IN THE MISSOURI COURT OF APPEALS

EASTERN DISTRICT

FILED

JUL 11 2011

LAURA ROY

CLERK, MISSOURI COURT OF APPEALS EASTERN DISTRICT

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

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FEB 8 2012

CLERK, SUPREME COURT

On Appeal from the Circuit Court of St Louis County

Honorable Stephen H. Goldman, Division 12

APPELLANT'S REPLY BRIEF

STEVE KOSLOWSKY, LLC
2458 OLD DORSETT RD.
SUITE 230
ST. LOUIS, MO 63043
(314) [illegible]-4066
[illegible]
[illegible] APPELLANTS

SCANNED

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Baltimore-Washington Telephone v. Hot Leads Co., 584 F Supp 2d 736, 745 (D Md. 2008)

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Cicero v. US Four, Inc., 2007 WL 4305720 (Ohio App 2007)

Advisory Committee Notes to 1966 Amendments to Federal Rule 23, 39 FRD 69, 105(1967)

Nola v. Merollis Chevrolet, 537 SW 2d 627,634 (Mo App 1976)

Blacks Law Dictionary, Rev. Fourth Ed. (1968)

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Weber v. US Sterling Securities, Inc, 924 A 2d 816, 818 (Conn. 2007)

State of Maryland v. Universal Elections, 2011 WL 2050751 (D Md. 2011)

Landesman & Funk, PC v. Skinder-Strauss Associates, 636 F Supp 2d 359 (D NJ 2009)

US Fax Law Center, Inc. v. iHire, Inc, 362 F Supp 2d 1248 (D Colo 2005)

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Priscom Asphalt Sealcoating v. Furnas, 2009 Ohio 2792 (Ohio App 2009)

Craft v. Philip Morris Companies, Inc., 190 SW 3d 368, 387 (Mo App 2005)

Top Craft Inc. v. International Collections Services, 258 SW 3d 488 (Mo App 2008)

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

Respondents contend that the exception to the general rule against personal liability for corporate acts is not limited to "tortious acts". Rather, according to Respondents, any corporate officer who directly participates in a corporate act which results in subsequent liability should be held personally liable, no matter the nature of the conduct or the alleged wrong. Under this theory, a corporate officer who directly participates in actions constituting a breach of contract would also be personally liable. This is clearly not the law. *Lynch v. Blanke Baer*, 901 SW 2d 147,153 (Mo App 1995); *Nola v. Merollis Chevrolet*, 537 SW 2d 627,634 (Mo App 1976).

While it is true that not all of the cases cited by Appellant use the term "tortious acts" in describing this exception, they all describe the type of action for which personal liability will accrue as "actionable wrongs" or "wrongful acts". *Blacks Law Dictionary* defines an "actionable wrong" as "[c]ommitted when a responsible person has neglected to use a *reasonable degree of care* for protection of another person from injury as under existing circumstances should reasonably have been foreseen as a *proximate consequence of that negligence*". *Blacks Law Dictionary*, Rev. Fourth Ed. (1968) In its most recent version, *Blacks* defines "wrongful conduct" as "[a]n act taken in violation of a *legal duty*; an act that unjustly infringes on another's rights-Also termed wrongful act", citing the reader to various sections of 12 C.J.S. *Torts*. *Blacks Law Dictionary*, Eighth Ed. (2004). *Blacks*' use of the terms reasonable degree of care, proximate consequence of that negligence and legal duty in these definitions underscores the concept that it is not every cause of action is a "wrongful act" which will give rise to personal liability of a corporate officer, but rather only conduct which is essentially tortious in nature.

Even cases cited by Respondents for other purposes reiterate the same

principal. *See e.g.*, *Weber v. US Sterling Securities, Inc*, 924 A 2d 816, 818 (Conn. 2007) ("The default common-law rule is that corporate officers may be held individually liable for their *tortious* conduct, even if undertaken while acting in their official capacity"); *State of Maryland v. Universal Elections*, 2011 WL 2050751 (D Md. 2011) ("corporate officers are liable for those *torts* which they personally commit").

Therefore, as stated in Appellants' opening brief, the issue is what type of conduct by a corporate officer will results in individual liability for a corporate violation of TCPA. At page 11 of their Brief, Respondents have cited several cases for the proposition that any violation of the TCPA constitutes a tort and therefore will subject a corporate officer to personal liability under the tortious acts exception. The precedential value of at least some of these cases is limited. Some are trial court decisions. Others dealt with other issues and address the personal liability issue presented here only in *obiter dictum. Landesman & Funk, PC v. Skinder-Strauss Associates,* 636 F Supp 2d 359 (DNJ 2009) (choice of law issue); *US Fax Law Center, Inc. v. iHire, Inc*, 362 F Supp 2d 1248 (D Colo 2005) and *Martinez v. Green*, 131 P 2d 492 (Ariz App 2006) (assignability of TCPA claims); *Priscom Asphalt*

Sealcoating v. Furnas, 2009 Ohio 2792 (Ohio App 2009) (appeal dismissed for lack of final judgment).

Two of Respondents' cases, namely *Weber v. US Sterling Securities*, *supra*, and *Maryland v. Universal Elections*, *supra*, do directly address the issue of whether a TCPA violation can be characterized as a tort and whether a corporate officer or LLC member *could* be personally liable if he directly participated or authorized the violation of the TCPA. However, in neither of these cases did the court actually *find* the individual defendants liable on the facts presented, only that they could be held liable. To the best of Appellants' research, the only reported case actually imposing individual liability on corporate officers is *Texas v. American Blastfax, Inc.*, 164 F Supp 2d 892 (W.D. Tex 2001) cited in Appellants' opening brief, where the individuals had engaged in *knowing and repeated violations* of TCPA.

Respondents would have the court adopt an essentially *per se* rule imposing liability on *any* corporate officer who participates in *any* conduct which is later determined to be a violation of TCPA, regardless of the circumstances. In the case of single member corporations or LLCs, such as Financial Solutions, such a rule would amount to an abrogation of any

the protections afforded by state statute to the corporate entity. Moreover, it would impose strict liability on those corporate officers and allow for no defenses, such as here, where Grimes testified that he acted in the reasonable belief that the fax blast was perfectly legal and in compliance with TCPA. There is nothing in the TCPA or reported decisions to support Respondents' broad proposition, and this court should reject such a sweeping interpretation.

Even if the Court chooses not to specify the facts and circumstances under which a corporate officer can be held liable under TCPA, it should at a minimum recognize that any such determination is fact intensive, and generally not a proper subject for summary judgment. Here Grimes presented testimony to the trial court in opposition to summary judgment that he sought and received assurances of the legality of his actions before authorizing the fax blast, and therefore did not commit a tortious act, and should not be held personally liable when those assurances were later determined by a court of law to be untrue.

For those reasons, the trial court erred in entering summary judgment against Grimes. That judgment must be reversed and remanded for further proceedings.

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

Respondents raise a false issue in response to Appellants' contention that this matter should not have been permitted to proceed to a class action judgment because the class is not ascertainable. The issue presented in the authorities cited by Respondents relates to whether there exists a class which can be clearly defined so as to determine if a given individual is a member of that class. *Craft v. Philip Morris Companies, Inc.*, 190 SW 3d 368, 387 (Mo App 2005) Appellant does not quarrel with the description of the class here as those parties who received the two faxes sent through ActiveCore by Financial Solutions.

Nor does Appellant suggest that the names of the class members were required to be set forth initially in the class certification order. Appellant

does contend that, to the extent known, the identities of class members is required to be set forth in any judgment under Rule 52.08(c)(3). *Advisory Committee Notes to 1966 Amendments to Federal Rule 23*, 39 FRD 69, 105(1967). However, this is not the principal flaw in the trial court's judgment.

The fundamental problem here is that while there may be a definable class, *there is no means available of identifying its members*. Unlike the TCPA class which was the subject of *Top Craft Inc. v. International Collections Services*, 258 SW 3d 488 (Mo App 2008), where Plaintiff had a list of telephone numbers to which the faxes were sent, and from whom the identity of at least some class members could be ascertained, Respondents here have been unable, after published notice and three years of litigation, to identify any other member of the class beyond the single named class representative. Nor have they presented a plan or procedure by which they intend to identify any additional class members. In light of this undisputed fact, it was error for the trial court to enter judgment for over $4 million on behalf of a phantom class.

Respondent has failed to even attempt to distinguish the decisions to

this effect in *Levitt v. Fax.com*, 2007 WL 3169078 (D. Md. 2007); *Party Paradise v. Al Copeland Investments, Inc.,* 22 So. 3d 1018 (La App 2009); *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), all cited in Appellants' opening brief.

In the absence of a means to identify at least some of the members of the class, the judgment below is a hollow shell, entered for the benefit of one frequent TCPA Plaintiff and its three attorneys. Such a judgment is an abuse of the class action process, and should not be permitted to stand.

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 Defendants/Appellants

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 11th day of July, 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 1992 words, and that the disk filed herewith pursuant to Rule 84.06(g) has been scanned for viruses and is virus free.