

**IN THE DISTRICT COURT
CLEVELAND COUNTY, STATE OF OKLAHOMA**

)	
)	
ROBERT H. BRAVER)	
Plaintiff,)	
v.)	
)	
)	Case No. CJ-2000-1628 BH
MIKE HIGGINS, d/b/a)	
SATELLITES DIRECT, and)	
ECHOSTAR COMMUNICATIONS)	
CORPORATION, d/b/a)	
DISH NETWORK,)	
Defendants.)	

**PLAINTIFF’S MOTION FOR TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION
AND BRIEF IN SUPPORT THEREOF**

COMES NOW the Plaintiff, Robert H. Braver (“Plaintiff”), and respectfully moves this Honorable Court for an order restraining and enjoining Defendants Mike Higgins and Echostar Communications Corporation (“Defendants”) from conducting prerecorded telephone solicitations which are in violation of the Telephone Consumer Protection Act of 1991 (“TCPA”), principally at 47 USC § 227 with its implementing regulations principally at 47 CFR § 64.1200.

INTRODUCTION

This is an action by the Plaintiff for damages and immediate injunctive relief arising from at least two automatically dialed, prerecorded telephone solicitations placed by Defendants to Plaintiff’s residence. Further, on information and belief, the Defendants are

engaged in a massive unlawful telemarketing campaign to consumers throughout the State of Oklahoma as well as neighboring states, including Texas and Missouri.

The TCPA is a remedial, private attorney general statute that confers to consumers the substantive right to be free of this abusive practice that creates a nuisance in their homes. Under the statute, consumers, such as the Plaintiff here, are entitled as a matter of law to seek and obtain judgment for minimum statutory damages and injunctive relief against violators.

FACTUAL BACKGROUND

On at least two occasions in November and December, 2000, Defendant Echostar Communications Corporation, by and through its authorized agent Defendant Mike Higgins, initiated unsolicited, prerecorded telephone solicitations to Plaintiff's residence in violation of 47 CFR § 64.1200(a)(2), 15 O.S. §755.1, and 21 O.S. § 1847a.

The prerecorded calls were made without the prior express permission or invitation of Plaintiff, and the Plaintiff does not have any kind of established business relationship with either defendant. (See affidavit of Robert H. Braver, attached hereto as Exhibit "A").

Furthermore, the prerecorded message did not identify the individual or business initiating the call, as mandated by 47 CFR § 64.1200(d)(1) and 21 O.S. § 1863; nor did it provide an address or telephone number where the calling party could be reached, as required by 47 CFR § 64.1200(d)(2) and 47 CFR § 64.1200(e)(2)(iv). (*Id.*).

After investigating and determining the identity of the calling party, Plaintiff contacted Mike Higgins and Echostar, and then brought this suit when it became apparent that the Defendants would not voluntarily cease their unlawful telemarketing practices.

In spite of being made aware of the relevant federal and State laws prohibiting Defendants' conduct and having a lawsuit filed against them on December 6, 2000, Defendants continue to engage in a pattern and practice of initiating these prerecorded telephone solicitations that not only run afoul of the TCPA, but are also expressly prohibited by the OCPA, and constitute a misdemeanor under 21 O.S. § 1847a, as well as a felony for the third and subsequent convictions under 21 O.S. 1861.

ARGUMENT AND AUTHORITY

I. PLAINTIFF IS ENTITLED TO INJUNCTIVE RELIEF AS A MATTER OF LAW

The TCPA specifically provides for a private right of action in state court to obtain an injunction to prevent further violations of the TCPA or the FCC regulations promulgated thereunder¹. As the right to obtain an injunction is specifically provided for by statute, and the injunctive relief being sought simply requires the cessation of clearly illegal activity under state and federal law, this Court should, as a matter of law, grant Plaintiff's request for a temporary, preliminary, and permanent injunction without bond².

II. SCOPE OF INJUNCTIVE RELIEF

The only question that remains regarding the issuance of an injunction in this case, is should Defendants be enjoined from initiating **any** further unsolicited prerecorded telemarketing calls, or should Defendants only be enjoined from initiating further unsolicited prerecorded telemarketing calls to the named Plaintiff?

¹ 47 USC § 227(b)(3)(A) and 47 USC § 227(c)(5)(A).

² 12 O.S. § 1392: "*Unless otherwise provided by special statute, no injunction shall operate until the party obtaining the same shall give an undertaking, with sufficient surety, to be approved by the clerk of the court granting such injunction, in an amount to be fixed by the court or judge allowing the same, to secure the party*

Like many other consumer protection statutes, the TCPA expressly provides for injunctive relief and relies principally on private citizen enforcement. See Erienet, Inc. v. Velocity Net, Inc., 156 F.3d 513 (3rd Cir.1998). “private enforcement provision [in the TCPA] puts teeth into the statute ...” The Oklahoma Supreme Court has also recognized the principle of a Private Attorney General. See, e.g. Thiry v. Armstrong World Industries, 661 P.2d 515 (1983 OK 28) “The plaintiff acts as a private attorney general to punish the culpable wrongdoer, thereby encouraging adherence to safety standards that benefit consumers generally.”

Few courts have applied the injunctive relief in the TCPA. The only case where a private plaintiff has specifically sought preliminary injunctive relief was in a Georgia state court which granted plaintiff’s request and issued “a temporary restraining order enjoining Hooters from sending further advertisements by facsimile.” Nicholson v. Hooters of Augusta. 136 F.3d 1287, 1288 (1998) (reciting history of the case in the courts below)³.

In Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) the Supreme Court noted that when a plaintiff in this situation obtains an injunction, “he does so not for himself alone, but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.” The Supreme Court also held that, “[t]his and other federal courts have repeatedly held that individual litigants, acting as private attorneys-general, may have standing as “representatives of the public interest.” Flast v. Cohen, 392 U.S. 83, 120 (1968) (Harlan, J. dissenting). A specific application noted in the context of fair

injured the damages he may sustain, including reasonable attorney’s fees, if it be finally decided that the injunction ought not to have been granted.” [Emphasis added]

housing laws, that “[t]he person on the landlord’s blacklist is not the only victim of discriminatory housing practices; it is... the whole community.” Red Bull Assoc. v. Best Western Int’l., 686 F.Supp. 447, 451 (S.D.N.Y. 1988). This philosophy applies equally to the TCPA. It is not just the named Plaintiff in this case that has suffered at the hands of Defendants’ continued non-consensual prerecorded advertising transmissions. Undoubtedly, hundreds of thousands of consumers in Oklahoma and surrounding states have been and will continue to be abused by Defendants’ unlawful telemarketing practices unless and until they are compelled to stop. The Defendants are clearly undissuaded from this course of continued conduct as shown by the fact that they continue their unlawful transmissions after being made aware of the applicable federal and State laws, and indeed after this suit was filed.

III. DISCRETION TO FASHION APPROPRIATE INJUNCTIVE RELIEF

It is fundamental that every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction. National Collegiate Athletic Ass’n v. Owens, 555 P.2d 879 (1976 OK 136), citing Inverarity v. Zumwalt, 97 Okl.Cr. 294, 262 P.2d 725 (1953).

Even if the relief benefits the public much more than the individual, who the primary beneficiary is, is irrelevant:

Congress often takes advantage of individual incentives to advance public policy, relying upon “private attorneys general” to secure enforcement of public rights without the need to establish an independent enforcement bureaucracy. As long as the interests of individual plaintiffs coincide with those of the public, it does not

³ A similar injunction was entered in State of Arkansas v. Tri-Star Marketing, Inc., No.C99-1888R at 11 (Sep. 13, 2000) but that action was brought by the Arkansas and Washington attorneys general under the attorney general cause of action in the TCPA.

matter whether Congress intended primarily to benefit the individual or primarily to benefit the public.

Evans v. Jeff D., 475 U.S. 717, 752, note 4 (1986).

Defendants do not have any right to engage in conduct that clearly violates the TCPA and OCPA, much less criminal conduct that in one aspect rises to the level of being a felony in the State of Oklahoma. With that in mind, Defendants deserve to have the plug pulled on their illegal telemarketing nuisance. This Court has the discretion, and the obligation, to fashion the relief to address the violative pattern of conduct and protect **all** citizens from Defendants' activities.

Even without considering the private attorney general aspect well settled in law, the named Plaintiff is entitled to the injunction for his own benefit. The only way to protect the Plaintiff from the rampaging dialing of Defendants is to prohibit Defendants from initiating their illegal prerecorded telemarketing calls to **any telephone number** to which Defendants do not have express prior consent. This is the only sufficient way to properly and **completely** protect the Plaintiff in this case. The Plaintiff here is prosecuting this matter in his own name, and asks for that relief to protect himself, no matter what telephone number he has, or may acquire in the future. Furthermore, Plaintiff should not be required to disclose his unpublished telephone numbers in order to facilitate Defendants' cessation of their criminal acts with regard to the Plaintiff while they merrily blast away at all other telephone numbers. The fact that the public may benefit collaterally is a militating factor in favor of the relief sought, not a ground on which it is premised. It is well settled that an injunction is an appropriate means for the enforcement of an Act of Congress when it is in the public

interest. Hecht Co. v. Bowles, 321 U.S. 321 (1944); Virginia R. Co. v. System Federation No. 40, 300 U.S. 515, 552 (1937).

Put another way, if a man lives downstream from a polluter, and he successfully enjoins the polluter from continuing to pollute the water supply, the fact that the man's unnamed neighbors also benefit from such an injunction does not make the remedy granted to the individual plaintiff improper. "That a court is called upon to enforce public rights and not the interests of private property does not diminish its power to protect such rights. 'Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" Scripps-Howard Radio v. Federal Communications Com'n, 316 U.S. 4, 14-5 (1942) citing Virginian Ry. v. System Federation, 300 U.S. 515, 552 (1937).

CONCLUSION

While difficult to quantify, illegal nuisance telemarketing calls, such as those initiated by the Defendants, are certainly injurious to the Plaintiff, as well as to consumers throughout the state and the country. Defendants are engaged in a massive unlawful campaign, creating a nuisance in thousands of homes that cannot be undone, trampling on consumers' legally guaranteed rights to be free of such nuisance under both federal and state law. The public's annoyance at these repeated and intrusive calls was of paramount importance to the Congress in drafting the Act:

"The Congress finds that...[t]he use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.
* * * Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers. * * * *Banning such*

automated or prerecorded telephone calls to the home... is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.” (Emphasis added)

[Telephone Consumer Protection Act of 1991, Congressional Statement of Findings, Section 2 of Pub. L. 102-243.]

Defendants will suffer no undue hardship by the entry of an injunction since Defendants have no right to engage in unlawful conduct or unfair trade practices in the State of Oklahoma, or to collect money from consumers as a result of such conduct. Further, Defendants have no right to unjustly benefit from current or prior unlawful conduct or unfair trade practices. In determining the right to an injunction where the acts sought to be enjoined are clear violations of legally guaranteed rights, there is no balancing of conveniences necessary.

Accordingly, Plaintiff respectfully suggests that, as a matter of law, this Court should immediately issue an order temporarily and permanently enjoining Defendants from initiating further prerecorded telemarketing calls, and for whatever other relief this Court deems appropriate.

Respectfully submitted,

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