
DISTRICT COURT, ARAPAHOE COUNTY,
COLORADO

Address: 7325 South Potomac St.,
Centennial, CO 80112

Plaintiff: USA TAX LAW CENTER, INC.,
dba US FAX LAW CENTER, INC.

v.

Defendant: PERRY JOHNSON, INC.

▲ COURT USE ONLY ▲

Case Number: 03 CV 5317

Division: 402

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DEFENDANT'S MOTION TO COMPEL

The Defendant Perry Johnson, Inc., submits the following Motion to Compel Discovery, and as grounds therefore states as follows:

NATURE OF THE CASE

This action is what is known as a TCPA suit. These claims arise under the federal TCPA (Telephone Consumer Protection Act), which in certain circumstances provides for compensation to recipients of unsolicited fax advertising. While the cause of action is created by federal law, the statute puts all of the burdens on the state court system, as the same statute prohibits jurisdiction in the federal courts.

These TCPA suits are now proliferating in the state court systems primarily due to entities like the Plaintiff. The Plaintiff (and others like it) engages in the affirmative solicitation of prosecution of TCPA claim/litigation from owners of phone lines and facsimile machines who believe that they have received an unsolicited facsimile advertisement. The Plaintiff then gets that recipient to assign their TCPA claim(s) to the Plaintiff and the Plaintiff then files suit against the alleged sender. The President of the

Plaintiff is an attorney. While the Plaintiff then attempts to collect \$1500 per each **individual facsimile** from the sender, the Plaintiff contracts to pay the fax recipient (the one who actually sustained any loss or damage from an unsolicited fax) merely \$25 or \$50 per fax. Hence, this is a huge money making enterprise for the Plaintiff, as the real “victims” will receive somewhere between 1.6% to 5% of the claimed recovery and the Plaintiff will pocket the other 95% to 98%.

In this case, the Defendant alleges that it had permission to send each fax that it did send, that any faxes sent were not an advertisement, that any fax was sent in full compliance with Colorado law, that the federal TCPA is not applicable here, and that the assignments to the Plaintiff are illegal under Colorado law. (There are numerous other defenses not mentioned here.)

In evaluating the reasonableness of the discovery requests at issue herein, it is important for the court to be aware that the Plaintiff’s only business activity is that of soliciting, purchasing, and prosecuting assignments of TCPA litigation.

DISCOVERY IN QUESTION

The Defendant has propounded the following discovery:

1. A First Set of Interrogatories containing only 15 questions. See 2nd Amended First Set of Interrogatories attached hereto (Exhibit B). (These Interrogatories were amended due to some initial typographical errors.)
2. Defendant’s Second Set of Interrogatories, consisting of only 1 additional interrogatory. (Exhibit C)
3. Defendant’s First Request for Production of Documents consisting of 9 requests. (Exhibit D)
4. Defendant’s Second Request for Production of Documents, consisting of 2 additional requests. (Exhibit E)

All of these discovery requests are attached hereto. The Plaintiff responded to all four of these discovery pleadings in a single pleading, a copy of which is attached hereto. (Exhibit A)

CERTIFICATE OF COMPLIANCE

The Defendant has conferred with opposing counsel pursuant to C.R.C.P. Rule 121, §1-12(5). This conference included a telephone conversation lasting approximately one hour, wherein none of the disputed issues were resolved. A draft of

the Motion to Compel was later provided to Plaintiff's counsel in advance of this filing and Plaintiff's counsel was given another opportunity to reevaluate all of the issues raised herein. In response to the draft, Plaintiff advised that it would not concede any of the issues.

DISCOVERY RESPONSES IN GENERAL

All of the Interrogatories were objected to except one (the inquiry concerning the identity of the person who prepared the discovery responses); and the Plaintiff has not substantively responded at all to a majority of the interrogatories.

SPECIFIC DISCOVERY ISSUES

The Interrogatories and Requests at issue in this motion can be broken down into several categories.

a. Basic facts regarding the facsimiles

Plaintiff's Complaint alleges that approximately 100 facsimile "advertisements" were sent by the Defendant to approximately 25 different recipients without the recipients' permission. In the discovery at issue, Defendant seeks to know (and have sworn answers to) such essential facts as: (1) the **date** that each facsimile was allegedly received; (2) the **telephone line number** on which the facsimile was allegedly received; (3) the **owner** of the telephone line on which the facsimile was allegedly received; and (4) the identity of the **person who noticed** that facsimile's **receipt** on the fax machine.

To that discovery, the Plaintiff asserts multiple objections and then provides no information whatsoever! The Plaintiff's response improperly merely refers to the copy of the alleged facsimile which had been previously produced in this case.¹ While many of the facsimile copies produced contain some "fax header" stamps, many of those headers contain no date, nearly half of the fax sheets contain no fax/telephone number of the alleged recipient, none of the faxes provide any information about the owner of the phone line on which they were received, and none of them contain any information about the identity of the person who first noticed the receipt of the fax. All of this information is essential to the proof of the Plaintiff's claims, yet the Plaintiff objects and refuses to provide the information. There can be no dispute that the Plaintiff has to prove that a fax was sent and received. Furthermore, this information will assist the Defendant in identifying potential witnesses on the question of whether the assignors gave the Defendant permission to send the fax.

¹ Responses to Interrogatories should not merely incorporate outside material by reference or refer to other documents in lieu of providing sworn answers. Moore's Federal Practice and Procedure, §15.15, Interrogatories, (5)(d).

Defendant also requested any documentation (e.g. telephone bills or otherwise) that would establish that the assignors in question actually owned the (in many cases as yet unknown) telephone number/line on which each facsimile was allegedly received. (See Request for Production #10 & #11) Defendant has produced no such information or documentation whatsoever, referring solely to the facsimile sheets produced, which in only some cases, provide a recipient phone number on the "fax header". Obviously, that information does not establish the *ownership* of the telephone line, even if it were certain that the stamped telephone number header is the line that the facsimile was received upon. If the Defendant is being asked to pay \$1500 in penalties for the receipt of a single sheet of paper on a "victim's" facsimile machine, certainly the Defendant is entitled to receive documentation proving that the telephone line was in fact owned by the alleged recipient/assignor.

The assignee of a claim, particularly an assignee as here who has solicited the assignment after the "tort"/event in question, has an obligation to inquire and obtain all information from its assignor. Fireman's Mutual Insurance Company v. Erie-Lackawanna Railroad Co., 35 F.R.D. 297 (E. Ohio, 1964) [wherein the Plaintiff insurance company was bringing an action for tort to obtain reimbursement for losses it had paid to its insured; and the Defendant then propounded interrogatories to the Plaintiff/insurer, and Plaintiff objected to answering the interrogatories, alleging that the requested information was not within the insurer's knowledge, and that its insured was not a party to the action.]

In Fireman's, the court concluded and observed as follows:

"... plaintiff is before this court seeking to recover for a wrong which was done to another. It is here asserting a cause of action which accrued to [its insured] and which plaintiff acquired by paying to [insured] its damage claim. Plaintiff is here standing in the shoes of the [insured] and will require the testimony of its insured-assignor in order to prove its claim.

... Under such circumstances, plaintiff is obligated to secure information from its assignor as it can in order to make response to defendant's interrogatories.

.... Rule One of the Federal Rules states as the purpose of the Rules:

'...They shall be construed to secure the just, speedy, and inexpensive determination of every action. '

To allow plaintiff to be insulated from answering these interrogatories on the basis of lack of personal knowledge would not be in accord with the objective of the rules.

It would not be just, in that plaintiff would be entitled to obtain from defendant information which the defendant might possess as to the operative facts of the action, whereas defendant would be denied the same opportunity of inquiry to the plaintiff.

...If defendant cannot secure the requested information from the plaintiff, the other alternative is to take depositions of officers and employees of plaintiff's insured-assignor. That procedure most certainly would be more costly than the use of interrogatories."

Rule 33 itself requires that the party to whom an interrogatory is directed provide all information which is "*available* to" the party, not merely that information which is immediately "known to" the party. Rule 33 has been repeatedly held to require that a party provide all information which is available from sources under its control. cf. General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204 (8th Cir. 1973), cert denied.

In the case at bar, the equities even more so demand that the Plaintiff provide such answers to this discovery. Here, Plaintiff did not acquire the causes of action by even a contract or insurance policy that preexisted the "tort". Here, the Plaintiff expressly solicited and knowingly purchased an assignment from the assignors for the sole purpose of pursuing this litigation. Plaintiff cannot now reasonably or fairly insulate the facts from the Defendant's economical discovery by asserting that the information is only in the possession of Plaintiff's assignors.

b. Plaintiff's own files and correspondence concerning the faxes and assignments/assignors

Defendant has requested discovery of the Plaintiff's files² and all correspondence /notes regarding the faxes and assignments/assignors in question in this case. The Plaintiff has objected to and not produced a single file or even a single item of correspondence or note concerning any of the particular facsimiles/assignments/ assignors in question in this suit.

Defendant has also requested a description of, and the production of any written documentation thereof, the communications back and forth between the Plaintiff and its assignors concerning the faxes and assignments at issue in this case. (See Requests for Production #1, #5, #6, #8, #9; and Interrogatories #3, #4 & #12.) The Plaintiff's responses object and provide none of this requested information.

² Defendant has requested production of only the *pre-litigation* files of the Plaintiff concerning the facsimile/TCPA claims and assignments at issue in this case.

c. Identity of potential witnesses

Defendant has asked for the identity of each person who acted on behalf of each **assignor** in regard to the faxes and assignments at issue. (Interrogatory #1) Similarly, Defendant asked for the identity of each person who acted on behalf of the **Plaintiff** in regard to the faxes and assignments at issue. (Interrogatory #2) Plaintiff profusely objects to both of these Interrogatories and gives no information whatsoever in response to the Interrogatories. The responses again merely refer to the written assignments previously produced and to the Plaintiff's prior Rule 26 Disclosures. (See authorities cited in footnote 1.)

Many of those assignments do not contain legible identifying information about even the person who merely signed the assignment. They say nothing about witnesses to the faxes' receipt or other issues in the case. More importantly, neither the assignments nor the Plaintiff's prior Rule 26 Disclosures give any verified assurance that those are **all** of the witnesses who have knowledge of these facsimiles and claims. Defendant is entitled to receive sworn interrogatory answers that all knowledgeable persons have been identified. Defendant refuses to do so.

For example, assignors' employees and representatives may have knowledge concerning either the receipt/non-receipt of the fax or permission given to send the fax.

While Plaintiff informally asserts that it has provided all information "the Plaintiff is aware of", Plaintiff refuses to submit a supplemental Interrogatory answer in which Plaintiff verifies that there are: (1) no other people at the Plaintiff organization and (2) no other people at the assignors' businesses, who have knowledge of the facsimiles or assignments in this case.

While the TCPA claims were originally the property of the individual assignors, and only the representatives and employees of those assignors will have knowledge of the circumstances of the receipt of the facsimiles in question, the Plaintiff (suing as their assignee) claims to have no responsibility to gather and disclose information in the possession of the actual owner of the claim (the assignor) --- even though the Plaintiff stands in the assignor's shoes and will have to present those witnesses' testimony at trial. (Again, see law cited in (a) above).

Moreover, the Plaintiff refuses to provide a comprehensive list of even the Plaintiff's *own* employees who have been involved in the facsimiles and assignments in question. For example, the Plaintiff refuses to even say which employee of the Plaintiff received/solicited/negotiated/accepted the TCPA assignments in question.

d. Discovery of other TCPA litigation

In an effort to economically obtain information already discovered from, or exchanged by, the Plaintiff in other TCPA litigation, the Defendant has requested that the Plaintiff identify other litigation (TCPA claims only!³) in which the Plaintiff has been involved in. This would allow the Defendant to independently verify or obtain previously exchanged discovery, documents, transcripts, etc. from third persons engaged in similar litigation against the Plaintiff. Clearly, the identification of such lawsuits “may lead to the discovery of admissible evidence” in this case.

It is important for the court to be aware that the Plaintiff itself has already required the Defendant to describe all fax-related litigation that the Defendant had ever been involved in (See Interrogatory #7, filed with the Plaintiff’s prior motion to compel). The Defendant answered Plaintiff’s interrogatory, but the Plaintiff now refuses to answer that same question itself.

Similarly, the Defendant requested production of any transcripts of deposition or trial testimony given by representatives of the Plaintiff in such litigation. (Request for Production #3 and Interrogatory #11)

In response to these discovery requests, the Plaintiff objects and provides no information whatsoever. Plaintiff does not dispute that it has access to all of this information. It just refuses to provide the information that it has and wants the court to leave the Defendant to wander to every state/county trying to locate such lawsuits on its own. Even if Defendant could somehow find every one of these actions on its own, the key court paperwork would not be publicly available anyway, as prior depositions and discovery documents and pleadings are rarely filed with the courts anyway.

Finally, the mere outcome of Plaintiff’s other TCPA litigation may well be relevant, instructive to the parties and the court, or have collateral estoppel effect on this litigation.

e. Circumstances under which the Plaintiff solicited and obtained these assignments.

Other discovery requests inquired of the circumstances under which the Plaintiff contacted the assignors and/or solicited the assignments, and to the circumstances under which the Plaintiff came to own the assignments upon which it sues. (Interrogatories #6, #7, & #12; Request for Production #2, #4, #5, & #6)

³ While the original discovery requests were not limited to merely TCPA claims, the only litigation that Plaintiff has ever been involved in is apparently TCPA claims. See Plaintiffs’ own sworn statement in its answer to Interrogatory #9 and response to Request for Production #7)

f. Documents related to the payments the Plaintiff has made to the assignors

While the Plaintiff has apparently identified the total amount of money paid to the assignors (See answer to Interrogatory #5, one of the few Interrogatories answered), the Plaintiff has refused to produce any documents related to these payments. (See response to Request for Production #8) These documents are relevant to verification of the payments/consideration given for the assignments and would presumably contain verification of the claimed payments and the dates of those payments.

g. Attorney's fees

The Defendant has incurred attorney's fees in the amount of \$2,260 as a result of the Defendant's efforts to identify all discovery deficiencies, attempt to resolve the issues in this motion and in the preparation, research, and filing of this motion. Defendant requests an award of such attorney's fees, pursuant to Rule 37(a)(4).

CONCLUSION

Plaintiffs should be ordered to fully answer the Interrogatories and fully respond to the Request for Production of Documents, without regard to objections, including information in the possession of the assignors, and to provide such supplemental responses within 20 days of the date of the Order. A proposed Order is tendered herewith.

ROGER T. CASTLE, P.C.

A duly signed original of this document is on file at the office of Roger T. Castle.

Roger T. Castle, #7621

CERTIFICATE OF MAILING

I hereby certify that on this 24th day of September, 2004, I have served Defendant's Motion to Compel via Courtlink to the following:

Stephen Allen, Esq.
Frank Ball, Esq.
Law Office of Frank J. Ball
7880 E. Berry Place
Greenwood Village, CO 80111

A duly signed original of this document is on file at the office of Roger T. Castle.
