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DISTRICT COURT, ARAPAHOE COUNTY
The Honorable William B. Sylvester
Civil Action No. 04 CV 0684

Plaintiff-Appellant:

US FAX LAW CENTER, INC.

v.

Defendant-Appellee:

MYRON CORPORATION

COURT USE ONLY

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Case No. 05CA1426

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLANT

Plaintiff-Appellant, US Fax Law Center, Inc., by and through its attorneys, The Demirali Law Firm, P.C., submits the following supplemental brief in the above-captioned action:

Plaintiff Has Standing To Assert TCPA And CCPA Claims

Properly understood, standing is a judicially developed test designed to maintain the separation of governmental powers. *Ainscough v. Owens*, 90 P.3d 851 (Colo. 2004). As such, it is a threshold issue that must be satisfied before a court may decide a case or controversy on the merits. *HealthONE v. Rodriguez, ex rel Rodriguez*, 50 P.3d 879 (Colo. 2002). The constitutional question of standing is: has a case or controversy been presented sufficient to entitle the parties to a *judicial determination. Bd. of County Commr's. v. Colo. Oil & Gas Commn.*, 81 P.3d 1119 (Colo.App. 2003). Therefore, standing is not conferred by either the remote possibility of future harm, or one that is merely indirect or incidental. In those events, no basis exists for the exercise of judicial authority. *Brotman v. E. Lake Creek Ranch, LLP*, 31 P.3d 886 (Colo. 2001).

In Colorado, standing involves the application of a two-pronged analysis. *Wimberly v. Ettenberg*, 194 Colo. 163, 570 P.2d 535 (1977). First, has there been an "injury in fact" (i.e. direct and palpable), as opposed to a *theoretical* basis for suit? The second prong queries: was the injury sued upon to a "legally protected interest"? *O'Bryant v. Pub. Utils. Commn.*, 778 P.2d 648 (Colo. 1989). Simply stated, does a legally protected right or interest give rise to a right to judicial relief? *Douglas County Bd. of Commr's. v. Bowen/Edwards Assocs., Inc.*, 830

P.2d 1045 (Colo. 1992). And, in Colorado, parties benefit from a broad entitlement to judicial determinations. *Ainscough, supra,* at 855.

The subject of assignability herein begins with the assumption that, because plaintiff is an assignee of the TCPA and CCPA claims of the original fax recipients, it lacks constitutional standing, as it has suffered no "injury in fact." *U. S. Fax Law Center, Inc. v. iHire, Inc.*, 362 F. Supp. 2d 1248 (D. Colo. 2005). The key case concerning constitutional standing, however, is *Vermont Agency of Natural Resources v. United States ex rel Stevens*, 529 U.S. 765 (2000). The Supreme Court there held that, while a claimant must suffer an "injury in fact" to have standing, "the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Id.*, at pages 773-74. This legal doctrine is recognized as *representational standing*. Thus, injury-in-fact as a requirement for standing is satisfied by an assignee of such claims.

Moreover, the TCPA claims brought by the plaintiff typify an established species of cases known as "assignments for collection purposes." *APCC Services, Inc. v. AT&T Corp.*, 281 F. Supp 2d 41 (D.D.C. 2003). These actions, in which a party seeks to enforce statutory claims which have been assigned to him (thereby vesting title in those claims in the assignee) has been explicitly recognized by the U. S. Supreme Court since at least 1920. *Spiller v. Atchison*, 253 U.S. 117 (1920).

The *Spiller* case confirmed that an assignee holding legal title to multiple claims alleging violations of federal law was entitled to bring suit for the collection of all statutory damages.

In Colorado, the assignment of claims for collection purposes is also well-established. *Farmers Acceptance Corp. v. DeLozier*, 178 Colo. 291, 496 P.2d 1016 (1972); *Ballinger v. Vates*, 26 Colo.App. 116, 140 P. 931 (1914). Consequently, the claims of original aggrieved parties may be brought by an assignee. *Kruger v. Merriman Electric*, 488 P.2d 228 (Colo.App. 1971). By virtue of the assignment, the assignee "stands in the shoes of the assignor," *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244 (Colo. 1994), and may then assert rights sufficient to establish an "actual controversy proper for judicial resolution." *O'Bryant v. Pub. Utils. Comm'n.*, 778 P.2d 648, 653 (Colo. 1989).

Unfortunately, some courts have conflated standing with a party's legal interest in the suit (i.e. real party in interest.) *See, Public Service Co. v. Barnhill*, 690 P.2d 1248 (Colo. 1984) (re: "critical distinction" between standing and C.R.C.P. 17 capacity). Real party in interest is a *procedural rule* which only seeks to determine *who is authorized* to bring an action. C.R.C.P. 17 (a) . *Cf. Alpine Associates, Inc. v. KP&R, Inc.*, 802 P.2d 1119 (Colo.App. 1990). In Colorado, an assignee of a claim becomes the real party in interest. *Platte Valley Mortgage*

Corp. v. Bickett, 916 P.2d 631 (Colo.App. 1996) *citing, Thistle, Inc. v. Tenneco, Inc.*, 872 P.2d 1302 (Colo.App. 1993).

Perhaps the simplest way to understand the distinction between standing and real party in interest is that, for standing, an actual controversy must be presented, whereas real party in interest presumes a controversy exists, but the named plaintiff must also be the person *legally entitled* to bring suit in order to vindicate the legal right or interest. *See, Ashton Properties v. Overton*, 107 P.3d 1014 (Colo.App. 2004). Consequently, standing concerns the *justiciability* of a dispute; real party in interest refers to a particular plaintiff's *personal right* to bring the matter to court for adjudication. *Compare Metro Wastewater v. National Union Fire Ins. Co.*, 105 P.3d 653 (Colo. 2005) *with National Propane Corp. v. Miller*, 18 P.3d 782 (Colo.App. 2000).

Colorado liberally permits assignments and favors the assignment of rights. *Brown v. Gray*, 227 F.3d 1278 (10th Cir. 2000), citing *Arvada Hardwood Floors v. James*, 638 P.2d 828 (Colo.App. 1981). *See also, Kirkham v. Hickerson Bros.*, 29 Colo.App. 303, 308, 485 P.2d 513, 518 (1971):

> "[A]ssignment is an act of the parties depending generally on intention, and contemplates a continuation of and transfers the whole claim or debt." *quoting* 6A C.J.S. *Assignments* § 5 (1975).

Property rights are *prima facie* assignable at common law, and the general rule is that any estate or interest in lands and tenements may be assigned. *Id.* at § 13.

The right to bring suit for damages based in tort is a "chose in action." *Ford v. Summertree Lane Ltd. Liability Co.*, 56 P.3d 1206 (Colo.App. 2002). Choses in action are freely transferrable. *Id., citing Webb v. Desert Seed Co.*, 718 P.2d 1057 (Colo. 1986). Whether the TCPA or the CCPA may be *construed* to prohibit the transfer of claims thereunder, then becomes the focus for analysis.

The legislative right to regulate in the context of the police power is greatest where commercial activities are implicated. *Hall v. Walter*, 969 P.2d 224, 230 (Colo. 1998). Principles of statutory construction govern that analysis, and judicial interpretations which serve to defeat the statutory purposes of the legislation will not be followed. *Id.* at 229. Rather, the courts should interpret the legislation with an eye towards effectuating the legislative intent. *Tivoli Ventures, supra,* at 1250. Neither federal law nor Colorado law expressly *prohibits* the assignment for collection of junk fax claims; they are merely silent. *See, Tivoli Ventures, supra*, at 1248 (where federal statute silent, courts may fill "statutory gaps"). *Compare*, C.R.S. 13-6-407 (1) ("no assignee... may commence an action" in *small claims court*).

In Colorado, whether a right, claim or interest is assignable, therefore, is a *legislative* prerogative. *Micheletti v. Moidel*, 94 Colo. 587, 32 P.2d 266 (1934):

> "Our statute narrows greatly the common-law rule that personal actions die with the person. The modern tendency to remove obstructions to the free transfer of all property, tangible and intangible, and rights and interests, forbids an extension of the language of the exception in the statute beyond its fair import."

Id. at 590.

That is because the judicial branch ordinarily will not invade areas of policy. *Olson v. City of Golden*, 53 P.3d 747, 750 (Colo.App. 2002). The *general* rule has always been that survivability and assignability go hand in hand. *Home Insurance Co. v. Atchison, T&S.F.R.R. Co.*, 19 Colo. 46, 34 P. 281 (1893). The Colorado Statutes, in contrast, contain numerous references to the assignability of substantive rights, interests and claims.

Colorado's survival statute further buttresses this state's preference for the transferability of legal claims. In fact, *all causes of action* except slander and libel survive, and therefore are assignable. *See,* C.R.S. 13-20-101. Perhaps most significantly, though, any claim for "injuries done to the person" (such as invasion of privacy) was *removed from the survival statute*, thereby making such claims assignable. *See, Micheletti, supra* at 591; *compare* Section 5383, Compiled

Laws ("trespass for injuries done to the person" *excepted*) *with* C.R.S. 13-20-101 (1) (no such exception).

As a substantive issue, Colorado law treats "invasion of privacy" as three separate torts: first, unreasonable intrusion upon the seclusion of another; second, unreasonable publicity given to another's private life; and third, appropriation of another's name or likeness. *See, Denver Publishing Co. v. Bueno*, 54 P.3d 893, 897 (Colo. 2002). The only form of invasion of privacy which may be implicated by junk faxing would appear to be an intrusion upon the seclusion of another.

But an invasion of privacy requires *injury to the person* through mental and emotional distress. *Seidl v. Greentree Mortg. Co.*, 30 F.Supp.2d 1292, 1302 (D. Colo. 1998), *citing Bolduc v. Bailey*, 586 F.Supp. 896, 901 (D.Colo. 1984). In TCPA or CCPA cases, though, no person can be considered a victim of the requisite physical and mental distress as a result of the receipt of faxes. Moreover, business entities do not have a right to seclusion. Thus, it is not logical to conclude that the TCPA or CCPA was designed to protect privacy interests in relation to the transmission of unsolicited facsimile advertisements.

The telemarketing abuse known as junk faxing is *commercial in nature*. That is because the abuse to be remedied is the *advertisement* of defendants' "property, goods or services." 47 U.S.C. § 227 (a) (4). Notably, non-commercial

communications are exempt from the Act's ban on unsolicited faxes. Further, under only the rarest circumstances might a facsimile transmission be considered an intrusion upon a person's seclusion. In this regard, the receipt of a junk fax is no more "intrusive" than junk mail. Instead, a recipient's economic interests, not solitude, are injured when fax equipment and supplies (e.g. paper, toner) are used without permission, regardless of the machine's location. And, the TCPA's junk fax ban was intended by Congress to directly address the effects of that abuse on *interstate commerce*. *See, Destination Ventures, Ltd. v. FCC*, 844 F. Supp. 632 (D. Or. 1994), *aff'd* 46 F.3d 54 (9th Cir. 1995), *citing* Senate Telecommunications and Finance Subcomm., 102 Cong., 1st Sess. 3-4 (1991). Unsolicited fax advertisements, consequently, are in the nature of *commercial torts*. *See, State of Missouri v. American Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003).

The characterization of TCPA claims as commercial in nature conclusively establishes that they are assignable under Colorado law. C.R.S. 4-9-109 (d) (12) clearly permits security interests in *assignments of commercial tort claims*. A "commercial tort" is defined as one which arose in the course of a claimant's business or profession and does not include damages arising out of "personal injury to or the death of an individual." C.R.S. 4-9-102 (a) (13). Logically, if such assignments may be used for security interests under the Colorado

Commercial Code, they are permitted by state law. Therefore, such commercial tort claims, including those addressing the telemarketing abuse known as junk faxing, must be assignable under Colorado law. And, it is that congressional intent which a state court should seek to effectuate. *Tivoli Ventures, supra*, at 1249.

One final point must be emphasized concerning privacy. Both the *iHire* opinion and the *McKenna* decision rely upon federal district court caselaw governing the interpretation of *insurance contracts*. That caselaw, however, not only fails to address the true underlying purpose of the junk fax prohibition, but also have been criticized for their reliance upon a "privacy" rationale. *See, Am. States Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, 392 F.3d 939 (7th Cir. 2004) (junk faxes invade *property interest* in recipients' *consumables*). Consequently, those cases do not support the court's conclusion in *McKenna* that, as to some individuals, the harm to be addressed is an invasion of their right to privacy.

The other basis for concluding that TCPA claims are unassignable is the contention that such claims are in the nature of statutory penalties. It is argued that plaintiff's claims could not be assigned, and as a consequence, plaintiff lacked standing. The following authorities, however, clearly establish that plaintiff's

TCPA claims are not penal; rather, they are remedial. As such, the claims are assignable.

First, a TCPA complaint may seek *three separate* types of relief. A claimant's request for *prospective injunctive relief* is unquestionably equitable in nature and, therefore, remedial. *Peterson v. McMahon*, 99 P.3d 594, 497 (Colo. 2004). *See also, Hartford Empire Co. v. United States*, 323 U.S. 386, 435 (1945) (relief in equity is remedial, not penal). Furthermore, the *compensatory* damages permitted pursuant to the TCPA's private right of action, 47 U.S.C. § 227 (b) (3) (B), are neither penal nor disproportionate. It states:

> "(3) Private right of action.
> A person or entity may... bring in an appropriate court...
>
> (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 supplied)

The compensatory damage provision of the TCPA was designed by Congress to be fair to both the senders and recipients of junk faxes. *See, 137 Cong. Rec.* S16204-01 (Nov. 7, 1991) (Statement of Sen. Hollings). Congress enacted a compensatory remedy which took into account the "difficult to quantify business interruption costs" that result from prohibited commercial fax transmissions. *Kenro, Inc. v. Fax Daily, Inc.*, 962 F.Supp. 1162, 1166 (S.D. Ind.

1997). And, the determination of statutorily set compensatory damages is a proper exercise of discretion by the *legislative branch. See, Reiter v. Sonotone Corp.*, 442 U.S. 330, 344-45 (1979) (courts "must take the statute as [they] find it.")

Accordingly, neither the injunctive relief nor the compensatory damage provision of the TCPA may be considered penal in nature. The only damage characterization remaining is that of the final sentence of § 227 (b) (3) which states:

> "If the court finds that the defendant willfully or knowingly violated 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).

Penal laws, strictly speaking, are those which (a) impose *punishment* for an offense, (b) that are committed *against the state. Huntington v. Attrill*, 146 U.S. 657, 673-74 (1892). The potential imposition of treble damages pursuant to § 227 (b) (3) does not, without more, constitute punishment. *See Rhino Linings U.S.A. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, *fn.* 8 (Colo. 2003) (CCPA treble damages and attorneys fees provisions are remedial as they *promote private enforcement*). *See also, Reiter, supra*, at 330 (1979). (Congress created treble damages remedy to encourage private antitrust enforcement.)

Legislation providing the means or methods whereby causes of action may be effectuated, wrongs redressed and relief obtained is remedial. *See, Blacks Law Dictionary* at 1296 (6th ed. 2000). Statutes that have a remedial purpose should be construed *liberally. Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992). The private enforcement mechanism of the Act does *not* contain a provision for an award of attorney's fees, as is the case with most consumer protection statutes. *See*, e.g. C.R.S. § 6-1-113 (2). It is reasonable to conclude, therefore, that TCPA ancillary damages are also remedial in nature (i.e. promoting private enforcement). *See, Jemiola v. XYZ Corp.*, 802 N.E.2d 745 (Ohio C.P. 2003). (TCPA statute is remedial.) *See also, Farmers Group v. Williams*, 804 P.2d 419, 427 (Colo. 1991) (treble damages for "willful and wanton" failure to pay benefits when due *not punishment).*

Credit Mens Adjustment Co. v. Vickery, 62 Colo. 214, 161 P. 297 (1916) is often cited for the proposition that statutory penalties are *not* assignable. But, that decision stands for just the opposite. *See, Perini v. Continental Oil Co.*, 68 Colo. 564, 190 P. 532 (1920). *Vickery* teaches that a statute may be penal in the sense that it must be *strictly construed* to establish liability. But the court went on to state that where it affords relief in the nature of *compensation to the private party* seeking enforcement, it is *remedial. Vickery, supra,* at 217 (debts and remedial

right to collect go together). Therefore, the TCPA provision giving a court the power to *increase* the damages, but only *after* liability has been established and compensatory damages set, is clearly consistent with the holdings of *Vickery, Huntington*, and *Perini*. Thus, plaintiff should be entitled to pursue the remedial right to collect those statutory damages.

The treble damage remedies under the TCPA and CCPA are comparable to the treble damages remedy pursuant to the Colorado punitive damage law in that it consists of an *auxiliary* award after compensatory damages have been established. Therefore, the plaintiff's treble damages claim herein must be considered remedial. *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984); *see also, Todd Holdings v. Super Valu Stores*, 874 P.2d 402 (Colo.App. 1993) (Colorado Organized Crime Control Act is *remedial*); *Udis v. Universal Comm. Co.*, 56 P.3d 1177 (Colo.App. 2002) (Colorado debt collection statute is *remedial*).

CONCLUSION

For the foregoing reasons, the plaintiff has standing to proceed with its claims against defendants.

DATED this 27th day of September, 2006.

Respectfully submitted,

THE DEMIRALI LAW FIRM, P.C.

A. M. Demirali

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 2006, a true and correct copy of the foregoing PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF was deposited in the United States mail, postage prepaid, addressed to:

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