No. SC92256

IN THE MISSOURI SUPREME COURT

HOOPS & ASSOCIATES, P.C., individually and as Class Representative,

Plaintiffs/Respondents,

vs.

FINANCIAL SOLUTIONS AND ASSOCIATES, INC., *et al.*

Defendants/Appellant.

On Appeal from the Circuit Court of St Louis County
Honorable Stephen H. Goldman, Division 12

RESPONDENTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

The Circuit Court of St. Louis County entered summary judgment against Defendant/Appellant Michael Grimes. Grimes filed a notice of appeal on February 22, 2011. This appeal was originally heard by the Missouri Court of Appeals, Eastern District, which issued an opinion on November 15, 2011 reversing the trial court's grant of summary judgment against Grimes. On January 31, 2012, this Court granted Plaintiffs/Respondents Hoops & Associate's application for transfer. As a result, this Court has jurisdiction over this appeal. Rule 83.04; Mo. Const. Art. V, §10.

STATEMENT OF FACTS

A. General Background.

This class action case arises out of the same events set out in *All American Painting, LLC v. Financial Solutions and Associates, Inc.*, 315 S.W.3d 719 (Mo. 2010), wherein this Court granted transfer and held the plaintiffs were entitled to a JNOV on their claims against Financial Solutions for violating the Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA") by sending unsolicited fax advertisements. The *All American Painting* case involved individual claims against Financial Solutions for violation of the TCPA. The case at bar is a separate case and involves class-wide TCPA claims against Financial Solutions and its owner, Michael Grimes, arising out of those same events.

In the case at bar, the material facts are again undisputed. There is no dispute that the unsolicited fax advertising campaign took place. As Grimes states in his brief: "The same fax was broadcast on two separate dates, March 11 and 25, 2005." *Grimes App. Brf.*, p. 5. Grimes further admits that 9,688 of those advertising faxes were successfully transmitted. *Id.* Respondent Hoops was a recipient of one of the subject fax advertisements. (L.F. 24, 123).

B. Grimes' Actively Participated in the Blast Fax Campaign.

Likewise, there are no disputed material facts regarding Grimes' personal involvement, participation and conduct in the blast fax campaign at issue. Grimes is the president of Financial Solutions and owns one hundred percent of its stock. (L.F. 115, 61). Grimes first heard about the blast fax advertising company, ActiveCore

Technologies ("ActiveCore"), when he received correspondence addressed to "Mike Grimes" from ActiveCore on or about January 10, 2005. (L.F. 128-129, 70-73). Grimes was the only person at Financial Solutions who communicated with ActiveCore about the blast fax campaign at issue. (L.F. 128-131).

In March 2005, Financial Solutions entered into a contract with ActiveCore to send advertising faxes. (L.F. 73, 130-131). Grimes testified that he signed the contract with ActiveCore. (L.F. 57). Grimes personally designed the fax advertisement on his computer and sent it to ActiveCore for blast faxing. (L.F. 89). The advertising faxes were all the same and included, *inter alia*, the following language in large bold face type in the middle of the fax:

> "***Call Michael Grimes*** @ 888-361-9287 24 hours a day and order a free report on a guaranteed 13.5% return."

(L.F. 126) (emphasis added). Grimes personally picked the zip codes to which the faxes were sent and they were generally zip codes west of Interstate 270. (L.F. 78, 95-96). Grimes personally looked at a map and picked the zip codes out of the telephone book. (L.F. 95-96). Grimes testified that he was attempting to target new potential customers in the St. Louis area with the fax advertisements. (L.F. 92, 115).

On March 11, 2005, Grimes launched the first fax broadcast to the Class by using a client passcode to access ActiveCore's computer website portal and thereby ordered the first fax broadcast to commence on that day. (L.F. 131-132, 103-104). Grimes uploaded the document to be faxed by ActiveCore. (L.F. 129-131, 104-105).

Grimes directed ActiveCore to send the faxes to the same zip codes on both

occasions in March 2005. (L.F. 79-83). Neither Grimes nor Financial Solutions attempted to obtain any of the fax recipients' prior express permission to send the fax advertisements. (L.F. 97-99). In fact, they have never asked anyone for permission to send advertising faxes. (L.F. 70, 100). Grimes testified that ActiveCore was directed to send the faxes on their behalf. (L.F. 107). Grimes testified that ActiveCore was acting at their direction in sending all of the faxes to the St. Louis area. (L.F. 96). Grimes admits that he does not know to whom the faxes were sent and that he did not care if they went to both residential fax numbers and business fax numbers. (L.F. 102). Grimes admits that *prior* to sending the faxes, he "had heard that these were not able to be sent" and that he "probably would have known somebody who have gotten one of [plaintiff's counsel's] emails" and that he "remembers seeing one of [plaintiff's counsel's] emails that prompted [Grimes] to ask them whether this was legal or not." (L.F. 84). Despite this heightened awareness, Grimes admits that prior to sending the faxes, he did not seek any legal opinion on whether it was lawful to transmit these unsolicited advertising faxes. (L.F. 86).

The trial court certified a plaintiff class (Supp. L.F. 41) and entered summary judgment on the TCPA claim in favor of Plaintiff Hoops and the Certified Class against both defendants, Financial Solutions and Michael Grimes. (L.F. 260, 282). The trial court awarded minimum statutory damages under the TCPA. *Id*. The trial court did not hold that the defendants acted "knowingly or willfully" and, therefore, did not increase the statutory damages beyond the minimum awardable amount under the TCPA. *Id.* Only Appellant Michael Grimes appealed. *Grimes App. Brf.*, p. 7. Financial Solutions

did not appeal.

C. The Missouri Court of Appeals' Opinion

Grimes appealed the summary judgment entered against him and the class certification order. Although none of the elements in the TCPA statute were challenged, the Missouri Court of Appeals, Eastern District, reversed the trial court's grant of summary judgment against Grimes. The Court of Appeals indicated that scienter and intent to violate the statute were required elements of the claim, as demonstrated by the following statements in the Court of Appeals' Opinion:

> Grimes argues that he did not ***knowingly*** violate the TCPA and therefore, there was a genuine issue of material fact precluding summary judgment.

COA Opinion, at 3 (emphasis added).

> Grimes contends that there are genuine issues of material fact that are not admitted regarding his ***knowing violation*** of the TCPA sufficient to subject him to personal liability.

COA Opinion, at 4 (emphasis added).

> Grimes contradicts Hoops' allegations, stating that he had ***no knowledge*** the faxes would ***violate the TCPA***.

COA Opinion, at 5 (emphasis added).

> Grimes disputes that he had actual ***knowledge*** that the actions taken by Financial Solutions ***violated the TCPA***. Grimes argues the trial court should not have entered summary judgment because there were factual issues remaining. ***We agree.***

COA Opinion, at 6 (emphasis added).

The Court of Appeals also observed:

> With regard to Financial Solutions' involvement by faxing potential clients, all of the facts needed to recover under the TCPA were admitted and there were no genuine issues of material fact precluding entering summary judgment against Financial Solutions.

COA Opinion, at 4.

The Court of Appeals reversed the trial court's grant of summary judgment and found no need to address the viability of class certification. Respondents filed an application for transfer with this Court, which this Court granted on January 31, 2012.

POINTS RELIED ON

I. **THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT AGAINST DEFENDANT GRIMES BECAUSE THERE WERE NO GENUINE ISSUES OF MATERIAL FACT AND LAW CONCERNING WHETHER GRIMES PARTICIPATED IN, AND HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF, ACTIONABLE OR WRONGFUL CONDUCT IN THAT THE FACTS CONCERNING GRIMES' ACTIONS WERE UNDISPUTED AND THE LAW IS CLEAR THAT GRIMES IS NOT SHIELDED FROM PERSONAL LIABILITY AS A CORPORATE OFFICER BASED ON THOSE UNDISPUTED FACTS.**

II. **THE TRIAL COURT DID NOT ERR IN CERTIFYING THE PLAINTIFF CLASS AND ENTERING JUDGMENT IN ITS FAVOR BECAUSE THE CLASS MET THE REQUIREMENTS OF RULE 52.08 AND WAS PROPERLY ASCERTAINABLE IN THAT THE CLASS DEFINITION WAS BASED ON OBJECTIVE CRITERIA AND RULE 52.08(c)(3) DOES NOT REQUIRE EACH CLASS MEMBER TO BE LISTED IN THE JUDGMENT IN A CLASS CERTIFIED UNDER RULE 52.08(b)(3).**

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT AGAINST DEFENDANT GRIMES BECAUSE THERE WERE NO GENUINE ISSUES OF MATERIAL FACT AND LAW CONCERNING WHETHER GRIMES PARTICIPATED IN, AND HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF, ACTIONABLE OR WRONGFUL CONDUCT IN THAT THE FACTS CONCERNING GRIMES' ACTIONS WERE UNDISPUTED AND THE LAW IS CLEAR THAT GRIMES IS NOT SHIELDED FROM PERSONAL LIABILITY AS A CORPORATE OFFICER BASED ON THOSE UNDISPUTED FACTS.

A. Standard of Review

The standard of review on an appeal from summary judgment is essentially de novo. *ITT Commercial Finance Corp. v. Mid–America Marine Supply Corp*., 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 74.04(c)(6); *Larabee v. Eichler*, 271 S.W.3d 542, 545 (Mo. banc 2008). A defending party moving for summary judgment may establish a right to judgment by showing facts that negate any one of the claimant's elements. *Fetick v. American Cyanamid Co.*, 38 S.W.3d 415, 418 (Mo. banc 2001). An order of

summary judgment may be affirmed under any theory that is supported by the record. *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. banc 2010).

Airis v. Metropolitan Zoological Park and Museum Dist., 332 S.W.3d 279, 280-281 (Mo. App. E.D. 2011).

B. Argument

The trial court entered summary judgment against Grimes based on Count I of Plaintiff's Petition. (L.F. 282). That count alleged a violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §227.

The material facts of this case are *not* disputed. Grimes does *not* challenge any element of the TCPA cause of action alleged against him. Grimes does *not* challenge any of the material facts that prove his level of personal involvement, conduct, and knowledge of the blast fax campaign at issue. *In fact, Grimes admits the evidence establishes that he violated the TCPA.* In his brief, Grimes admits "the evidence established a one-time violation by a defendant who obtained assurances that the fax transmittals were legal." *Grimes App. Brf*., p. 18. However, Grimes argues that he should nonetheless escape individual liability because:

1. He alleges he "was acting solely on behalf of Financial Solutions and in furtherance of that corporation's business." *Grimes App. Brf.*, p. 12;

2. "Grimes testified that he had been assured by ActiveCore that the proposed fax transmittals would comply with all applicable laws" and "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." *Id*., p. 12;

3. "Plaintiffs made no attempt to pierce the corporate veil of Financial Solutions or allege any improper use of the corporation by Grimes." *Id*., p.13;

4. He alleges he "can only be held personally liable if the violation of the TCPA rises to the level of a 'tortious act.'" *Id*., p. 15.

5. He asserts this Court should require evidence establishing "intentional and repeated wrongful conduct" before imposing individual liability on a corporate officer for a TCPA violation and that "there were genuine issues of material fact presented as to whether Grimes' conduct was sufficiently egregious to justify the imposition of personal liability." *Id*., p. 20.

Grimes is correct that he cannot be held individually liable simply because he was an officer of his corporate co-defendant. However, Grimes' liability is not premised on his status as a corporate officer and none of Grimes' arguments, above, is a defense to the TCPA violations he committed. Contrary to Grimes' argument, the trial court did not find Grimes liable because Grimes was an officer of the co-defendant corporation in this case. Rather, as alleged in the Petition and as indicated in the trial court's judgment, both Grimes and the co-defendant corporation are jointly and severally liable based on their *actions* that violated the TCPA. This is not a derivative liability case. It is a direct action against two defendants based on their own actions ─ nothing more. Under the TCPA, both can be held liable. The TCPA does not require scienter or intent to violate the statute in order to prove a violation. All *material facts* of this case are undisputed. Grimes' specific knowledge of the law and his knowledge of whether his actions constituted a

violation of the law are *not* material facts. Further, Grimes' alleged ignorance of the TCPA is not a defense.[1]

Grimes is a "Person" Subject to the TCPA

At the time of the blast fax campaign at issue, the TCPA, 47 U.S.C. §227, stated in relevant part:

> §227. Restrictions on use of telephone equipment
>
> (a) Definitions
>
> As used in this section—
>
> (4) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.
>
> (b) Restrictions on use of automated telephone equipment
>
> (1) Prohibitions
>
> It shall be unlawful for any ***person*** within the United States--
>
> (C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine

[1] Even if ignorance of the law was a defense (which it is not), Grimes admitted that, prior to sending the faxes, he had heard doing so was unlawful. (L.F. 83-84).

47 U.S.C. §227 (emphasis added). "The term 'person' as used in the TCPA includes 'corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.'" *All American Painting, LLC v. Financial Solutions and Associates, Inc.*, 315 S.W.3d 719, 722 (Mo. 2010) (citing 1 U.S.C. § 1 (2000); *Reynolds v. Diamond Foods & Poultry, Inc*., 79 S.W.3d 907, 909 n. 2 (Mo. banc 2002)). Grimes is therefore a "person" subject to the TCPA.

Grimes' Individual Liability is Not Limited to Common Law Torts

Grimes also argues that he can only be found individually liable if his conduct "rises to the level of a 'tortious act.'" *Grimes App. Brf*., p. 15. He further argues that this is generally limited to "common law torts." *Id.*, pp. 14-15. Grimes refers to this as the "tortious acts exception." [2] That is not the law. For instance, in *State ex rel. Ashcroft v. Marketing Unlimited of America, Inc*., 613 S.W.2d 440 (Mo. App. 1981), the Court of Appeals reversed the trial court's grant of summary judgment in favor of the defendants and held that the individual officers of the corporate seller of the merchandise at issue were "persons" liable for violations of the Missouri Merchandising Practices Act, §407.020 RSMo. ("MMPA"). Like the TCPA, the MMPA provides a civil statutory cause of action and is not a common law tort. In addressing the issue of holding the corporate officers liable in their individual capacities, the court stated:

> Under the statutory scheme, the definition of "person" clearly indicates a legislative intent to subject those "persons" who have engaged in unlawful practices to the remedial provisions of s 407.100. ***This is true whether they***

[2] No reported case in Missouri has ever used the phrase "tortious acts exception."

> ***are officers, salesmen or employees of a corporation or acting in their individual capacity.***
>
> There can be no dispute that Schirmer and Santhoff come within the definition.
>
> * * *
>
> In the present case, it is not the person's intent that is determinative of the applicability of the remedial provisions of Chapter 407 ***but rather that the defendants' conduct*** constituted unfair practices. We do not hold defendants subject to the remedial provisions for the acts of Marketing Unlimited or the Handicapped Assistance League of America, Inc. ***but for their own conduct.***
>
> ***The trial court's conclusion of law that the findings of fact do not support the conclusion that defendants violated Chapter 407 and cannot be held individually liable is erroneous and cannot be sustained.***

State ex rel. Ashcroft v. Marketing Unlimited of America, Inc., 613 S.W.2d 440, 447 (Mo. App. E.D. 1981) (emphasis added). Just as the defendants in *Marketing Unlimited* were "persons" subject to the MMPA, Grimes is a "person" subject to the TCPA. Both are civil statutory causes of action and are not common law torts. Further, just as the *Marketing Unlimited* court focused on the defendants' *conduct* to find individual liability under the MMPA, the trial court in the case at bar found Grimes' *conduct* was a violation of the TCPA. Contrary to Grimes' argument, Missouri courts have not imposed any "common law tort" limitation on individual liability. It is the *conduct* and the harm

caused thereby, rather than a label placed on the conduct, that gives rise to individual liability of corporate officers who participate in, or have actual or constructive knowledge of, actionable or wrongful conduct.

However, even if Grimes was correct that his individual liability is solely limited to acts constituting "tortious conduct," this does not aid him in this case. Violation of the TCPA is an actionable wrong for which Congress has provided a private right of action. 47 U.S.C. §227(b)(3). "Tort is defined as '[a] private or civil wrong or injury, other than a breach of contract..." *McKinney v. State Farm Mut. Ins.*, 123 S.W.3d 242, 249 (Mo. App. W.D. 2003) (citing Black's Law Dictionary 1335 (5th ed.1979)). "Violations of the TCPA constitute congressionally created torts." *Pricom Asphalt Sealcoating, Inc. v. Furna*, 2009 WL 1655031, 1 (Ohio App. 2009). TCPA violations are invasion of privacy torts. *Martinez v. Green*, 212 Ariz. 3203 (Ariz. App. 2006). "A violation of the TCPA is a statutory tort." *Betor v. Quantalytics, Inc.*, 2003 WL 22407121, 1 (Ohio Com. Pl. 2003). *See also, e.g., Landsman & Funk, P.C. v. Skinder-Strauss Associates*, 636 F.Supp.2d 359, 366 (D.N.J. 2009) ("Landsman has correctly posited that claims under the TCPA sound in tort.."); *Weber v. U.S. Sterling Securities, Inc*., 282 Conn. 722, 728, 924 A.2d 816, 821 (Conn. 2007) ("Claims under the [TCPA] sound in tort regardless of whether they are construed as property or invasion of privacy tort claims."); *US Fax Law Center, Inc. v. iHire, Inc.*, 362 F.Supp.2d 1248, 1252 (D. Colo. 2005) ("Defendants contend that the TCPA claim sounds in tort and is predicated upon personal injury for purposes of Colorado's survival statute. Moreover, they argue that the TCPA claims are not assignable as a matter of law because they are essentially invasion-of-privacy tort

claims. I agree with both contentions").

The Trial Court did Not find Grimes acted "Willfully or Knowingly"

The TCPA does not require scienter or intent in order to find a violation. However, if the court determines a defendant acted "willfully or knowingly," the court may treble the statutory damages. The TCPA's private right of action provision states:

> (3) PRIVATE RIGHT OF ACTION.—A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—
>
> (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
>
> (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, or
>
> (C) both such actions.
>
> ***If the court finds that the defendant willfully or knowingly*** violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

47 U.S.C. §227(b)(3) (emphasis added). The trial court entered summary judgment against Grimes for the minimum statutory damages under the TCPA. (L.F. 282). The

trial court did *not* find Grimes acted "willfully or knowingly," which would have allowed the trial court to treble those statutory damages.

Scienter and Intent to Violate the Statute are Not Elements of the TCPA Cause of Action

As set forth above, the TCPA does not contain any requirement that a defendant must act with scienter or intent to violate the statute in order for the defendant to be found liable under the statute. The trial court did not find that Grimes acted "knowingly or willfully" which would have allowed the trial court to treble the TCPA's statutory damages. The trial court's judgment against Grimes is consistent with *All American Painting, LLC v. Financial Solutions and Associates, Inc*., 315 S.W.3d 719 (Mo. 2010), which sets out the elements necessary to establish a TCPA violation, stating:

> [A] person or entity violates the TCPA by sending material advertising the commercial availability or quality of property, goods, or services to a facsimile machine without the recipient's prior express invitation or permission.

Id., at 722. Grimes does not dispute any of these elements. As demonstrated above, this Court, in *All American Painting*, did not require the plaintiff to prove scienter or intent to violate the statute because the TCPA contains no such elements.

Other courts agree. "The TCPA is essentially a strict liability statute which imposes liability for erroneous unsolicited faxes." *Alea London Ltd. v. Am. Home Servs., Inc*. 638 F.3d 768, 775-776 (11th Cir. 2011) (emphasis added). "The TCPA does not require any intent for liability except when awarding treble damages." *Id.* "Congress

clearly did ***not*** intend to impose a $500 fine on ***only*** knowing or willful violators of the statute because the statute provides for three times the $500 penalty in situations where a court finds that the defendant willfully or knowingly violated this subsection...." *Accounting Outsourcing, LLC. v. Verizon Wireless Personal Communic'ns*, L.P. 329 F.Supp.2d 789, 810 (M.D. La. 2004) (emphasis added). *See also, Park University Enterprises, Inc. v. American Cas. Co. of Reading, PA*. 314 F.Supp.2d 1094, 1103 (D. Kan. 2004) ("The TCPA is essentially a strict liability statute-even if Park erroneously faxed advertisements to recipients with whom it did not have an existing business relationship, Park may be held liable under the TCPA for its actions (albeit without treble damages)"). Plaintiffs have found no case, and Defendant has cited no case, that holds a plaintiff must prove scienter, knowledge of the TCPA, or intent to violate the TCPA in order to hold a defendant liable under the TCPA. The express language of the statute simply does not require it.

As discussed above, this is not a derivative liability case. It is a direct action against two defendants based on their conduct giving rise to the claims. Grimes' relationship with his corporate co-defendant has no bearing on Plaintiff's claim against Grimes because Grimes' conduct, independently, is sufficient to find him liable under the TCPA. However, Grimes also argues that he should not be found liable because he "was acting solely on behalf of Financial Solutions and in furtherance of that corporation's business." *Grimes App. Brf.*, p. 12. Even if this were true, Grimes is still liable. The trial court's judgment is consistent with *State ex rel. Doe Run Resources Corp. v. Neill*,

128 S.W.3d 502 (Mo. 2004), which holds that a corporate officer can be individually liable even for acts in the scope and course of employment:

> An individual is not protected from liability simply because the acts constituting the tort were done in the scope and course, and pertained to, the duties of his employment. If the rule were otherwise, the agent of a corporation could shield himself from liability for almost every kind of wrong, provided he was acting in the capacity of agent.... Thus, a corporate officer may be held individually liable for tortious corporate conduct if he or she had actual or constructive knowledge of, and participated in, an actionable wrong.

Id., at 505. The *Doe Run* court did not create a separate scienter requirement. *Doe Run* does not require a corporate officer to know the legal ramifications of his conduct. There is no dispute that Grimes "had actual or constructive knowledge of, and participated in" the conduct that resulted in the TCPA violation.

In his brief, Grimes erroneously relies on the Texas federal trial court opinion in *Texas v. American Blastfax, Inc*., 164 F.Supp.2d 892 (W.D. Tex. 2001). However, that case actually supports Plaintiffs. First, contrary to Grimes' argument, the *American Blastfax* court did not require scienter or intent by the individual defendants. Rather, the *American Blastfax* court looked to the *actual conduct* of the individual defendants to find liability under the TCPA. The *American Blastfax* court held:

> The State counters it is not suing the individual defendants simply because of their status as officers of Blastfax, but rather is suing them "***based on***

> ***their own conduct*** which is in violation of the [TCPA]." The State argues Greg and Michael Horne are personally liable because they did far more than simply sit on the Blastfax board while the company violated the TCPA-***they actually committed the conduct that violated the TCPA***, and/or they actively oversaw and directed this conduct. ***The Court agrees with the State***.

Am. Blastfax, at 897 (emphasis added). Thus, the *American Blastfax* court's finding of liability against the individual defendants was not premised on the individual defendants' status as corporate officers, knowledge of the TCPA, or intent, but rather on the individual defendants' *actions* which were found to have violated the TCPA. Likewise, Grimes did far more than passively act as a corporate officer. He "actually committed the conduct that violated the TCPA" in the case at bar and that conduct is undisputed.[3]

[3] On page 18 of his brief, Grimes also erroneously attempts to rely on *Kopff v. Battaglia*, 425 F. Supp 2d 76, 93 (D. DC 2006) and *Baltimore-Washington Tel. v. Hot Leads Co*., 584 F.Supp 2d 736, 745 (D. Md. 2008). Neither of those cases supports Grimes' argument. Neither case involved a TCPA summary judgment. Rather, both cases dealt with motions to dismiss various claims. Further, both of those cases involved the liability of the fax broadcasting companies and individual employees and officers of the fax broadcasting companies, not of the actual advertisers as in the case at bar. Moreover, in *Battaglia*, the court denied the individual defendant's motion to dismiss. *Battaglia*, at 93. In *Hot Leads*, the court found that the individual defendants could be held liable under

Moreover, even if scienter or intent were elements of the TCPA (which they are not), Grimes' alleged ignorance of the TCPA is a fiction. Grimes continuously asserts that he should not be held liable because "he had been assured by ActiveCore that the proposed fax transmittals would comply with all applicable laws." *Grimes App. Brf.*, p. 12. In support of this statement Grimes cites to pages 83-86 of the legal file. *Id.* A review of those pages indicates Grimes testified that prior to sending the faxes, ActiveCore allegedly told Grimes the faxes could be lawfully transmitted because the faxes had wording at the bottom that would allow the fax recipient to call and be removed from the fax list for future faxes. (L.F. 83-84). This Court has already addressed those same facts:

> Activecore advised Mr. Grimes that it would include "opt-out" provisions at the bottom of each advertisement, which would allow recipients to remove themselves from the recipient list if they did not wish to receive future solicitations. Activecore assured Mr. Grimes that inclusion of such a provision would ensure compliance with the law. During direct examination, however, Mr. Grimes acknowledged that it would be impossible for a recipient to opt-out from receiving future advertisements without receiving at least one initial advertisement by facsimile.

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the TCPA, finding they "may be held jointly and severally liable for any TCPA damages this Court may award on the remaining counts." *Hot Leads*, at 745.

All American Painting, LLC v. Financial Solutions and Associates, Inc., 315 S.W.3d 719, 721 (Mo. 2010). *After* the faxes had been transmitted, Grimes alleges that ActiveCore told him that the faxes were lawful because the fax recipients belonged to the same trade organizations as ActiveCore. (L.F. 85-86). Again, this Court has already addressed those same facts:

> Mr. Grimes testified that as members of the same organizations, Activecore had access to membership lists containing plaintiffs' facsimile numbers, which enabled Activecore to send advertisements to them. While the jury was entitled to believe that testimony, the evidence was not legally sufficient to allow the jury to reasonably infer that plaintiffs gave Financial Solutions prior express permission to send the facsimiles. At most, Mr. Grimes' testimony suggested that Financial Solutions had plaintiffs' implied permission to send the advertisements, which is insufficient under the TCPA.

All American Painting, LLC, supra., at 725. So even if everything ActiveCore allegedly told Grimes was 100% accurate, it would still not be a defense to Grimes' TCPA violation. Grimes' alleged ignorance of the TCPA is not a defense. He had a duty to comply with the law. "Persons are conclusively presumed to know the law." *Missouri Highway and Transp. Com'n v. Myers*, 785 S.W.2d 70, 75 (Mo. 1990). "It is a rule deep within our law that ignorance of the law is no excuse, and under this maxim defendant is presumed to know the law." *State v. Bridges*, 398 S.W.2d 1, 5 (Mo. 1966). More importantly, however, Grimes admits that *prior* to sending the faxes, he "had heard that

these were not able to be sent" and that he "probably would have known somebody who have gotten one of [plaintiff's counsel's] emails" and that he "remembers seeing one of [plaintiff's counsel's] emails that prompted [Grimes] to ask [ActiveCore] whether this was legal or not." (L.F. 84). Despite his heightened awareness of the potential illegality of his blast fax campaign, Grimes admits that prior to sending the faxes, he did not seek any legal opinion on whether it was lawful to transmit these faxes. (L.F. 86). Grimes cannot bury his head in the sand and then claim innocence.

Plaintiffs were Not Required to Pierce the Corporate Veil

Grimes also argues that he should not be held liable because Plaintiffs did not "pierce the corporate veil" of Grimes' corporate co-defendant. *Grimes App. Brf.*, p. 13. Again, however, there was no need to do so, because it is Grimes' *conduct* that forms the basis of the claim against him and not his affiliation with his corporate co-defendant. The *American Blastfax* court addressed this exact point by citing a Fifth Circuit case, stating:

> Appellees seem to support [their] position on the ground that to hold the individuals liable for the actions of the corporation would require a 'piercing of the corporate veil.' ***In point of fact appellees have the cart before the horse***. There can be no doubt but that a trademark, like a patent, can be infringed by an individual. It is infringed when an individual performs the act or does the things that the patent or trademark law protects against. The fact that the persons thus acting are acting for a corporation also, of course, may make the corporation liable under the doctrine of

> respondeat superior. It does not relieve the individuals of their responsibility.

Am. Blastfax, Inc., at 898 (emphasis added) (citations omitted). The same is true here. The undisputed facts are that Grimes' *actions* satisfied each element of the TCPA. Grimes does not dispute any of those elements.

The Trial Court's Judgment is Consistent with other Courts that have addressed this issue in TCPA Litigation

Lastly, the trial court's judgment against Grimes is consistent with opinions of other courts that have addressed this issue in the context of TCPA cases. Last year, the federal court in Maryland addressed this issue head on, stating:

> It is true that officers or employees are generally not liable for statutory violations based solely on their corporate offices or ownership…The State of Maryland does not, however, seek to hold Henson and Russell liable based solely on their positions as owner/officer and employee. Rather, it alleges that Henson and Russell are liable because they were directly involved in the TCPA violations.
>
> * * *
>
> For these reasons, if the State of Maryland can prove that Henson and Russell directly participated in or authorized the statutory violations, they may be personally liable under the TCPA.

Maryland v. Universal Elections, 787 F.Supp.2d 408, 417 (D. Md. 2011). *See also, Versteeg v. Bennett, Deloney & Noyes, P.C.*, 775 F.Supp.2d 1316, 1321-1322 (D. Wyo.

2011) (finding corporate officer personally liable for direct involvement in TCPA violation); *Creative Montessori Learning Center v. Ashford Gear, LLC*, 2010 WL 3526691, 3 (N.D. Ill. 2010) ("Reeves, however, was much more involved with the day-to-day operations of Ashford Gear in general and with the specific conduct alleged in the instant complaint. He admittedly created the majority of the unsolicited facsimile advertisements, corresponded directly with Business to Business, and was in possession of the names and fax numbers of some, if not all, of the recipients. These facts are sufficient to allege an individual violation of the TCPA by Reeves under 42 U.S.C. § 227.").

Likewise, on November 4, 2011, the U.S. District Court for the Northern District of Illinois issued its opinion in *The Savanna Group, Inc. vs. Truan*, No. 10-C-7995 (N.D. Ill. Nov. 4, 2011), stating, "Based on well-settled tort law, however, federal courts that have addressed the issue of whether individuals acting on behalf of a corporation are liable for TCPA violations have concluded that if the individual officer directly participated in or personally authorized the conduct at issue, he may be held personally liable for the corporation's TCPA violations." *Id*., at 2.

Conclusion

In the case at bar, the undisputed facts are that Grimes actively participated in and had actual knowledge of the acts that were found to violate the TCPA. It is undisputed that Grimes' actions satisfied every element of a TCPA violation. In fact, as set forth above, Grimes admitted to the violation and Grimes does not dispute any element in the statute. Tellingly, nowhere in Grimes' brief does he deny his active participation in, and

knowledge of, the fax blast campaign that resulted in a violation of the TCPA — nor could he. Grimes simply believes he is shielded from liability because he was a corporate officer and/or that he can only be held liable if "intentional and repeated violations" are shown. However, that is not the law in Missouri or elsewhere. As discussed above, the TCPA does require scienter, intent or repeated conduct to find a violation. Further with regard to Grimes' "corporate shield" argument, this Court held that simply holding a corporate office does not protect an individual from liability and "if the rule were otherwise, the agent of a corporation could shield himself from liability for almost every kind of wrong, provided he was acting in the capacity of agent...." *Doe Run*, *supra*., at 505. And as the U.S. District Court in Maryland held specifically with regard to TCPA violations, "if an individual acting on behalf of a corporation could avoid individual liability, the TCPA would lose much of its force…Congress cannot have intended for such individuals to avoid personal liability by affiliating themselves with an entity such as Universal Elections." *Maryland v. Universal Elections*, 2011 WL 2050751, 6 (D. Md. May 25, 2011). Missouri law is clear that Grimes may be held liable because he had knowledge of, and participated in, an actionable wrong.

Grimes' actions satisfy each element of liability under the TCPA and the trial court correctly entered summary judgment against him.

Based on the foregoing, Respondent respectfully requests this Court affirm the trial court's judgment; and for such further relief as this Court deems just.

II. THE TRIAL COURT DID NOT ERR IN CERTIFYING THE PLAINTIFF CLASS AND ENTERING JUDGMENT IN ITS FAVOR BECAUSE THE CLASS MET THE REQUIREMENTS OF RULE 52.08 AND WAS PROPERLY ASCERTAINABLE IN THAT THE CLASS DEFINITION WAS BASED ON OBJECTIVE CRITERIA AND RULE 52.08(c)(3) DOES NOT REQUIRE EACH CLASS MEMBER TO BE LISTED IN THE JUDGMENT IN A CLASS CERTIFIED UNDER RULE 52.08(b)(3).

A. Standard of Review (Abuse of Discretion)

> We review a trial court's order granting class certification under an abuse of discretion standard. We will find an abuse of discretion only if the trial court's ruling is so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration. The trial court does not abuse its discretion where reasonable persons could differ with respect to the propriety of its ruling.

Wright v. Country Club of St. Albans, 269 S.W.3d 461, 464-465 (Mo. App. E.D. 2008) (internal citations omitted).

B. Argument

The trial court did not abuse its discretion and properly granted class certification because the requirements of Rule 52.08, which governs class certification in Missouri, were satisfied. The certified Class is composed of Missourians in the St. Louis area to which 9,683 of Appellants' unsolicited junk fax advertisements were sent on two separate

occasions in March, 2005 in violation of the TCPA, 47 U.S.C. § 227. Grimes and Financial Solutions admitted to engaging in the activity alleged in the Petition.

The TCPA prohibits any person from using any "telephone facsimile machine, computer, or any other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). An unsolicited advertisement is defined as "any material advertising the commercial availability or quality of any property, goods or services which is transmitted to any person without that person's *prior express invitation or permission*." 47 U.S.C. § 227(a)(4). Section 227(b)(3) of the TCPA provides a private right of action against a sender of an unsolicited advertisement, with damages of $500 or actual damages, whichever is greater, for each violation. A court has discretion to treble these damages if it finds the violation to be willful or knowing. 47 U.S.C. § 227(b)(3). Here, the trial court awarded the certified class the minimum statutory damages under 47 U.S.C. § 227(b)(3).

All of the claims of Respondents are based on this uniform federal statute where damages are statutorily set. This case is a textbook scenario for class certification, *i.e.*, a streamlined, simple set of facts common to all class members within a defined geographic area, applying the same legal theory under a uniform federal law where damages are statutorily set and need not be individually proved. Undisputed class-wide proof established liability of Grimes and Financial Solutions and the damages of the class.

Because most TCPA cases like this one are so well suited for class certification, the overwhelming majority of courts faced with the issue have granted class certification in TCPA cases. *See, e.g.*, Supp. L.F. 16-21 (citing 54 TCPA class certifications). After a

rigorous analysis, the trial court agreed and certified the following class:

> 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.

(Supp. L.F. 41).

Grimes' sole argument with respect to the trial court's order certifying the class is that he claims the certified class is not ascertainable because there is no list of the names of the class members which would allow individual class members to be identified. *Grimes App. Brf.*, pp. 22-25. Grimes also argues that the judgment is defective because it likewise does not list the name of each and every member of the class. *Id*., pp. 25-28.

With respect to Grimes' argument on class certification, he confuses the term "ascertain" with the term "identify." In Missouri and elsewhere, a class is "ascertainable" if the class definition is based on "objective criteria that do not depend on the [class member's] subjective state of mind or the merits of the case." *Craft v. Philip Morris Companies, Inc.*, 190 S.W.3d 368, 388 (Mo. App. E.D. 2005). Contrary to Grimes' argument, there is no requirement that class members be individually identified. Many other courts have addressed this erroneous argument:

> Defendants again misconstrue the ascertainability requirement as relating to the means used to identify potential class members instead of the criteria used to distinguish members of the class from non-members. Membership in the Check Presenter class can be assessed by using solely objective criteria, namely whether the putative class member received a Disclosure Report during the relevant time period and had presented a check at a SCAN member retailer prior to making that request. These are matters within the personal knowledge of the putative class members and are a suitable basis for class membership

Seary v. eFunds Corp., 2010 WL 183362, 8 (N.D. Ill. 2010). In *Stephens v. Montgomery Ward*, 193 Cal. App.3d 411 (Cal. App.1.Dist.1987), the court held:

> Defendant apparently fails to distinguish between the necessity of establishing the existence of an ascertainable class and the necessity of identifying the individual members of such class as a prerequisite to a class suit. If the existence of an ascertainable class has been shown, there is no need to identify its individual members in order to bind all members by the judgment.

Id., at 419.[4] Another court addressed this issue in a TCPA class action:

[4] *See also, e.g., Lau v. Arrow Financial Services, LLC*, 245 F.R.D. 620, 624 (N.D. Ill. 2007) ("Arrow argues that the definition of the proposed class and subclass do not satisfy the first requirement because the former does not allow the class members to be readily

> In addition, the Defendant proposes that the class should not be certified because class members cannot be ascertained. This argument does not avail the Defendant. It is not necessary that the class representative name the specific individuals who are possibly members of the class. *Hayna v. Arby's, Inc.*, 99 Ill.App.3d 700, 710-711 (1981). The Plaintiff need not present a list of ascertained class members nor indicate that such a list exists as part of the motion to certify. The Plaintiff must merely allege the four requirements set forth in the Illinois statute. Identity of class members is not one of these requirements.

Travel 100 Group, Inc. v. Empire Cooler Serv., Inc., No. 03-CH-14510, 2004 WL 3105679, *4 (Ill. Cir. Oct. 19, 2004).

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identified and the latter is based on subjective criteria. The Court rejects both of these arguments. ***Plaintiff need not identify each class member to secure class certification***."); *REC Centers, Inc. v. Shaughnessy*, 407 So.2d 971, 975 (Fla. App. 4 Dist. 1981) ("so long as the existence of an ascertainable class has been shown, there is ***no need to be able to identify the individual members of the class*** to determine the issues affecting the class."); *Central Valley Chap. 7th Step Foundation v. Younger*, 95 Cal. App.3d 212, 228, (Cal. App. 1979) ("Respondents "apparently ***(fail) to distinguish between the necessity of establishing the existence of an ascertainable class and the necessity of identifying the individual members*** of such class as a prerequisite to a class suit.")

Here, the class was certified pursuant to Rule 52.08***(b)(3),*** *i.e.* a damages class, and not under 52.08(b)(1) or (b)(2). The leading treatise on class action litigation states:

> By its express terms, Rule [52.08(c)(2)][5] recognizes that class actions can consist of those with members who cannot be identified through reasonable effort and that the court should direct the best notice practicable under those circumstances. Notice by publication, by news and television media, and by other means may be employed to inform potential class members of the action, so that there is no need that class members be determinable either at the outset of litigation or at the time of class notice**. *In addition, individual class members need not be able to be determined even at the time of final judgment.*** Rule [52.08(c)(3)] provides:
>
> > The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision ***(b)(3)***, whether or not favorable to the class, shall include and

[5] References to the Federal Class Action Rule 23 are replaced with the Missouri Class Action Rule 52.08 because they are identical. *See, Craft v. Philip Morris Companies, Inc.*, 2005 WL 1944333, *3 (Mo. App. E.D. 2005) ("Because Missouri Rule 52.08 and Fed.R.Civ.P. 23 are identical, we may consider federal interpretations of Rule 23 in interpreting Rule 52.08.").

> specify ***or describe those to whom the notice provided in subdivision (c)(2) was directed***, and who have not requested exclusion, and whom the court finds to be members of the class.
>
> ***The drafters of Rule [52.08(c)(3)] were careful not to require in a final class judgment that all class members be specifically identified. Rather, even in classes under Rule*** [52.08***(b)(3)***], ***all that is required is that the class be described in the final judgment.*** The Rules Advisory Committee explained:
>
> > The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b)(1) or (b)(2), those found by the court to be class members; ***in a class action under subdivision (b)(3), those to whom the notice prescribed by subdivision (c)(2) was directed***, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class.

Newberg on Class Actions, §2:4.[6] Thus, even by the express terms of the rule governing class certification, the class need only be *described* and it is not necessary that each

[6] *Newberg on Class Actions* is the leading treatise on class action litigation in the United States and is routinely cited by courts in Missouri and scores of jurisdictions throughout the country as persuasive authority. *See, e.g.*, *Gerken v. Sherman*, 2011 WL 2534145, 8 (Mo. App. W.D. June 28, 2011); *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 716 (Mo. 2007).

member be individually identified, as Appellant would have this Court believe.

The fallacy of Appellants' argument is further revealed by examining a Missouri class action case, *Craft v. Philip Morris Companies, Inc.*, 190 S.W.3d 368 (Mo. App. E.D. 2005), in which this Court affirmed class certification and found the following class was properly ascertainable:

> All residents of Missouri who purchased and consumed Defendants' Marlboro Lights cigarettes, in Missouri, at any time between the five years immediately preceding the filing of the Petition in this suit through the date the Court originally certified this suit as a class action (December 31, 2003), but who do not have a claim for personal injury resulting from the purchase or consumption of cigarettes.

Craft, at 374. The *Craft* class would thus encompass all persons in the State who purchased Marlboro lights from any source in Missouri over a five year period. This would include every conceivable way to purchase Marlboro lights, such as any and all retail outlets, convenience stores, grocery stores, bars, nightclubs, cigarette machines, casinos, street vendors, *etc*. It is undisputed that there is no "master list," or any list for that matter, identifying the names and addresses of every single person in the State who purchased Marlboro lights over a five year period. In affirming that the *Craft* class was properly ascertainable, this Court was able to reach this finding because "ascertainability" of a class does ***not*** mean that individual members must be identified. In fact, those members do not even need to be identified at the time of final judgment. As stated above, in 52.08(b)(3) class actions, such as *Craft* and the case at bar, the class only needs to be

described, even at the time of final judgment. As the *Craft* court further found:

> All Missouri residents who purchased Lights during the relevant time period but who do "not have a claim for personal injury related to smoking" ***is an ascertainable defined class***. These are objective criteria that do not depend on the consumer's subjective state of mind or the merits of the case. See 5 Moore et al., supra, section 23.21[1]-[4]. Specifically, whether an individual has a personal injury claim can be determined by the application of established legal principles to objective facts. The trial court did not abuse its discretion in so defining the class.

Craft, at 374 (emphasis added). Nowhere did this Court find that class members must be individually identified because that is ***not*** required when determining ascertainability of the class.

If Appellant's erroneous argument were valid, the need to give class notice by means of publication would always preclude certification. Further, it would preclude all class actions based on claims arising from goods purchased at retail, or in any other case where there is no "master list" of class members. Obviously, that is not the law. Classes are routinely certified in such cases.

In this case the certified class is clearly ascertainable because it is based on objective criteria — *i.e.* the fax was or was not sent to the person. There is nothing subjective about that. There are also no merits issues contained within the definition. Further, there are no individual issues with respect to damages because they are set by statute. Further, undisputed class-wide proof established that Appellants did not obtain

the "prior express invitation or permission" from any class member to whom the fax was sent. Further, undisputed class-wide proof established that 9,683 of the junk faxes were successfully transmitted to the class. Appellants do not dispute these class-wide facts.

The class is properly ascertainable and Appellants' argument in this respect is without merit.

Likewise, Appellants' argument that the judgment is improper because it does not include the name of each and every class member is also without merit. As discussed above, this class was certified pursuant to Rule 52.08(b)(3). Rule 52.08(c)(3) plainly requires that a "judgment in an action maintained as a class action under Rule 52.08(b)(3), whether or not favorable to the class, shall include and specify ***or describe those to whom the notice provided in Rule 52.08(c)(2) was directed***.." Rule 52.08(c)(3) (emphasis added). That is precisely what the trial court did in its summary judgment order. Appellant's argument is nonsensical. There are (b)(3) classes throughout the United States that routinely have hundreds of thousands, and sometimes millions, of class members. Listing each class member's name in a class action judgment is not required. The plain language of Rule 52.08(c)(3) is clear and unambiguous in this respect.

Finally, Appellant's suggestion that the lack of any responses to the class notice establishes any relevant fact is without merit. The notice was a "Notice of Pendency of Class Action Lawsuit" which gave class members the *right to opt out* of the lawsuit. (Supp. L.F. 59). It was *not* a notice where class members were instructed to make claims or to affirmatively respond if they wanted to stay in the class. The notice informed the recipients that "If you wish to remain in the Class, YOU DO NOT NEED TO TAKE

ANY ACTION." (Supp. L.F. 59). It is therefore not expected that class members need make any response until the claims stage when funds are available for distribution. When the funds become available for distribution, the trial court can make an appropriate order for the distribution of same, including *inter alia*, further class notice and a claims process. If, for any reason, unclaimed funds remain thereafter, the "court can use the 'fluid class recovery' doctrine or escheat the unclaimed funds to the state. *Buchholz Mortuaries, Inc. v. Director of Revenue*, 113 S.W.3d 192, 195-196 (Mo. 2003) (Wolff, J., concurring). Any "unclaimed funds may also be distributed to the appropriate state or political subdivisions where the class members reside." *Id.* (*citing* 4 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS §§ 10:15, 11:20 (4th ed.2002)).

Based on the foregoing, Respondent respectfully requests this Court affirm the order and judgment of the trial court certifying the plaintiff class; and for such further relief as this Court deems just.

III. CONCLUSION

Based on the foregoing, Respondents respectfully request this Court affirm the trial court's grant of summary judgment against Defendant/Appellant Michael Grimes; affirm the trial court's order certifying the plaintiff class; and for such further relief as this Court deems just.

Respectfully submitted,

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Rule 84.06(C) Certificate

The undersigned certifies that the foregoing brief complies with the limitations contained in Mo. Sup. Ct. R. 84.06(b), and that the number of words in this brief is 9,590 as indicated by Microsoft Word.

/s/ John Steward

Rule 55.03 Verification

The undersigned certifies that the attorney electronically signing this document has also signed the original and will keep it during the pendency of this appeal.

/s/ John Steward

Certificate of Service

The undersigned hereby certifies a true and accurate copy of the foregoing was served via electronic filing on this 12th day of March, 2012, to:

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