

CHAMBERS  
**District Court**  
CITY AND COUNTY BUILDING  
DENVER, COLO.

H. JEFFREY BAYLESS  
CHIEF JUDGE

**FAX TRANSMITTAL**

DATE: September 1, 2005

TO: Eileen Permas

FAX NUMBER: 303-322-4005

PAGES INCLUDING THIS COVER SHEET: 4

TELEPHONE (720) 865-8307 FOR QUESTIONS CONCERNING FAX.

RETURN FAX NUMBER IS (720) 865-8579

COMMENTS:

Order re: Motion in Limine  
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<b>DISTRICT COURT</b>  <b>CITY AND COUNTY OF DENVER, COLORADO</b>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p>Case Number:</p> <p style="text-align: center;"><b>04 CV 5151</b></p> <p style="text-align: center;"><b>Courtroom 6</b></p>
Plaintiff:  <b>CONSUMER CRUSADE, INC.</b> , a Colorado corporation  Defendants:  <b>NEW YORK DELI NEWS, INC.</b> ; and <b>ALBERT BELSKY</b> , its officers and directors	
<u><b>O R D E R</b></u>	

THIS MATTER comes before the court on defendants' motion *in limine* to exclude certain evidence at trial. The evidence sought to be excluded is the assignment received by plaintiff from each of two persons, Craig C. Eley and Russell Simpson, M.D., and the attachments to the assignments, faxes which were allegedly received by the assignors. Plaintiff's trial brief represented that it will seek to introduce these exhibits as its business records without calling either Mr. Eley or Dr. Simpson. Defendants' motion attacks the foundation for such admission under Rule 803(6), C.R.E., arguing that the assignments and the attached faxes are not admissible under that rule.

The case is brought under the Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA"). Under that statute faxes received by an individual or a business are actionable only if they are "unsolicited" as that term is defined in the TCPA, 47 U.S.C. §227(a)(4). (Plaintiff's Complaint, ¶¶3 and 5.) The key to any suit brought under this statute, therefore, is proof that the faxes were unsolicited.

Plaintiff is a Colorado corporation which obtains assignments of rights relating to faxes received by others. Those assignments are pre-printed forms which state the faxes were unsolicited. Plaintiff's position is that those assignments are its business records and are admissible as exceptions to the hearsay rule under C.R.E. Rule 803(6).

The issues raised by the motion *in limine* go to the very heart of the actionable provisions of the TCPA. Attached as exhibits to defendants' motion are letters signed by both Mr. Eley and

Dr. Simpson which state that the assignments were sent "inadvertently" and that defendant New York Deli News "had our consent to send faxes to us". (Defendants' Exhibits F and G to the Motion *in Limine*.) Further, plaintiff itself acknowledges in its response brief that the assignors have changed their position on consent "three times" (emphasis in original) and admit: "for purposes of the issue of consent, there exists a factual dispute as to the true position of the assignors." (Plaintiff's Response to Defendants' Motion *in Limine*, p. 7.)

C.R.E. Rule 802 provides:

Hearsay is not admissible except as provided by these rules or by the civil and criminal procedural rules applicable to the courts of Colorado or by any statements of the state of Colorado.

Hearsay is defined at C.R.E. Rule 801(c) as:

"Hearsay" is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Colorado case law has addressed the philosophy which underlies the business records exception to the hearsay rule stating:

Underlying the business records exception is the belief that records kept in the ordinary course of business and relied upon by a business necessarily have sufficient guarantees of trustworthiness.

*Schmutz v. Bolles*, 800 P.2d 1307, 1312 (Colo. 1990) citing *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187, 200 (Colo. 1984).

In this case plaintiff as assignee has no way of knowing whether the faxes were solicited or unsolicited. Only the assignor would have that knowledge. The court is presented with evidence from the assignors themselves that their initial representation in the assignment that the faxes were unsolicited was "inadvertent" and that they had "consented" to the sending of the faxes. If the court were to admit the assignments and the attachments it would be violating the fundamental principle which underlies the business records exception, the guarantee of trustworthiness. When plaintiff itself admits that there is a factual dispute on the issue of consent plaintiff is acknowledging a lack of trustworthiness.

The assignment is offered for the truth that the fax was unsolicited. The assignment is hearsay. The assignment is contradicted directly by defendants' exhibits signed by the assignors. There is an inadequate guarantee of trustworthiness of the assignments and the attachments to the assignments as being actionable facsimiles.

In *Schmutz v. Boles, supra*, the Colorado Supreme Court held:

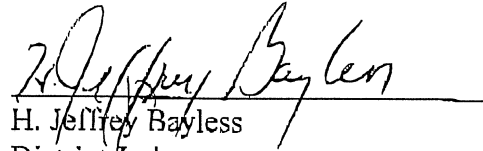
Finally, a court must be satisfied that the source of the information or the method or circumstances of preparation do not indicate a lack of trustworthiness.

This court concludes the assignments are not trustworthy.

The motion *in limine* is granted. The court concludes that the assignments and their attached facsimiles are not admissible under C.R.E. Rule 803(6).

Done this 1<sup>st</sup> day of September, 2005.

BY THE COURT:

  
H. Jeffrey Bayless  
District Judge

cc: