

District Court, Denver County Colorado Court Address: 1437 Bannock Street, Room 256; Denver Colorado 80202	FILED Document CO Denver County District Court 2nd JD Filing Date: Jul 1 2004 4:20PM MDT Filing ID: 3828327 Review Clerk: Suzann M Shotts
Plaintiff: Consumer Crusades, Inc. v. Defendants: MBA Financial Group, Inc., a Colorado Corporation, Inc., et al.	<input type="checkbox"/> Court Use Only <input type="checkbox"/>
Attorney for Defendant Douglas A. Turner, Esq. 602 Park Point Drive, Suite 240, Golden, Colorado 80401 Phone: (303) 273-2923 Fax: (720) 746-3027 E-mail: DTurner@DouglasTurner.com Atty. Reg. No. 22564	Case Number: 04 CV 4841 Division: 5 Courtroom:
MOTION TO DISMISS	

COMES NOW DEFENDANTS MBA FINANCIAL GROUP, INC. and Dale Finney, pursuant to C.R.C.P. 12(b)(5), and move this Honorable Court to dismiss the claims against said Defendants. In support of this MOTION, Defendants aver as follows:

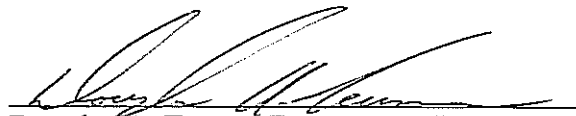
1. Plaintiff, as an assignee of various unnamed individuals and entities, has filed claims against Defendants alleging that Defendants sent faxes which constitute and undisclosed number violations of 47 U.S.C 227(b)(3). *See* Complaint ¶¶ 1 - 8
2. Plaintiff, as an assignee, is requesting \$500.00 for every violation of 47 U.S.C. 227(b)(3), plus treble damages of \$1,000.00 for each of those violations found to be knowing or willful. *See* Complaint ¶¶ 9 - 17.
3. Although Plaintiff does not allege that it received even one unsolicited fax, Plaintiff, as an assignee, further requests injunctive relief. *See* Complaint, Prayer for relief.
4. For the purpose of this Motion to Dismiss, Defendants assume that all allegations in the Complaint are true and correct. Even under that assumption, Plaintiff fails to state a claim for which relief can be granted.

5. The fatal flaws in Plaintiff's Complaint are as follows:
- a. Private rights of action under 47 U.S.C. 227(b)(3) are statutory penalties and as such cannot be assigned under either Federal or Colorado law.
 - b. If the Court finds that a private right of action pursuant to 47 U.S.C. 227(b)(3) can be assigned, then the claim still fails because 47 U.S.C. 227(b)(1)(3) is an unconstitutional abridgement of Defendants Due Process rights under the United States Constitution.
6. At the heart of this Motion to Dismiss are issues touched upon in two recent cases involving T.C.P.A. claims – *Giovanniello v. Hispanic Media Group, USA, Inc.* No. 7704/03, 2004 WL 1258014 (N.Y. Sup. Ct. May 27, 2004) and *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.* No. 14-00-00711-CV, 2004 WL 964224 (Tex. App. May 6, 2004). In *Giovanniello*, the issue touched upon is the classification of these claims as statutory penalties. In the case of *Chair King*, the issues touched upon are (a) the application and interaction of federal and state law and (b) the classification of T.C.P.A. claims as statutory penalties in order to save the claims from being an unconstitutional abridgement of due process.

PRAYER FOR RELIEF

WHEREFORE, Defendants MBA and Finney respectfully requests this Court to dismiss all claims with prejudice, an award of attorneys fees and costs and for such other and further relief as this Court deems just and proper

Respectfully submitted this 1st day of July 2004.


Douglas A. Turner, Esq. Reg. #22564

CERTIFICATE OF MAILING:

I certify that on this 1st day of July 2004, a true copy of the foregoing **MOTION TO DISMISS** was duly mailed to the following by U.S. first class mail, postage prepaid, at the addresses shown:

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