DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO
City and County Building
1437 Bannock Street, Rm. 256
Denver, CO 80202

CONSUMER CRUSADE, INC., a Colorado corporation,

Plaintiff,

vs.

AFFORDABLE HEALTH CARE SOLUTIONS, INC., a California corporation, *et al.*,

Defendants.

COURT USE ONLY

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Case No. 04 CV 0803

Courtroom 7

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER ORDER

Plaintiff, Consumer Crusade, Inc., by and through its attorneys, The Demirali Law Firm, P.C., submits the following memorandum in support of its Motion To Reconsider Order.

INTRODUCTION

Since this Court issued its Order dismissing Plaintiff's Complaint herein, at least four different defendants in four separate cases have submitted that Order in support of dismissal or summary judgment. As a consequence, Plaintiff has provided those courts with legal authoritie in addition to those submitted in support of its Motion To Reconsider Order in this action. Therefore, the following discussion shall reference supplemental authorities insofar as they ma be helpful in resolving the instant motion.

COLORADO COURTS HAVE JURISDICTION OVER TCPA CLAIMS

1. Statutory Interpretation

The *Affordable Health Care Solutions* opinion is premised upon the principle that "Colorado has exercised its right to set a different course for private litigation concerning unsolicited fax advertisements." (*See*, Order, at page 4, paragraph 2.) Although this Court acknowledged the debate concerning whether a state must "opt-in" or may "opt-out" of the federal law, it found the distinctions immaterial for purposes of its analyses. *Id.* Under either theory, the Court concluded it lacked jurisdiction.

The United States Supreme Court, in *Howlett v. Rose*, 496 U.S. 356 (1990), stated the following with respect to state enforcement of federally created rights:

> "Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might well be true – but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

...

Three corollaries follow from the proposition that 'federal' law is part of the 'Law of the Land' in the State:

1. A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a 'valid excuse...' 'The existence of the jurisdiction creates an implication of duty to exercise it.'

...

2. An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source...' By virtue of the Constitution, the courts of the several states must remain open to such litigants on the same basis that they are open to litigants with causes of action springing from a different source.'

..

3. When a state court refuses jurisdiction because of a neutral state rule regarding the administration of courts, we must act with the utmost caution before deciding that it is obligated to entertain the claim.... The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.' The States thus have great latitude to establish the structure and jurisdiction of their own courts. In addition, States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law."

Howlett, 496 U.S. 356, 369-382 (emphasis supplied) (internal citations omitted)

Thus, it cannot be contested that, so long as federal law does not intrude upon the ability of a State to control its judicial process, it must, consistent with the Supremacy Clause of the U.

S. Constitution, enforce such laws. Nevertheless, because the TCPA uses the phrase, "if otherwise permitted by the law or the rules of court of a State," the following question concerning the Tenth Amendment and federalism may be presented:

Has Colorado, either through the original passage of the Colorado Consumer Protect Act (CCPA) in 1999, or by the re-enactment of the statute (C.R.S. 6-1-702) in 2004, demonstrated an intent to preclude its citizens from bringing private TCPA enforcement actions in its Courts?

While the Motion For Reconsideration has addressed this subject matter at length, severa additional points must be emphasized here. First, C.R.S. 6-1-702(b)(1) does not purport to address an individual's access to the Colorado courts to vindicate federally created rights. It merely seeks to create an additional requirement for junk fax senders (i.e. placing a "remove number" in the footer of the facsimile.) *See*, C.R.S. 6-1-904 (which references C.R.S. 6-1-702 as providing "disclosure requirements"). Furthermore, there is no authority for the proposition that the State legislature ever intended to affect the subject matter jurisdiction of the Colorado courts.

Second, the District Courts of this State are courts of general jurisdiction, as provided by the Colorado Constitution. Specifically, it states:

> "Section 9. District courts – jurisdiction.
>
> (1) the district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate, and criminal cases, except as otherwise provided herein, and shall have such appellate jurisdiction as may be prescribed by law."

Colo. Const. Art. VI Section 9(1).

There is no question that Colorado District Courts would have jurisdiction over TCPA

claims in the absence of limiting legislation. The CCPA does not clearly express any legislative intent to remove constitutional jurisdiction from the State courts. *People ex rel Cruz v. Morley,* 77 Colo. 25, 234 P.178 (1925). (The constitutional jurisdiction of the district courts is unlimitec It should not be limited without circumspection and no statute should be held to limit it unless it says so plainly.) Thus, although the CCPA addresses the subject of unwanted faxes, it cannot be construed as a limitation upon the enforcement of federal legislation by removing subject matter jurisdiction by implication.

However, if there were any remaining doubt as to the jurisdictional appropriateness of TCPA claims in Colorado state courts, that doubt evaporates in light of specific statutory authority. As was stated in the Motion To Review, the Plaintiff was a Colorado corporation which took assignments from Colorado residents in order to proceed against the Defendant, a California corporation, for violations of the TCPA. The Colorado "Long Arm Statute" provides

> "13-1-124. Jurisdiction of court.
>
> (1) Engaging in any act enumerated in this section by any person, whether or not a resident of the state of Colorado, either in person or by an agent, submits such person and, if a natural person, such person's personal representative, to the jurisdiction of the courts of this state concerning any cause of action arising from:
> ...
>
> (b) The commission of a tortious act within this state;"

(emphasis supplied)

Obviously, the unlawful use of facsimile machines addressed by the TCPA is a tort whic otherwise is legally actionable by the citizens of Colorado in the courts of Colorado. C.R.S. 13-1-124 (1)(b). This Court's opinion supporting dismissal never addressed the fact tha

a tortious act committed in Colorado provides an independent basis for jurisdiction. That courts in this State could hear such cases, however, is confirmed by the jurisdictional statute cited above. The Colorado legislature has never sought to restrict the jurisdictional scope of C.R.S. 13-1-124. Therefore, so long as Colorado courts retain the authority to adjudicate tort claims, there must be subject matter jurisdiction over federal tort claims. *See*, *FERC v. Mississippi*, 456 U. S. 742, 776 n.1 (1982) (State may not discriminate against federal causes of action.)

2. Recent Caselaw

And finally, virtually every court to consider the matter supports the Plaintiff's position herein. While the legal analysis may be discussed in terms of "opt-in" and "opt-out" legislation the issues presented to those courts were the same:

(1) Did the phrase, "if otherwise permitted by state law..." mean that a State court could restrict or reject the TCPA's grant of jurisdiction; and

(2) If so, how and to what extent could the State constitutionally do so? *See*, generally, *International Science & Technology Institute v. Inacom Communications, Inc.*, 106 F.2d 1146 (4th Cir. 1997).

The Plaintiff's original Motion To Reconsider Order did not make specific reference to a number of appellate state court decisions and an order by one U. S. District Court which recently examined the authority and responsibility of States to hear TCPA cases. Those decisions are:

1. *Condon v. Office Depot, Inc.*, 855 So. 2d 644 (Fla. App. 2003). (A state need not "opt-in" to entertain TCPA cases.);

2. *Lary v. Flasch Bus. Consulting*, No. 2020803, __ So. __, 2003 W L 22463948. (Ala. App. Oct. 31, 2003) (Same);

3. *Kaufman v. ACS Systems, Inc.*, 2 Cal. Rptr. 3d 296 (Cal. App. 2003) (TCPA damage claims permitted unless prohibited by the state);

4. *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W. 907 (Mo. 2002) (No state enabling legislation necessary for TCPA private actions.)

5. *Aronson v. Fax.com, Inc.*, 51 Pa. D & C 4th 421 (Ct. Comm. Pl. 2001) ("Opt-out interpretation adopted);

6. *Hooters of Augusta, Inc. v. Nicholson*, 537 S.E. 2d 468 (Ga. App. 2000) (Same a *Aronson*);

7. *Schulman v. Chase Manhattan Bank*, 710 N.Y.S. 2d 368 (N.Y. App. 2000) (Stat have right to structure court systems.)

8. *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 135 S.W. 3d 365 (Tex. App. 2004) (State must affirmatively "opt-out.")

9. *R. A. Ponte Architects, Ltd. v. Investors Alert, Inc.*, __ Md. __, __ A.2d __ (August 26, 2004); (States acknowledge federal rights and courts use regular procedures.); and

10. *Accounting Outsourcing, LLC v. Verizon Wireless Personal Communications, L.P.* __ F. Supp. 2d __ (M. D. La. August 2004) (Same as *R. A. Ponte.*).

All of the foregoing cases to one degree or another disagree with the analysis contained *Affordable Health Care Solutions*. Thus, even if a Colorado trial court could assert that the law of this State permits what amounts to the preemption of federal law by implication, it is highly unlikely that the position could be sustained on appeal.

For all of the foregoing reasons, the Order dismissing this action with prejudice should vacated.

DATED this 30th day of August, 2004.

/s/ A. M. Demirali
A. M. Demirali

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of August, 2004, a true and correct copy of the foregoing SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER ORDER was served electronically upon Patrick L. Ridley, attorney for the Defendant.

/s/ Susan L. Beck
Susan L. Beck, Legal Assistant