exhibits #15 through #16, #28 through #30, Exhibits #44 through #46, and #48) that they are familiar with and presumably studied or received advice about the law governing unsolicited fax advertising. Defendants have expressly stated in many of their fax ads (Exhibits #1 through #5, #16 through #20, #29 through #30, #35 through #36, #44 through #46, and #48), including the earliest one at issue (Exhibit #1) that they are familiar with the important legal requirement in the TCPA of prior express permission before sending advertising to fax machines. In spite of being familiar with this requirement, they went ahead and transmitted large numbers of advertisements, including the 48 at issue herein, to fax machines without having obtained the prior express invitation or permission of the recipients. Discovery

against Defendants and perhaps others will likely add to the overwhelming existing evidence already provided as Exhibits in the Complaint that Defendants acted in a knowing and willful manner.

INTERROGATORY #15: *For each facsimile transmission which is the basis of Plaintiff's claim, please set forth each and every basis for Plaintiff to claim, as asserted in rhetorical paragraph #13.15, that "Pursuant to the TCPA ..., Plaintiff is entitled to a permanent injunction ..." (emphasis added). Please identify with particularity the precise statutory language upon which Plaintiff relies, any state or federal regulation which so provides for a third party to obtain injunctive relief under the TCPA on behalf of a non-party, or any case law which establishes any arguable right in such party as assignee / Plaintiff, herein.*

**Objection**: Plaintiff objects to the question in its entirety because he is being asked to provide a legal opinion, conclusion, interpretation, or analysis, which opinion is neither germane nor probative to the facts at issue or the discovery of any evidence relevant to this action. Plaintiff additionally objects because it is not the Plaintiff's burden to do Defendants' legal research. Plaintiff plans to file a motion for permanent injunction and/or for summary judgment at the appropriate time providing pertinent authorities and legal argument.

**RESPONSE**: Subject to the foregoing Objection and without waiving any objections herein, Defendants' counsel is welcome to look up the case law concerning "private attorney general" statutes that provide for a "statutory injunction". The TCPA, at 47 U.S.C. §277(b)(3)(A), expressly provides statutory injunctive relief as a federal right, as stated in the Complaint at ¶13.15. That right is assignable, has been assigned, and is being asserted by its owner, the Plaintiff, against Defendants.

INTERROGATORY #16: *For each facsimile transmission which is the basis of Plaintiff's claim, please set forth each and every basis for Plaintiff to claim, as asserted in rhetorical paragraph #12.1, that such facsimiles were sent "...without that sender having obtained that respective Assignor's prior express permission to do so." Please identify each individual of whom inquiry was made, the date, and response of each person responding, and their basis to believe that no consent, permission, or invitation was tendered by another person, who has or had access to such facsimile machine during the time period germane to such consent.*

**Objection**: Plaintiff objects to this question in its entirety because the evidentiary burden of proof and the burden of keeping adequate business records with respect to consent is not the Plaintiff's; it is up to the Defendants to provide evidence that Defendants obtained the prior express consent of any particular recipient of Defendants' fax advertisements. Defendants have a duty to maintain appropriate documentation with respect to such permission. *See Jemiola v. XYZ Corp.*, 802 N.E.2d 74 (Ohio C.P. 2003). Plaintiff further objects to this interrogatory to the extent that it is overly broad, unduly burdensome, and/or would not likely lead to the discovery of admissible evidence. Plaintiff objects to the extent that the interrogatory includes subparts under C.R.C.P. 33(e) in excess of the number of written interrogatories permitted under C.R.C.P. 26(b)(2)(B).

Plaintiff further objects to the extent that the interrogatory seeks from Plaintiff specific information pertaining to a third person or entity who is not a party to this action and which is not within the knowledge of Plaintiff. Plaintiff further objects to the extent that the inquiry pertains to faxes not at issue or to any original defendants other than MBA and Finney.

**RESPONSE:** Subject to the foregoing Objection and without waiving any objections herein, each assignor has provided a signed and sworn, notarized affidavit, which Plaintiff has disclosed and provided to Defendants under Rule 26(a), testifying that that assignor has never given prior express consent, permission, or invitation to receive any fax advertisements transmitted by the Defendants. This constitutes the best information Plaintiff has with respect to the issue of lack of consent to receive Defendants' faxed advertisements.

***INTERROGATORY #17:** For each facsimile transmission which is the basis of Plaintiff's claim, please set forth each and every basis for Plaintiff to claim, as asserted in rhetorical paragraph #12.2, that "Each of the facsimile messages ... that the respective Defendants transmitted to the respective Assignors failed to clearly mark the identity of the business, other entity, or individual sending the message and the telephone number of the sending machine..."*

**RESPONSE:** The content of each of the unsolicited fax transmissions, Exhibits #1 through #48, contains telephone numbers, either in the header or footer, of an unidentified sender. These numbers are not the Defendants', as evidenced by the fact that they appeared on the fax advertisements (Exhibits #49 through #105) sent by the other defendants whose cases have been severed from the original Complaint on the basis of, in part, their protestations of unrelatedness. Additionally, Plaintiff incorporates by reference information within his Response to Request for Admission #1 in **Plaintiff's Response to Defendants MBA and Finney's First Request for Admissions**, dated Oct. 31st, 2004.

***INTERROGATORY #18:** Please fully identify each proponent of all facsimile transmissions in the possession and control of Plaintiff, and detail any settlement arrived at between Plaintiff and each such proponent, regarding such document(s). Please include the date, the amount and terms of any settlement, the RELEASE or other document which relates to such agreement, and the disbursement, or reason for non-disbursement, to the assignor of such Exhibit.*

**Objection:** Plaintiff objects to the question in its entirety. Not only is the question overly broad and burdensome, but Plaintiff's or any assignor's TCPA or other litigation against or settlements with any party other than Defendants is neither germane nor probative with respect to the facts at issue or the discovery of any evidence relevant to this action. Plaintiff additionally objects to the term "proponent", which is not defined and is misused in a manner not comports with its ordinary dictionary meaning.

**RESPONSE:** Subject to the foregoing Objection and without waiving any objections herein, Plaintiff is unaware of any litigation that any assignor other than Mathemaesthetics, Inc. has initiated against anyone with regard to junk faxes or other causes of action under the TCPA.

Plaintiff, as assignee, has not yet settled any litigation concerning any assigned junk faxes, nor has Plaintiff yet collected any judgments from any defendant in a case involving assigned junk faxes that Plaintiff has brought. There have thus been no funds to disburse to any assignors.

INTERROGATORY #19: *Please set forth each and every basis for Plaintiff to claim, as asserted in rhetorical paragraphs #13.10 through #13.14 of Plaintiff's COMPLAINT, that:*

*A) Individual Defendant Finney has conducted business with inadequate or thin capitalization for the business in which he is or has been engaged.*

*B) Individual Defendant Finney has used his corporation in an illegal or fraudulent manner.*

*C) Individual Defendant Finney should be held personally liable for all damages under any and all counts of the COMPLAINT.*

*D) The corporate veil of MBA Financial Group, Inc. should be pierced or disregarded.*

**Objection:** Plaintiff objects to the question to the extent that it asks the Plaintiff to offer a legal opinion, conclusion, analysis, or interpretation, which is neither germane nor probative to the facts at issue or the discovery of any evidence relevant to this action.

**RESPONSE:** Subject to the foregoing Objection and without waiving any objections herein, (A) Defendant Finney has knowingly conducted a marketing campaign subjecting his business to exceptionally large damages for massive numbers of violation of law, each and every one of which subjects his business to a minimum \$500 and likely \$1500 damages award to each of the victims of his automated fax vandalism spree; (B) marketing by unsolicited fax is illegal, and claiming on those faxes that (1) they are legally transmitted under state law while conveniently omitting that they are illegal under federal law appears fraudulent, or (2) expressly claiming that the faxes were sent with consent when they were not appears fraudulent; (C) Defendant Finney is the person in charge of his company, Defendant MBA Financial Group, Inc., and especially his company's fax marketing policies and actions, and Finney cannot use the corporate form to shield himself from liability for any tortious acts he has initiated and accomplished; (D) the corporate veil can be pierced when any of the conditions described in (A) or (B) holds. Regardless of whether the corporate veil is pierced or not, Defendant Finney is liable because this is an action based in tort. His business is vicariously liable for his tortious acts performed in his capacity as an agent of his company.

INTERROGATORY #20. *Do you understand that under the Colorado Rules of Civil Procedure, Rule 33, you have the legal obligation in your answers to these interrogatories to furnish all information which is available from any of Plaintiff's records and from any of Plaintiff's assignors, employees or agents?*

**Objection:** Plaintiff objects to this question in its entirety for its presumptive and non-specific wording concerning Rule 33, presumably Rule 33(d). Rule 33(d) is plainly labeled an option, not an obligation, and concerns the business records of the party upon whom interrogatories are served. Plaintiff additionally objects to the extent that the question asks Plaintiff to offer a legal opinion, analysis, or interpretation, which is neither germane nor probative to the facts at issue or

the discovery of any evidence relevant to this action. General Objection at ¶5 is incorporated by reference herein, since the interrogatory is vastly overbroad and seeks to impose duties upon the Plaintiff with respect to third person assignors, from which Plaintiff has no legal right to obtain or compel any records or information other than the Affidavits that have already been disclosed to Defendants.

**RESPONSE:** Subject to the foregoing Objection and without waiving any objections herein, Plaintiff notes that he is an individual, not a business. Plaintiff has to the best of his knowledge examined all records pertaining to the facts of this case and to the answers to these interrogatories, and has furnished such to Defendants.

*INTERROGATORY #21. In answering these interrogatories, has Plaintiff McKenna made a full inquiry of any and all employees, and examined all of Plaintiff's records, as necessary to respond fully and accurately to the questions asked in these interrogatories?*

**RESPONSE:** Plaintiff is an individual who has no employees to inquire of. Plaintiff has examined those of Plaintiff's records that pertain to this case in order to fully and accurately respond to these interrogatories.

Dated: November 24th, 2004

Respectfully submitted,

THE LAW OFFICES OF ANDREW L. QUIAT  
A Professional Corporation

/s/ Signature On File

Andrew L. Quiat (Reg. #1286)  
8200 So. Quebec Street, Suite A-3185  
Englewood, CO 80112

**CERTIFICATE OF SERVICE**

I hereby certify that on November 24th, 2004 a true and correct copy of the above and foregoing **Plaintiff's Response to Defendants MBA and Finney's First Set of Interrogatories** was served via Lexis/Nexis E-Filing or via First Class United States Mail, postage prepaid to the following:

MBA Financial Group, Inc.  
Dale Finney  
c/o Timothy J. Essling, Esq.  
50 S. Steele, Ste 260  
Denver, Colorado 80209

*/s/ signature on file* \_\_\_\_\_  
Melvin Ray Fritts



1140 Linden Ave.  
Boulder, CO 80304

December 1st, 2003

Dear Assignors,

I thought I would send out an update concerning the various junk faxes you have assigned to me in order to attempt to go after some of these advertisers for their violations of the laws against junk fax transmissions.

After identifying some of the senders of these junk faxes, I have filed four lawsuits in Boulder District Court. I expect to file more, although that may depend on the court decisions that arise out of the current bunch. Each complaint is against multiple defendants whose junk faxes are similar in some way. The complaints are slightly different, in order to keep the legal issues in each lawsuit cleanly separated to make the court's job easier.

Three complaints are through an attorney in South Denver that I have worked with in the past, who is suing at least one of these defendants in a similar matter for another client. I am prosecuting one of these cases myself without an attorney. Three of these cases are, rather improbably, in front of the same judge, Carol Glowinsky. I don't know if this is good or not, but the judge is about to get an in-depth legal education on the subject of fax spam. Unfortunately, if the judge makes a legal mistake, which happens, it will likely affect all the cases.

The first lawsuit is against a bunch of mortgage brokers in the Denver region who all contracted with the same fax blaster in California, possibly to operate as local fax blasters themselves. The first of eight Answers has come in (12 single-spaced pages of uninformed and incorrect legal froth) and it looks like they plan to fight hard for a while, at least until they realize they are going to lose. The defendant responsible for nearly half of those faxes is currently threatening bankruptcy, so collection may prove difficult to impossible. The fax blaster in California is also a defendant, and I know they've been sued before and settled, but I don't know their current status. The attorneys will no doubt be making various bogus arguments that the courts have already disposed of (such as, since the junk fax law is federal you have to use federal court, or that they have a commercial free speech right to junk you, or that the suit is filed in the wrong court because junk faxes don't harm anyone, yadda, yadda, yadda). This will, unfortunately, take lots of my time to respond to, but it's what one has to do in order to hold these junkers' feet to the fire.

Another complaint I've filed is against Stephen Oliver's Mile High Karate organization, using junk faxes from several assignors. I have already collected hard evidence through a private investigator I know in Denver that Mr. Oliver's organization(s) continued junk faxing even after being informed by registered letter that it was sending out fax spam illegally, so it will be interesting to see how hard they fight back before sitting down for a settlement discussion. His attorney

**EXHIBIT A**

has asked the court for more time to answer, and I expect a response sometime in the next week or so.

In an ironic and possibly useful twist of fate, I learned last week that the California defendants in my own company's complaint have hired a new lawyer at a local law firm. Earlier this year, the Denver office of this same law firm transmitted a junk fax to my company machine. They settled amicably without a fight when they were their own clients; we'll see what they do on behalf of someone else paying the bills.

I have not gotten to the stage yet of asking any of you to sign the affidavits that I will prepare for you, which will be very simple statements that you never gave express consent for these fax spammers to fax ads to you or your business. Our assignment agreement requires you to do this if I need them, but I must wait until these cases progress further before I'll know what to use for the exact wording.

Anyway, that's the news from Lake Fax-Be-Gone.

Cheers,

Doug McKenna