IN THE MISSOURI COURT OF APPEALS

EASTERN DISTRICT

HOOPS & ASSOCIATES, P.C.	)	
	)	
	)	
Plaintiff/Respondent,	)	
	)	No. ED 96391
	)	
	)	
FINANCIAL SOLUTIONS AND ASSOCIATES, INC., ET. AL.	)	
	)	
	)	
Defendants/Appellants.	)	

On Appeal from the Circuit Court of St Louis County

Honorable Stephen H. Goldman , Division 12

APPELLANT'S BRIEF

STEVE KOSLOVSKY, LLC
2458 OLD DORSETT RD.
SUITE 230
ST. LOUIS, MO 63043
(314) 222-4066
ATTORNEY FOR
DEFENDANTS/APPELLANTS

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Rule 52.08(b)(3), 52.08(c)(3)

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JURISDICTIONAL STATEMENT

This is an appeal from the entry of summary judgment in favor of Plaintiffs on their claims for violation of the Telephone Consumer Protection Act, 47 U.S.C. Section 227.

As this appeal does not involve any of the matters reserved for the exclusive jurisdiction of the Missouri Supreme Court, this Court has jurisdiction over this appeal under Art V, Section 3 of the Missouri Constitution, as amended.

STATEMENT OF FACTS

This action was brought by Hoops & Associates, PC (hereafter "Hoops") asserting claims against Defendants alleging violation of the federal Telephone Consumer Protection Act (Count I),conversion (Count II), and violation of the Missouri Merchandising Practices Act (Count III) in the sending advertising faxes to a group of St. Louis County residents in March 2005.

Defendant Financial Solutions and Associates Inc. (hereafter "Financial Solutions") is a Missouri corporation in good standing, providing financial advisory services to the public. Defendant Michael G. Grimes (hereafter "Grimes") is President and sole owner of Financial Solutions. (LF at 270-1)

In March, 2005, Financial Solutions hired a now defunct company known as ActiveCore Technologies to send faxes advertising Financial Solutions' services to certain residents of St. Louis County. The content of the fax was created by Financial Solutions and the zip codes to which the faxes were sent were selected by Grimes. (Copy of the fax is included in the Appendix to this Brief) The fax also contained a message at the

bottom allowing recipients to be removed from any future faxes.

Prior to sending the faxes, Grimes obtained assurances from ActiveCore that the transaction would comply with applicable laws. Based upon those assurances, Financial Solutions authorized ActiveCore to send the faxes to a list of fax recipients supplied by ActiveCore. (LF at 241-5)

The same fax was broadcast on two separate dates, March 11 and 25, 2005. The total number of faxes successfully delivered by ActiveCore was 9688. Financial Solutions paid ActiveCore $.04 for each fax successfully delivered, for a total cost of $437.52. The invoices from ActiveCore for the two fax transmissions were directed to Financial Solutions and were paid by checks from a bank account in the name of Financial Solutions. (LF 271-6)

Plaintiff Hoops was originally one of five individual plaintiffs who filed another action against Financial Solutions (but not Grimes) styled *All American Painting, LLC v. Financial Solutions and Associates.* Before the conclusion of that action, Hoops voluntarily dismissed its claim against Financial Solutions, refiled the identical claim in this case, added Grimes as a party defendant, and sought class action certification.

On December 18, 2008, the trial court granted Hoops' Motion

to Certify a class action under Rule 52.08(b)(3) without holding an evidentiary hearing and appointed Hoops as class representative. (SLF at 41-56)

After certification, the Court ordered notice be sent to the class by establishment of a website containing the notice, and by publishing a short version of the notice in a newspaper circulated in St. Louis County. (SLF at 57-61) The court also required Plaintiff to mail a notice form to "...the list appearing on the InfoUSA database of companies with SIC codes #3441-98, #1721-01, #1521-39, and # 8721-01, in the 314 and 636 area codes no later than August 31, 2009". There was no evidence presented by Plaintiff that this "InfoUSA database" was the same as or even similar to the recipient list to which ActiveCore sent the faxes in March, 2005. Moreover, there is no verification in the court file that the required mailing was ever undertaken by Plaintiffs.

Since the class action notice in August, 2009, *not a single member of the "class" other than Plaintiff/Class representative Hoops has ever been identified.*

On February 11, 2011, the trial court granted summary judgment

in favor of the Plaintiff class against Grimes on Count I (TCPA) in the amount of $4,841,500.00 "jointly and severally" with Financial Solutions against which the trial court had previously entered the identical summary judgment on July 27, 2010. The Grimes summary judgment order also stated:

> "The Court finds Grimes fifty-one percent at fault, with his co-defendant FSIA bearing the remaining percentage of fault." (LF at 289)

The trial court further found "no just reason for delay" under Rule 74.01(b) in entering its Judgment on Count I (LF 289). No judgment was rendered on Counts II and III, which remain pending.

From that summary judgment and the underlying class certification, Grimes has appealed.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT AGAINST DEFENDANT GRIMES BECAUSE THERE WERE GENUINE ISSUES OF MATERIAL FACT AND LAW CONCERNING WHETHER GRIMES' ACTIONS AMOUNTED TO "TORTIOUS CONDUCT" UNDER THE TORTIOUS ACTS EXCEPTION TO THE GENERAL RULE PROTECTING CORPORATE OFFICERS FROM LIABILITY FOR CORPORATE ACTS

27 *USC* Section 227(b) (3)

Regulations of the Federal Communications Commission, 2006 WL 901720(F.C.C.)

Texas v. American Blastfax, Inc., 164 F Supp 2d 892 (W.D. Tex 2001)

Kopff v. Battaglia, 425 F Supp 2d 76, 93 (DDC 2006)

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II. THE TRIAL COURT ERRED IN CERTIFYING THE PLAINTIFF CLASS AND ENTERING JUDGMENT IN ITS FAVOR BECAUSE NO MEMBERS OF THE PUTATIVE CLASS HAVE BEEN OR CAN BE IDENTIFIED OR ASCERTAINED OTHER THAN THE SINGLE NAMED PLAINTIFF

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Rule 52.08(b)(3), 52.08(c)(3)

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Capaci v. Katz & Besthoff, Inc., 72 FRD 71 (ED Pa 1976)

Advisory Committee Notes to 1966 Amendments to Federal Rule 23, 39 FRD 69, 105)

ARGUMENT

I. THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT AGAINST DEFENDANT GRIMES BECAUSE THERE WERE GENUINE ISSUES OF MATERIAL FACT AND LAW CONCERNING WHETHER GRIMES' ACTIONS AMOUNTED TO "TORTIOUS CONDUCT" UNDER THE TORTIOUS ACTS EXCEPTION TO THE GENERAL RULE PROTECTING CORPORATE OFFICERS FROM LIABILITY FOR CORPORATE ACTS

STANDARD OF REVIEW

The standard of review of a motion for summary judgment was well established in *ITT Commercial Finance v. Mid-America Marine Supply Corp.*,854 SW 2d 371(Mo banc 1993). On appeal from the grant of a motion for summary judgment, this Court reviews the motion essentially *de novo.* The record below is to be reviewed in the light most favorable to the party against whom summary judgment was entered, and that party is entitled to the benefit of all reasonable inferences from the record. *Davis v. US Bank*

National Assoc., 243 SW 3d 425 (Mo App 2007) The movant bears the burden of establishing both a legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment. *Id.* at 376-380.

SUMMARY OF ARGUMENT

The undisputed evidence establishes that in hiring ActiveCore to send the faxes in question, Grimes was acting solely on behalf of Financial Solutions and in furtherance of that corporation's business. Therefore, the general rule against personal liability for corporate acts applies. Moreover, before authorizing the faxes to be sent, Grimes testified that he had been assured by ActiveCore that the proposed fax transmittals would comply with all applicable laws. (LF at 83-6) At a minimum, this testimony presented a genuine issue of material fact concerning whether Grimes' actions constituted tortious conduct within the tortious acts exception to the general rule of immunity of corporate officers for corporate acts. For these reasons, the summary judgment imposing individual liability on Grimes was inappropriate as a matter of fact and law and therefore should be reversed.

ARGUMENT

The undisputed evidence in this case establishes that Grimes' actions in hiring ActiveCore to send advertising faxes to residents of St. Louis County were solely on behalf of and in furtherance of the business of Financial Solutions, a Missouri corporation in good standing. This conclusion is supported not only by the affidavit of Grimes filed in opposition to Plaintiff's Motion for Summary Judgment (LF at 271-2), but also by documents showing that (1) the two ActiveCore invoices were directed to Financial Solutions (LF at 273 and 275), and (2) the two checks for payment of those invoices were drawn on a Financial Solutions bank account. (LF at 274 and 276). Furthermore, the fax itself identifies the advertiser as Financial Solutions and includes the corporate office address and logo at the bottom. (LF at 277)

Plaintiffs' contention that Grimes should nevertheless be held personally liable is based only on his 100% ownership of the corporation and direct participation in arranging for the faxes to be sent. (LF at 283) Plaintiffs made no attempt to pierce the corporate veil of Financial Solutions or allege any improper use of the corporation by Grimes.

It is elementary that a corporate officer is normally not personally liable for actions he undertakes on behalf of a corporate entity, even one in which he is the sole owner. *Constance v. BBC Development Co.*, 25 SW 3d 571 (Mo App 2000); *Zipper v. Health Midwest,* 978 SW 2d 398 (Mo App 1998); *Lynch v. Blanke Baer,* 901 SW 2d 147 (Mo App 1995). Merely holding a corporate office will not subject one to personal liability for the misdeeds of the corporation. *Lynch v. Blanke Baer; Benson Opticla v. Floerschinger,* 810 SW 2d 531 (Mo App 1991).

An exception to this general rule exists where a corporate officer participates in, or has actual or constructive knowledge of, corporate conduct which constitutes a tort. *Constance v. BBC Development Co., supra*; *Zipper v. Health Midwest, supra.* Reported cases applying this exception generally involve claims based upon established common law torts.

For example, in *State ex rel Doe Run Resources Corp. v. Neill,* 128 SW 3d 502 (Mo 2004), the case cited by Plaintiffs to the trial court in support of holding Grimes personally liable, the causes of action were negligence, negligence per se, strict liability, private nuisance and trespass. Other reported cases have involved claims of fraud (See e.g. *Osterberger v.*

Hites Construction, 599 SW 2d 221 (Mo App 1980)), conversion (See e.g. *Grothe. v. Helterbrand*, 946 SW 2d 301(Mo App 1997)), tortious interference with contract (See, e.g. *Honigmann v. Hunter Group,* 733 SW 2d 799 (Mo App 1987)) and breach of fiduciary duty (See e.g., *McKeehan v. Wittles,* 508 SW 2d 277 (Mo App 1974)). Although Plaintiffs have asserted a tort claim for conversion (Count II) in this action, the judgment against Grimes below was based solely on the TCPA claim (Count I).

Under this tortious acts exception, Grimes can only be held personally liable if the violation of the TCPA rises to the level of a "tortious act".

Plaintiffs cited no reported TCPA case to the trial court, and Defendant has subsequently found none, declaring that a violation of the TCPA is *per se* a tortious act that automatically subjects a corporate officer participating therein to personal liability. The TCPA itself does not address this issue. Rather, it simply creates a private right of action on behalf of fax recipients in 27 USC Section 227(b) (3) as follows:

> "Private right of action. A person may, *if otherwise permitted by the laws or rules of court of a state*, bring in an appropriate court of that state:...

(B) An action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater..."
(emphasis added)

By use of the phrase "if otherwise permitted by the laws or rules of court of a state", the TCPA expressly defers all other issues which may arise in such actions to state courts. This deference is confirmed by the regulations issued under the TCPA by the FCC at *Regulations of the Federal Communications Commission*, 2006 WL 901720(F.C.C.), paragraph 56, in which the FCC states that:

> "...Congress contemplated that such legal action was a matter for consumers to pursue in appropriate state courts, subject to those state courts' rules....we decline to make any determinations about the specific contours of the private right of action."

Thus, each state court in which TCPA private actions are brought may apply its own laws and rules to the prosecution of such actions.

No reported Missouri case has considered under what circumstances individual liability for a corporate violation of the TCPA should attach. A federal case which touches on this issue is *Texas v. American Blastfax, Inc.*,

164 F Supp 2d 892 (W.D. Tex 2001), in which the State of Texas brought a TCPA action against a blast faxing company doing business in Texas. After reviewing the same general principles of individual immunity for corporate acts discussed above, along with evidence of *knowing and repeated violation*s of the TCPA by the individual defendants there, the District Court imposed personally liability on the principals of American Blastfax, stating, at 898:

> " To be clear, the Court finds Greg and Michael Horne were the "guiding spirits" and the "central figures" behind the TCPA violations...They both had direct personal involvement in and ultimate control over every aspect of Blastfax's wrongful conduct that violated the TCPA, and/or directly controlled this conduct. And they did so with their eyes and pocketbooks wide open. *After October 5, 2000, Greg and Michael Horne had good reason to believe they were running a business that violated the TCPA. On February 1, 2001, they knew they were. Yet they continued to direct their company to send unsolicited fax advertisements. This is more than a simple derivative liability case.*" (emphasis added)

Thus the Court in *American Blastfax* distinguishes between facts which may present a "simple derivative liability case" under which the

general rule of immunity of corporate officers applies, and egregious conduct in which corporate officers engaged in intentional and repeated violations of the TCPA. This distinction has also been recognized by other District Courts in *Kopff v. Battaglia,* 425 F Supp 2d 76, 93 (DDC 2006) (individual liability under TCPA based upon knowledge of wrongful act was fact issue) and *Baltimore-Washington Telephone v. Hot Leads Co.*, 584 F Supp 2d 736, 745 (D Md. 2008)(egregious conduct similar to corporate officers in *American Blastfax* could give rise to individual liability).

What these cases make clear is that individual liability for a violation of the TCPA should not be automatic and should only be imposed upon the presentation of facts showing intentional and repeated violations. No such evidence is presented here. On the contrary, the evidence established a one-time violation by a defendant who obtained assurances that the fax transmittals were legal. *At a minimum,* that evidence presented genuine issues of fact which made summary judgment against Grimes inappropriate.

The adoption of a *per se* liability rule for any corporate officer who participates in some manner in a corporate violation of the TCPA, as advanced by Plaintiff and accepted by the trial court, would effectively

abolish the general rule protecting corporate officer in any case alleging a violation of TCPA. The language of the Act simply does not support such a sweeping interpretation.

Moreover, such a *per se* rule would have consequences for private actions brought under other consumer protection statutes beyond the TCPA. Numerous Missouri consumer protection statutes authorize a private right of action. However, violations of these consumer protection statutes would not necessarily be considered common law tortious acts in themselves, Rather they are actionable only because they are prohibited by statute. Among these are New Motor Vehicle Warranties, Nonconformity ("Lemon Law'), R.S. Mo. Sections 407.585-407.592; Rent To Own (Rental Purchase Agreements), R.S. Mo. Sections 407.600-407.665; Buyers Clubs, R.S. Mo. Sections 407.670-407.679; and Motor Vehicle Franchise Practices, R.S. Mo. Sections 407.810-407.835, to name but a few. Under Plaintiffs' rationale, individual liability would automatically apply to corporate officers participating in violations of those statutes as well.

As a matter of state law, this Court should reject Plaintiffs' attempt to establish a *per se* liability rule and instead require evidence establishing

the type of intentional and repeated wrongful conduct of the type found in *American Blastfax* before imposing individual liability on a corporate officer for a TCPA violation.

Assuming this Court does not adopt a rule imposing liability *per se* on any corporate officer involved in a corporate violation of TCPA, the summary judgment entered below must be reversed because there were genuine issues of material fact presented as to whether Grimes' conduct was sufficiently egregious to justify the imposition of personal liability.

II. THE TRIAL COURT ERRED IN CERTIFYING THE PLAINTIFF CLASS AND ENTERING JUDGMENT IN ITS FAVOR BECAUSE NO MEMBERS OF THE PUTATIVE CLASS HAVE BEEN OR CAN BE IDENTIFIED OR ASCERTAINED OTHER THAN THE SINGLE NAMED PLAINTIFF

STANDARD OF REVIEW

Determination of whether an action should proceed as a class action under Rule 52.08 ultimately rests within the sound discretion of the trial court. *State ex rel Union Planters v. Kendrick,* 142 SW 3d 729 (Mo banc 2004) *State ex rel. Am. Family Mut. Ins. Co. v. Clark,* 106 S.W.3d 483, 486 (Mo. banc 2003). Such determination may be overturned only upon a showing of an abuse of discretion, which occurs when the decision below is untenable, clearly against reason or works an injustice. *Gomez v. Construction Design, Inc.*, 126 SW 3d 366 (Mo 2004).

SUMMARY OF ARGUMENT

The trial court abused its discretion in certifying the plaintiff class below and subsequently entering judgment in favor of that class because it is undisputed that the members of the "class" are not identifiable or ascertainable. Because ActiveCore (owner of the fax recipient list) is no longer in business, Plaintiffs have been unable to produce or retrieve *any* of the names of recipients of the faxes, or even the fax numbers of those recipients from which the members of the class might be ascertained. Since Plaintiffs failed to show that class members can be identified, class certification was improper. *Levitt v. Fax.com*, 2007 WL 3169078 (D. Md. 2007); *Party Paradise v. Al Copeland Investments, Inc.*, 22 So. 3d 1018 (La App 2009)

ARGUMENT

Class Certification

It is undisputed that the only member of the Plaintiff class whom Plaintiffs have been able to identify (other than the four remaining individual

Plaintiffs in *All American Painting, LLC v. Financial Solutions and Associates,* who were expressly excluded from the class) is Plaintiff Hoops. Despite their best efforts, the attorneys for the class have been unable to identify a single additional member of the class or even present a methodology by which their identity could be ascertained, even though this litigation has been pending for well over three years. Despite this defect, Plaintiffs persuaded the trial court to enter summary judgment in favor of the "class" for $4,841,500.00 (based on $500 times 9683 faxes delivered, which excludes the 5 faxes sent to the four individual plaintiffs in *All American Painting, LLC*).

Essentially, this case is a class action without a class. Ironically, there are more lawyers (3) representing the purported class than identified class members (1).

In order to certify a class action, the members of the class must be known or at least ascertainable by reference to some objective criteria. *Clay v. American Tobacco Co.* 188 FRD 483 (SD Ill 1999); *Capaci v. Katz & Besthoff, Inc.,* 72 FRD 71 (ED Pa 1976).

This requirement of identifiability of class members under a TCPA

class action was addressed directly by the District Court in *Levitt v. Fax.com*, 2007 WL 3169078 (D. Md. 2007). In *Levitt*, as here, Plaintiffs were unable to identify or reconstruct the identity of the recipients of the faxes at issue because the blast faxing company in question had gone out of business and the list it used was not available. Under these facts, the Court properly denied certification of the "class".

Likewise, in *Party Paradise v. Al Copeland Investments, Inc.*, 22 So. 3d 1018 (La App 2009), the Louisiana Court of Appeals denied TCPA class certification because Plaintiffs were unable to establish the actual identity of the putative class, even though, as in the case at bar, Plaintiff knew the total number of faxes sent and the approximate geographic area to which they were sent. The court added in a footnote that "We find it noteworthy that in the year between the time of the Party Paradise letter [the fax] and the hearing on the certification motion, *plaintiff did not join one other person as a party to this lawsuit.*" *Id* at 1026, fn 6. (emphasis added) These are exactly the facts presented here, i.e. despite the pendency of this action for over three and one half years, and published notice to putative class members in August 2009, *not a single additional class member has ever been identified.*

Other courts have similarly held that Plaintiff's inability to identify or ascertain the members of a TCPA class is a bar to class certification. See *GM Sign v. Franklin Bank*, 2007 WL 4365359 (ND Ill 2007); *Cicero v. US Four, Inc.*, 2007 WL 4305720 (Ohio App 2007); *Pinnacle Realty Co. v. Carol Kondos*, 130 SW 3d 292 (Tex App 2004); *Apartment Investment Co. v. Suggs & Associates*, 129 SW 3d 250 (Tex App 2004).

In support of their Motion to Certify Class, Plaintiffs offered no evidence as to how they could ascertain actual class members. As stated above, after 3 plus years, they have been unable to identify any other class member. Under these circumstances, it was an abuse of discretion for the trial court to allow this matter to proceed as a class action, much less to subsequently enter a judgment for $4,841,500.00 in favor of that class.

Therefore, the trial court's certification of this class must be reversed, and the sole Plaintiff Hoops be permitted to pursue its individual remedy under the TCPA.

Form of Judgment

For many of the same reasons outlined above, the class action

judgment entered in this case violates Rule 52.08(c)(3) because it fails to specify the members of the class in whose favor judgment is entered. Rule 52.08(c)(3) imposes a requirement of specific identification of class members in judgments entered in Rule 52.08(b)(3) class actions. By contrast, the rule requires only a description of the class members in judgments rendered under Rule 52.08(b)(1) and (2). Specifically, Rule 52.08(c)(3) requires:

> "The judgment in an action maintained as a class action under Rule 52.08(b)(1) or Rule 52.08(b)(2)...shall *include and describe* those whom the court finds are members of the class. The judgment in an action maintained as a class action under Rule 52.08(b)(3) shall *include and specify or describe* those to whom notice ...was directed, and who have not requested exclusion, and *whom the court finds to be members of the class.*" (emphasis added)

According to the drafters of the identical federal Rule 23(c)(3) this provision requires the judgment to "specify" the actual identity of known class members and "describe" any remaining unknown members. See *Advisory Committee Notes to 1966 Amendments to Federal Rule 23*,

39 FRD 69, 105(1967).

The judgment below merely describes the class in whose favor this $4,841,500.00 judgment is rendered, as follows:

> "All persons in the State of Missouri to whom were sent one or more facsimiles the same or substantially similar to Exhibit A attached hereto by or on behalf of Financial Solutions and Associates, Inc. in or around March, 2005." (LF at 282)

The rationale for requiring specification of class members in a 52.08(c)(3) class action judgment is made obvious by the facts presented here. If this judgment of $4,841,500.00 is permitted to stand, the only parties who could receive compensation are a single Plaintiff and its three sets of attorneys. If the full judgment were ever collected, Plaintiff would receive $500 for the single fax it received. From the remaining $4,840,500.00, Plaintiff's attorneys would apply for an award of attorneys fees under their contingent fee agreement with Hoops. The balance of the judgment would *never* be paid to any member of the class. Such an absurd result turns the entire rationale of class action litigation on its head, turning into nothing more than a grab for attorneys fees.

Therefore, for the same reasons that the ability to identify class members is a requirement of class certification, the ability to specify class members in a Rule 52.08(b)(3) class action judgment is also required. The failure of the judgment below to identify class members is a fatal defect which mandates reversal.

CONCLUSION

This case presents a class action without a class, based upon a $500 claim of a single client who received a single fax, pursued by experienced three TCPA attorneys in search of attorneys fees.

This Court should not permit this abuse of the class action process and must reverse the judgment below.

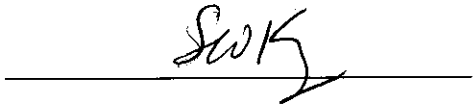
Respectfully Submitted,

STEVE KOSLOVSKY, LLC

Steven W. Koslovsky MBE # 29183
2458 Old Dorsett Road Ste 230
St. Louis, MO 63043
(314) 222-4066
(314) 770-9330(fax)
Attorney for Defendant/Appellant

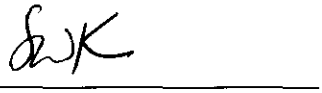
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed two copies of this Brief to on this Brief to Max G. Margulis, Esq., Attorney for Respondents, at the Margulis Law Group, 14236 Cedar Springs Drive, Chesterfield, MO 63017, on this 18th day of May, 2011.



CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

The undersigned hereby certifies that this Brief complies with the limitations contained in Rule 86.06 (b) and contains 4944 words, and that the disk filed herewith pursuant to Rule 84.06(g) has been scanned for viruses and is virus free.



APPENDIX

1. Judgment

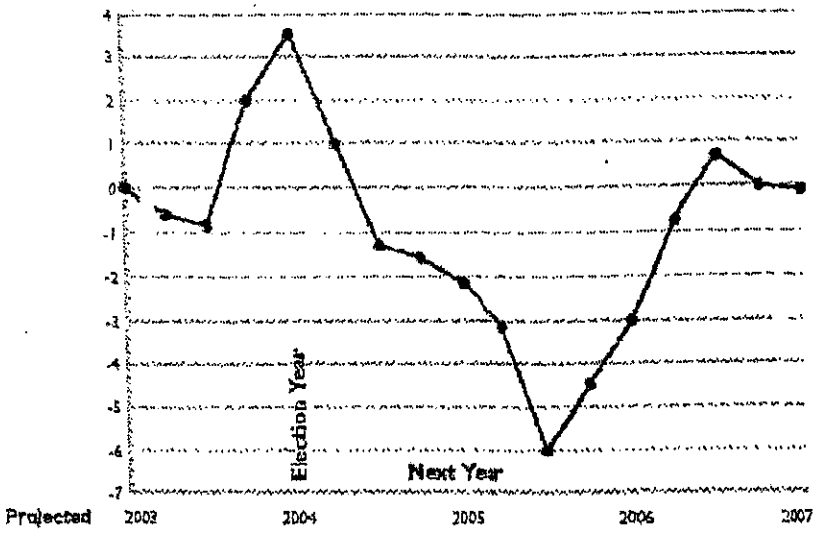
2. Fax received by Plaintiff Hoops and Associates

THOMAS L. HOOPS

350

X

Average Return of Investment Chart on Four Year Presidential Cycle from 1886 - 1983



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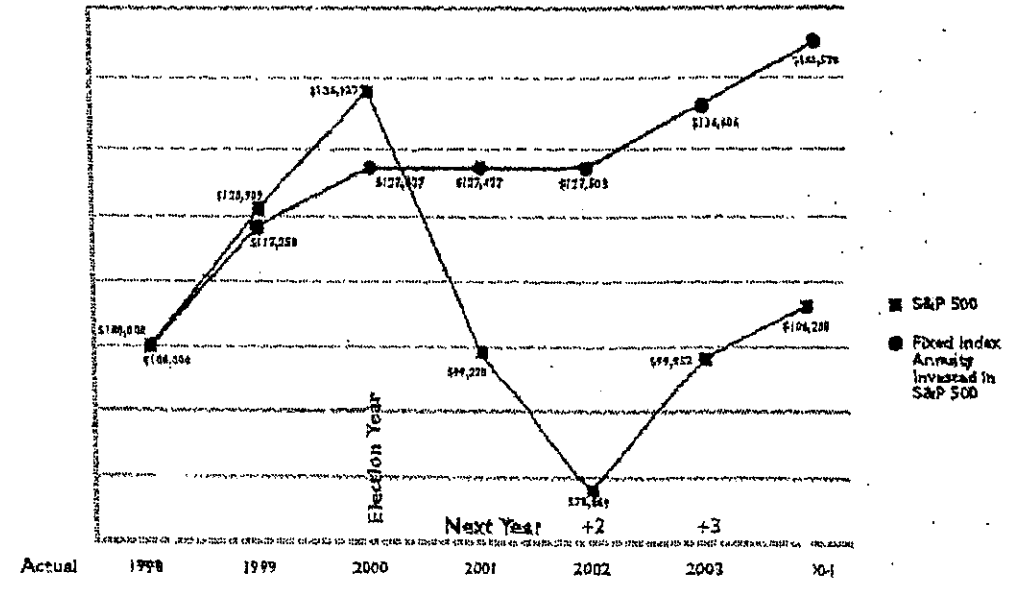

Financial SOLUTIONS & ASSOCIATES
More Money, Less Taxes
12400 Olive Blvd., Suite 202, St. Louis, MO 63141-5436

EXHIBIT A

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

HOOPS & ASSOCIATES, P.C., a Missouri corporation, individually and as the representatives of a class of similarly-situated persons,	)
Plaintiff,	)
v.	) Cause No. 07SL-CC-00938
FINANCIAL SOLUTIONS AND ASSOCIATES, INC., *et al.*	) Division 12
Defendants.	)

ORDER GRANTING SUMMARY JUDGMENT

Plaintiff Hoops & Associates, P.C. represents a class of individuals in an action against Financial Solutions and Associates, Inc. and Michael G. Grimes, in which Plaintiff claims in Count I of its Petition that Defendants violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, by sending Plaintiff and the Class one or more unsolicited advertisements by fax. This order and judgment pertains to Defendant Michael Grimes ("Grimes"). The claims against Grimes were previously stayed due to Mr. Grimes' filing of a personal bankruptcy petition in the U.S. Bankruptcy Court for the Eastern District of Missouri ("bankruptcy court"). That stay is no longer in effect as the bankruptcy court dismissed Grimes' bankruptcy petition before a discharge was entered. This Court also entered its order granting summary judgment as against Grimes' co-defendant, Financial Solutions and Associates, Inc. on July 27, 2010, while the stay against Grimes was in effect. "Defendants" as used herein means Financial Solutions and Associates, Inc. and Michael G. Grimes. The certified plaintiff class against Defendants, as defined in my order of December 18, 2008, consists of:

> All persons in the State of Missouri to whom were sent one or more facsimiles the same or substantially similar to Exhibit A attached hereto by or on behalf of Financial Solutions and Associates, Inc. in or around March, 2005. Excluded from the proposed class are any members of the judiciary who are called upon to hear this matter, Defendants and their officers, directors and employees, Plaintiff's counsel, and any other persons or entities who have filed separate actions against Defendant related to said conduct.

(Hereinafter "the Class"). The fax in question, Exhibit A, is attached hereto and incorporated herein. Notice of the pendency of this litigation was disseminated to the Class per the Court's order dated August 17, 2009. No member of the Class requested exclusion.

Now before me is Plaintiff's motion for partial summary judgment under Count I of the

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Petition — the TCPA claim against Grimes. A hearing was held on January 31, 2011. For the reasons set forth in Plaintiff's Motion for Partial Summary Judgment and the accompanying Memoranda, evidentiary support, argument of counsel, and based on the Missouri Supreme Court opinion in *All American Painting, LLC v. Financial Solutions and Associates, Inc.*, 315 S.W.3d 719, 724 (Mo. SC June 29, 2010), Plaintiff's motion is hereby GRANTED as to Grimes.

Specifically, the Court finds that both Defendants violated 47 U.S.C. 227(b)(1)(C) by using a telephone facsimile machine, computer or other device to send nine thousand six hundred eighty-three (9,683) faxes to Plaintiff's and the Class members' facsimile machines. The faxes sent contained material advertising the commercial availability or quality of any property, goods, or services. *See* Exhibit A. The only exception to liability under 47 U.S.C. 227(b)(1)(C) is if Defendants obtained the fax recipients' prior express invitation or permission to send the faxes. *See* 47 U.S.C. § 227(a)(4). Defendants had the burden of proving prior express invitation or permission. *All American Painting, LLC v. Financial Solutions and Associates, Inc.*, 315 S.W.3d 719, 724 (Mo. SC June 29, 2010). Defendants did not demonstrate that they obtained Plaintiff's and the Class members' prior express invitation or permission to send the faxes to them. The Court finds those faxes were unsolicited advertisements under 47 U.S.C. 227(a)(4).

Pursuant to 47 U.S.C. § 227(b)(3), Plaintiff and the Class may recover Five Hundred Dollars ($500.00) for each of Defendants' violations of 47 U.S.C. 227(b)(1)(C).

The Court finds that Grimes had actual knowledge of, and participated in, an actionable wrong, *i.e.* violation of the TCPA. Just a sampling of the undisputed facts of this case clearly reveals that Grimes meets these criteria. Financial Solutions and Associates, Inc. ("FSAI") is a small business comprised of Grimes and two secretaries. As has already been determined by this Court, *inter alia*, Grimes owns 100% of the stock in FSAI; Grimes is president of FSAI; Grimes picked the zip codes to which the junk faxes were sent; and Grimes designed the fax advertisement on his office computer and sent it to ActiveCore (the fax blast company hired to send the faxes). Again, these are but a few of the many undisputed facts already determined by this Court. The exhibits to Grimes' supplemental response also demonstrate Grimes' knowledge and participation. For example, Grimes' Exhibit C and Grimes' exhibit marked as "Plaintiff's Exhibit 6" are both invoices from ActiveCore which state: "Bill to: Financial Solutions & Associates Michael Grimes." Grimes' exhibit D is a copy of the fax advertisement at issue in this case which clearly states:

> "Can you afford to let this happen to your money? Call Michael Grimes @ 888-361-9287 24 hours a day and order a free report on a guaranteed 13.5% return."

Further, Grimes was the person at FSAI who communicated with ActiveCore with regard to the blast fax campaign. *See, e.g.*, Plaintiff's Exhibit 6 - Correspondence from ActiveCore to Michael Grimes dated January 10, 2005; Plaintiff's Exhibit 7 - Email from ActiveCore to Michael Grimes dated March 4, 2005.

Nowhere in Grimes' Supplemental Response does he deny his active participation and knowledge of the fax blast campaign that resulted in a violation of the TCPA. Grimes simply

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believes he is shielded from liability because he was a corporate officer. However, that is not the law. Missouri law is clear that Grimes may be held liable because he had knowledge of, and participated in, an actionable wrong.

Based on the total of 9,683 unsolicited fax advertisements Defendants sent to Plaintiff and the Class, Judgment is hereby entered in favor of Plaintiff and the Class and against Grimes, jointly and severally with the judgment entered by this Court in this cause against Financial Solutions and Associates, Inc., under Count I of Plaintiff's Petition in the amount of Four Million Eight Hundred Forty-One Thousand Five Hundred Dollars ($4,841,500.00). The Court finds that Grimes is fifty-one percent at fault, with his co-defendant FSAI bearing the remaining percentage of fault. Costs are assessed against Grimes, jointly and severally, in the same percentages with the judgment entered by this Court in this cause against FSAI on July 27, 2010.

This is no just reason for delay in entering this order and Judgment.

SO ORDERED:

JUDGE Steven H. Goldman, Division 12

2-9-11

DATE