EXHIBIT 4

STATE OF SOUTH CAROLINA) IN THE SMALL CLAIMS COURT
) CASE NO.: 98-SC-86-5519
COUNTY OF CHARLESTON)

ROBERT BIGGERSTAFF,)
Plaintiff,)
)
vs.)
)
LOW COUNTRY DRUG SCREENING)
INC.)
Defendant.)
)

ATTEST A TRUE COPY

ORDER

Filed in Charleston County Small Claims Court

NOV 2 9 1999

The above captioned matter came before this Court for trial on February 28, 1999. Plaintiff appeared pro se. Defendant was represented by Sean Keefer, Esq. of the Mason Law Firm. After considering all of the evidence and arguments, this Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The material facts of this case are essentially undisputed. During November 1998, Defendant sent, via electronic facsimile ("fax") machine, a large number of single-page advertisements promoting its commercial drug testing services. An employee of Defendant used the fax numbers printed in the Charleston Metro Chamber of Commerce 1998 Membership Directory and Buyer's Guide (the "Guide") as the source for the fax numbers to send the advertisements to. On November 6, 1998, one of these fax advertisements was sent to Plaintiff's fax machine. The parties have stipulated that Defendant in fact sent the unsolicited advertisement in question to Plaintiff's fax machine. Uncontroverted testimony of Defendant's own witness established that sending out its advertisements via fax was significantly less expensive for Defendant than sending the same advertisements by other marketing means such as direct mail. Defendant kept no records of whether or not new customers or sales were obtained from these fax advertisements.

In October of 1997, Plaintiff had joined the Charleston Chamber of Commerce as an individual. In filling out his application for membership in the Chamber, Plaintiff had provided information

including his mailing address, phone number, and fax number. Subsequently, this information was published in the Guide as part of the Chamber's membership roster, along with similar information on the other Chamber members, both individuals and businesses. Most members are businesses and are listed in the membership roster under various business categories, while Plaintiff was listed, along with several other individuals, under the section titled "Individual Memberships." Guide p. 115. There is no evidence that Defendant ever had any direct contact with Plaintiff or that Plaintiff expressly consented to the receipt of unsolicited faxes from Defendant.

Based on these facts, Plaintiff filed suit under the federal Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, December 20, 1991, which amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 et seq., by adding a new section, 47 U.S.C. § 227 (the "TCPA") to that Title.

Defendant's original Answer, filed December 18, 1998, raised as a defense to the TCPA claim that this State has not enabled suits under the TCPA by passing specific legislation to open this state's courts to private actions under the TCPA. Defendant also claimed that Plaintiff failed to comply with provisions of S.C. Code Ann. § 15-75-51 and is therefore barred from recovery. After this Court granted Defendant's motion for leave to file an amended Answer at a hearing on February 11, 1999, Defendant raised an additional defense that by his acts in joining the Chamber of Commerce whereby his facsimile number was published in the membership list, Plaintiff "consented, either expressly or in the alternative, impliedly, to the receipt of material at the address, phone and fax numbers published in the Guide." Amended Answer ¶ 36.

CONCLUSIONS OF LAW

1. Applicability of S.C. Code Ann. §§ 15-75-50 and 51

As a preliminary matter, S.C. Code Ann. §§ 15-75-50 and -51 have no application to this case. Code § 15-75-50 is similar to the TCPA insofar as it provides a civil remedy under state law with statutory damages of $200 for sending an unsolicited advertisement via fax. Section 15-75-51 provides that, before taking action against the sender of an unsolicited fax advertisement under § 15-75-50, the complaining party must notify the sender to stop:

> SECTION 15-75-51. Notice not to transmit unsolicited material required prior to imposition of penalty.
>
> The penalty provided by Section 15-75-50, including injunctive relief, may not be imposed unless the person who is alleged to have violated that section does so after being instructed, (1) in writing, (2) by telephone, or (3) by a machine that electronically transmits facsimiles through connection with a telephone network, by the receiver of the unsolicited advertising material not to transmit the material.

Plainly this condition on recovery only applies to recovery under Section 15-75-50. The Complaint relies on the federal law for the relief sought and makes no reference to this code section.

The TCPA, at 47 USC §227[e] states in part, "nothing in this section or the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits - (A) the use of telephone facsimile machines...to send unsolicited advertisements...".

The clear import of this provision is that states may further restrict the use of facsimile machines to send unsolicited advertisements but they may not lessen or reduce the restrictions imposed by federal law. In that case the Plaintiff need only choose the more restrictive federal law upon which to base his cause of action. In this case Plaintiff sought relief under federal law.

II. <u>The TCPA does not require a state to "opt in"</u>

Defendant argues that the clause in the TCPA "if otherwise permitted by the laws or rules of court of a State" conditions the right to bring suit in a state court on permission having been affirmatively granted by that state. In other words, Defendant argues that the state must "opt in" before the doors of its courts are deemed to be open to TCPA suits. Defendant urges that, because federal courts' doors are closed to private suits under the TCPA,[1] requiring a state court to enforce the federal law would be an unconstitutional commandeering of the state's resources.

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[1] See Int'l Science & Tech. Inst., Inc. v. Inacom Commun., Inc. 106 F.3d 1146 (4th Cir.1997) (holding that state courts have exclusive jurisdiction over private suits under the TCPA) which was followed by the Fifth, Eleventh, Third, and Second circuits in succession; but see, Kenro, Inc. v. Fax Daily, Inc., 904 F.Supp. 912 (S.D. Ind. 1995) and on rehearing Kenro, Inc. v. Fax Daily, Inc., 962 F.Supp. 1162 (S.D. Ind. 1997) (holding that federal courts have jurisdiction over TCPA claims by virtue of federal-question jurisdiction under 28 U.S.C. § 1331).

It is the Constitution itself, not Congress, that imposes the duty upon an appropriate state court to hear claims arising under a valid federal statute such as the TCPA. For that reason, the TCPA clearly presents no Tenth Amendment "commandeering" problem, regardless of whether jurisdiction is exclusive in the state courts or concurrent with the federal courts. The "if otherwise permitted" language of the TCPA was fully explored by the Fourth Circuit in Int'l Science, 106 F.3d at 1156:

> The clause . . . "if otherwise permitted by the laws or rules of court of a State" does not condition the substantive right to be free from unsolicited faxes on state approval.

At least one other court has agreed, as this language was adopted in a similar case in the Second Circuit. Foxhall Realty Law Offices, Inc. v. Telecommun. Premium Svcs., Ltd., 156 F.3d 432, 438 (2nd Cir. 1998). A cause of action under the TCPA is therefore available in this State's courts to all citizens of this State without any requirement for the State to "opt-in" to the TCPA.

III. Implied versus express consent.

Defendant argues that, by joining the Chamber of Commerce and allowing his facsimile number to appear in the membership list, Plaintiff consented to receipt of unsolicited fax advertisements at that number. Plaintiff argues that even if his actions could be construed as implied consent to receive fax advertisements, the TCPA requires prior express consent as the only exception to the prohibitions on sending unsolicited fax advertisements. 47 U.S.C. § 227(a)(3). Thus our inquiry is reduced to a pure question of statutory construction of the phrase "prior express invitation or permission."

We begin, as we must, with the plain language of the statute, which provides at § 227(b)(1):

> 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; . . .

The TCPA defines "unsolicited advertisement" by:

> (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. [emphasis added]

In general, the TCPA restricts or prohibits three types of solicitations: 1) unsolicited fax advertisements to homes and businesses, 2) telemarketing solicitations by an artificial or prerecorded voice, and 3) telemarketing solicitations by live agents. It is worth noting that the restrictions on

unsolicited fax advertisements are the most rigid of the three. In addition to an exemption for prior express consent, the restrictions on voice telemarketing solicitations generally exempt calls to businesses, provide exemptions for charities, and provide for an established-business-relationship exemption under certain circumstances. 47 U.S.C. § 227(a)(3). These and other additional exemptions are not available to fax advertisements. Compare § 227(a)(3) with § 227(a)(4). The maxim casus omissus pro omisso habendus est instructs us that such an exclusion is intentional. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Rodriguez v. United States, 480 U.S. 522, 525 (1987).

By excluding these additional exemptions from the prohibitions of fax advertisements, Congress singled out unsolicited faxes for the most stringent restrictions imposing strict liability. This is wholly reasonable, given that Congress found unsolicited fax advertisements interfered with commerce and cost the recipient both time and money. See H.R. Rep. No. 317, 102nd Cong., 1st Sess. 1991 at 10, 25. It shifts the cost of advertising to the unwilling recipient. Id. at 25. It is analogous to a long distance telemarketing call made with the charges reversed or junk mail sent with postage due. As a result, the statute is explicit that obtaining "prior express invitation or permission" presents the only exception to the TCPA's blanket prohibition on sending unsolicited fax advertisements.

A. Construction of "Prior Express Permission or Invitation"

On the question of statutory interpretation the South Carolina Supreme Court has said. "Where the terms of the statute are clear, the court must apply those terms according to their literal meaning." Soil Remediation Co. v. Nu-Way Environmental, Inc., 323 S.C. 454, 457, 476 S.E.2d 149, 151 (1996). citing Paschal v. State of S.C. Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995). "In construing a statute, its words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Adkins v. Comcar Industries, Inc., 323 S.C. 409, 411, 475 S.E.2d. 762, 763 (1996). We are also mindful that the TCPA is a remedial statute and "should be liberally construed and interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers." Scarborough v. Atlantic Coast Line R. Co., 178 F.2d 253, 258

(4th Cir. 1950). Exemptions from provisions of remedial statutes "are to be construed narrowly to limit exemption eligibility." Hogar v. Suarez-Medina, 36 F3d 117, 182 (1st Cir 1994); accord Olson v. Lake Country, Inc., 955 F.2d 203, 206 (4th Cir. 1991). See also 3 N. Singer, Sutherland Statutory Construction § 60.01.

The term "prior express invitation or consent" is not defined in the statute. Black's Law Dictionary defines "express" as:

> Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C.A.Minn., 34 F.2d 270, 274. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with "implied."

Black's Law Dictionary (Revised 6th ed.) Webster's dictionary provides a similar definition. This is the proper definition to use within the context of the TCPA and is confirmed by the FCC's opinion:

> Although the term "express permission or invitation" is not defined in statutory language or legislative history, there is no indication that Congress intended that calls be excepted from telephone solicitation restrictions unless the residential subscriber has (a) clearly stated that the telemarketer may call and (b) clearly expressed an understanding that the telemarketer's subsequent call will be made for the purpose of encouraging the purchase or rental of, or investment in, property, goods or services.[2]

In the Matter of the Telephone Consumer Protection Act of 1991, Memorandum Opinion and Order, ¶ 11, 10 FCC Rcd 12391, 78 Rad. Reg. 2d (P&F) 1258 (August 7, 1995) 1995 WL 464817 (F.C.C.). The same FCC order states that "We [the FCC] do not believe that the intent of the TCPA is to equate mere distribution or publication of a telephone facsimile number with prior express permission or invitation to receive such advertisements." Id.

This court agrees with Black's and with the FCC, and accordingly holds that for the purposes of the TCPA, "prior express permission or invitation" means that the sender must obtain prior consent from the recipient in direct and explicit terms, set forth in words, and not left to inference or

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[2] While the FCC is addressing the "express permission or invitation" clause in the TCPA as applied to live operator telemarketing calls, the same construction applies equally to that phrase with respect to telephone facsimiles.

implication. This consent must state clearly and unambiguously that the sender may send fax advertisements to the recipient. Accordingly, we find that Plaintiff's actions do not constitute "prior express invitation or consent" as required by the statute. Defendant's alternative claim that Plaintiff's actions gave implied consent is not relevant. Even if consent could be inferred or implied from Plaintiff's actions, the statute plainly requires prior express consent. We therefore find for Plaintiff on the issue of liability. The TCPA at § 227(b)(3)(B) provides that Plaintiff shall recover the greater of actual monetary loss or $500 in damages for each such violation of the statute or FCC rules. Plaintiff has not claimed any actual damages and is entitled to the statutory minimum damages of $500 for the violation he has proven.

IV. Willful or Knowing Violations

Plaintiff also alleges that Defendant's actions are "knowing and/or willful" within the meaning of the 1934 Communications Act and prays for treble damages as provided for by the TCPA, which provides, in pertinent part:

> 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). "Willfully" and "knowingly" are terms of art within the law. "'Willfully' means something not expressed by 'knowingly,' else both would not be used conjunctively." United States v. Illinois Central R. Co., 303 U.S. 239, 243 (1938).[3] The terms therefore have different meanings within the TCPA, and we consider each separately.

A. Knowingly

The FCC has a well established construction of "knowing" as used throughout that agency's administration of the 1934 Communications Act. This standard is set out as a clear "knew or should have known" standard. Intercambio, Inc., 3 FCC Rcd. 7247, 64 Rad. Reg. 2d (P & F) 1663, 1988 WL 486783 (F.C.C.); Audio Enterprises, Inc., 3 FCC Rcd. 7233, 64 Rad. Reg. 2d (P & F) 1681, 1988 WL 486782 (F.C.C.).

> As stated previously, the term "knowingly," for purposes of enforcement actions brought under Section 223(b)(4), does not require that a person have a specific intent to violate the statute.

[3] But see e.g. Hutchman v. State, 66 P.2d 99, 101-2, 61 Okl. Cr. 117 (1937). ("'Willfully' is equivalent to 'knowingly.'") Citing Words and Phrases volume 8 [First Series], pp. 7474 and 7475: ("These words are used interchangeably and both convey the same meaning.")

> Rather, the "knowingly" standard only requires that a person either had reason to know or should have known that it engaged in acts which could constitute a violation of the statute.

Intercambio, ¶ 41.

As the administrative agency charged with administering the TCPA, the FCC's definition is entitled to great deference from a court where that definition is not clearly at odds with the intent of Congress. Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984). "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." Id. At 843 n 11. Other authorities agree with the FCC, having held that "knowingly" "does not have any meaning of bad faith or evil purpose or criminal intent." United States v. Sweet Briar, Inc., 92 F.Supp. 777, 780 (D.S.C. 1950).[4] Similarly, "knowingly" can not be held to mean knowledge that a particular act was a violation of the law, as this would conflict with the truism that all persons are presumed to know the law.

We note that in addition to private suits brought by individual consumers, the FCC is empowered by the Communications Act to take actions against persons violating the TCPA. 47 U.S.C. § 503. "Federal laws 'should be the same everywhere' and 'their construction should be uniform.'" U.S. Term Limits, Inc. v. Thornton, 514 US 779, 812 (1995) citing Murdock v. City of Memphis, 87 U.S. 590, 632 (1874). Since the FCC would properly impose its well established definition of "knowing" on its own enforcement actions against TCPA violators, it could subvert uniform enforcement of the TCPA if state courts hearing TCPA cases imposed a different definition than the FCC. In other words, conduct that would be "knowing" in an action brought by the FCC might not be "knowing" if the same action was brought by a consumer in a state court. Therefore this Court will give deference to the FCC's construction and hold that "knowing" within the context of the TCPA requires only that a Defendant knew or should have known it was engaged in acts which could constitute a violation of the statute.

Applying this "knew or should have known" standard, it is clear that Defendant should have known that its actions could constitute a violation of the statue. Any business that engages in a regulated activity (in this case sending advertisements via fax) must fully acquaint itself with the laws and regulations governing that activity - or risk the consequences for that laxity. Had the fax sent to Plaintiff been misdirected as a result of an error in

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[4] See generally United States v. Singkey, 119 F.3d 712 (8th Cir. 1997), for a recent exploration of "knowing" in federal courts.

dialing, a wrong number, or otherwise not due to fault or negligence of Defendant, it would not fall within the "knowing" standard. While it may seem harsh to apply such strict liability with a "knew or should have known" standard, that is nonetheless the standard the FCC would undoubtedly apply, and thus is the appropriate standard for this Court to apply to the TCPA. It has been long established that harshness is no justification for a court to alter its interpretation of the law. "If the true construction has been followed with harsh consequences, it cannot influence the courts in administering the law. The responsibility for the justice or wisdom of legislation rests with the Congress, and it is the province of the courts to enforce, not to make, the laws."

B. Willfully

The FCC's construction of "willful" is set forth in In re Southern California Broadcasting Co., 6 FCC Rcd. 4387, 69 Rad. Reg. 2d (P & F) 953 (1991). In Southern California Broadcasting, the FCC took action against the respondent under 47 U.S.C. § 503(b)(1)(B), which provides for forfeitures for "willful or repeated" violations of the FCC's rules. The FCC cited a line of prior Commission rulings[5] and said:

> The [House] Conference Report . . . specifically notes Congress's intent that the definition is consistent with the Commission's decision in Midwest Radio-Television, Inc. [citation omitted] Thus, consistent with congressional intent, recent Commission interpretations of "willful" do not require licensee intent to engage in a violation.

Southern California Broadcasting, ¶ 5. The "congressional intent" was a Conference Committee report[6] regarding the amendment to the 1934 Communications Act, which established a statutory definition for the term "willful" at 47 U.S.C. § 312(f)(1):

> (1) The term "willful," when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter [Chapter 5 of the Communications Act] or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States.

Prior to adoption of this statutory definition in 1982, the FCC consistently used a similar definition in its own proceedings. See In the Matter of Liability of Midwest Radio-Television, Inc. 45 FCC 1137 (1963). Congress created the statutory definition at § 312(f)(1) for the specific purpose of codifying the FCC's definition used in

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[5] Citing MCI Telecommunications Corp., 3 FCC Rcd 509, 514 n. 22 (1988) (subsequent history omitted); Hale Broadcasting Corporation, 79 FCC 2d 169, 171 (1980).

[6] H.R.Conf.Rep. No. 97-765, 97th Cong.2d Sess. (1982), reprinted in 1982 U.S.C.C.A.N. 2294.

Midwest Radio-Television. H.R.Conf.Rep. No. 97-765, at 51. ("The definitions . . . are consistent with the Commission's application of those terms in Midwest Radio-Television Inc., 45 F.C.C. 1137 (1963).") Congress further stated that this statutory definition would control "for any other relevant section of the [1934 Communications] Act." Id. at 50. The TCPA, as an amendment to the 1934 Communications Act, is such a relevant section since it uses "willful" as the defined term of art.

The result of the statutory definition and FCC construction of "willful" is to remove any element of intent or mens rea from the term, which is a common construction in the law. Other authorities recognize that "willful" can be used in a sense "which does not imply any malice or wrong." See 94 C.J.S. 625-26 and cases cited therein. Intent to do a wrongful act is not an essential element of willfulness. Id. at 625 It implies nothing blamable, but simply the act of a free agent. Smith v. Wade, 461 U.S. 30 (1983), n 8, citing 30 American and English Encyclopedia of Law, 529-530 (2d ed. 1905) (footnote omitted).

To avoid a finding of willfulness, it is important to distinguish the nature of the conduct (which must be unintentional), and not the violation of the regulation to which the conduct led. The FCC has used the example of "bumping a switch" as an example of a non-willful act that could give rise to a violation that would not be construed as willful. In re Valley Page, 12 FCC Rcd. 3087 at ¶ 6, 1997 WL 106481 (F.C.C.). ("[W]illfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question such as using a radio transmitter, as opposed to being accidental (for example, brushing against a power switch turning on a radio transmitter).") In addition, the FCC has consistently found willfulness where "laxity" has led to preventable violations. Midwest Radio-Television, at 1141. In the case of the TCPA and as used by the FCC, "willful" simply means that the act out of which a violation arises was not an accident or mistake, even if the resulting violation was unintended.

As with its established construction of the term "knowing," the FCC would apply its long-established definition of "willful" to TCPA actions. This court will do likewise and adopt the FCC construction of "willful" codified in the Communications Act at 47 U.S.C. § 312(f)(1). Accordingly, this Court holds that a "willful" violation of the TCPA exists where there is a conscious and deliberate commission or omission of an act which results in a violation, irrespective of any intent to violate any law or regulation.

Testimony was undisputed that the fax advertisement sent to Plaintiff was not an accident or mistake. Defendant intended to send the fax to Plaintiff and did exactly what it intended to do. Therefore, this was a willful action which was a violation of the statute and clearly within the "willful" standard proper for the TCPA.

V. Trebled Damages

Having found that Defendant's violation of the statute was willful and knowing, the amount of exemplary damages is entirely within the discretion of this Court. Defendant engaged in illegal conduct, and reaped a gain from this conduct in the form of reduced advertising costs - and possibly even new customers. We are mindful that there may be some manner of violative conduct more egregious than what this defendant did and the full effect of the TCPA's trebled damages should be reserved for those most egregious violators. This Defendant's conduct deserves a measured response, and this Court finds that the appropriate amount of exemplary damages in this case to be Fifty and no/100($50.00) dollars.

It is hereby ORDERED, ADJUDGED AND DECREED, that Plaintiff shall have judgment against Defendant for Five Hundred Fifty and no/100($550.00) dollars plus Thirty Five and no/100($35.00) dollars court costs.

AND IT IS SO ORDERED.

Henry W. Guerard, Magistrate
November 29, 1999, Charleston South Carolina.