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3:03-CV-01438 PEOPLE OF THE STATE V. FAX.COM INC

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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

THE PEOPLE OF THE STATE OF
CALIFORNIA and STATE OF INDIANA,

Plaintiff,

v.

FAX.COM, INC., a Delaware Corporation;
KEVIN KATZ, ERIC WILSON; CHARLES
MARTIN; THOMAS ROTH; JEFFREY
DUPREE; EVERGLADE ENTERPRISES, LLC,
a Limited Liability Company; JOE GARSON,
individually and doing business as EVERGLADE
ENTERPRISES, LLC, a Limited Liability
Company; LIGHTHOUSE MARKETING, LLC, a
California Limited Liability Company; TECH
ACCESS SYSTEMS, CORP., a California
Corporation; TELCOM TECH SUPPORT, LLC,
a California Limited Liability Company; ROBERT
W. BATTAGLIA; IMPACT MARKETING
SOLUTIONS, LLC, a California Limited
Liability Company; STANTON MARKETING,
INC., a California Corporation; PAUL L.
STANTON; DATA RESEARCH SYSTEMS,
INC., a Nevada Corporation, and DOES 1-10,

Defendants.

CASE NO.: 03 CV 1438 DMS (AJB)

PRELIMINARY INJUNCTION

1 Plaintiffs, the PEOPLE OF THE STATE OF CALIFORNIA, appearing through its attorney,
2 Bill Lockyer, Attorney General of the State of California, by Judith A. Fiorentini, Deputy Attorney
3 General, and the State of Indiana, appearing through its attorney, Stephen Carter, Attorney General
4 of the State of Indiana, by Marguerite Sweeney, Deputy Attorney General, and Defendants Fax.com,
5 Inc.; Kevin Katz; Eric Wilson; Charles Martin; Thomas Roth; Jeffrey Dupree; Everglades
6 Enterprises, LLC; Joe Garson, individually and doing business as Everglades Enterprises, LLC; Tech
7 Access Systems, Corp.; Telcom Tech Support, LLC; Robert W. Battaglia; Impact Marketing
8 Solutions, LLC; and Data Research Systems, Inc., appearing personally and through their attorney
9 James H. Casello, having stipulated and consented to the entry of this Preliminary Injunction without
10 the taking of proof and without this Preliminary Injunction constituting evidence or an admission
11 of the Defendants regarding any issue or fact alleged in the complaint, and without Defendants
12 admitting any liability herein, and the Court having considered the matter and the pleadings, and
13 from the evidence before the Court and good cause appearing therefrom:

14 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that:

- 15 1. This Court has jurisdiction over the subject matter and the parties hereto.
- 16 2. The injunctive provisions of the Preliminary Injunction are applicable to Defendants
17 Fax.com, Inc.; Kevin Katz; Eric Wilson; Charles Martin; Thomas Roth; Jeffrey Dupree; Everglades
18 Enterprises, LLC; Joe Garson, individually and doing business as Everglades Enterprises, LLC; Tech
19 Access Systems, Corp.; Telcom Tech Support, LLC; Robert W. Battaglia; Impact Marketing
20 Solutions, LLC; Data Research Systems, Inc., ("Defendants") and to their agents, assigns,
21 employees and representatives, and to all persons acting by, through, under or on behalf of
22 Defendants, and to all persons acting in concert with or participating with the Defendants who have
23 actual or constructive knowledge of this Preliminary Injunction.
- 24 3. Pursuant to 47 U.S.C. section 227 (f)(2), the Defendants, and each of them, are hereby
25 commanded to comply with the provisions of the Telephone Consumer Protection Act (TCPA), 47
26 U.S.C. section 227, including the requirement that the Defendants take such action as is necessary
27 to remove the danger of such violation. Pursuant to 47 U.S.C. section 227 (f)(2), the Defendants,
28 and each of them, are hereby enjoined and restrained from:

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- a) Violating, or assisting and/or facilitating in the violation of the provisions of the TCPA, 47 U.S.C. section 227, including the requirement that Defendants take such action as is necessary to remove the danger of such violation;
- b) Engaging in a pattern or practice of sending, or causing to be sent, unsolicited faxes, via facsimile machine, computer, or other device to facsimile machines located within the United States in violation of the TCPA, 47 U.S.C. § 227(b)(1)(C), or 47 C.F.R. § 64.1200(a)(3);
- c) Engaging in a pattern or practice of sending faxes without including in the margin an identification of the business sending the fax and the number from which the fax was sent in violation of the TCPA, 47 U.S.C. § 227(d), or 47 C.F.R. § 68.318(d);
- d) Making, or causing to be made, telephone calls to residential telephone lines in the United States using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party in violation of the TCPA, 47 U.S.C. § 227(b)(1)(B), or 47 C.F.R. § 64.1200(a)(2);
- e) Using an “automatic dialing system” as defined by 47 U.S.C. §227(a)(1) and 47 C.F.R. § 64.1200 (f)(1) to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers to make calls to one or more emergency telephone lines; one or more telephone lines of a guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; and one or more telephone numbers assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call in violation of 47 U.S.C. §227(b)(1)(a) or 47 C.F.R. §64.1200 (a)(1); or
- f) Using any technology to dial any telephone number for the purpose of determining whether the line is a facsimile or voice line in violation of 47 C.F.R. §64.1200 (a)(7).

4. Pursuant to Business and Professions Code sections 17203 and 17535, the Defendants, and each of them, are hereby enjoined and restrained from:

1 a) Making, or causing to be made, in violation of California Business & Professions
2 Code § 17500, any untrue or misleading statements to the public in the State of
3 California in an attempt to sell their services to their clients or to sell the products,
4 goods or services of their clients. Such statements include, but are not limited to, the
5 following:

6 i) Representing, directly or by implication, that there is an agreement between
7 Defendants and the recipients of the facsimiles sent by Defendants under which
8 Defendants have the legal right to send such facsimile advertisements to such
9 recipients, when there is no such agreement;

10 ii) Representing, directly or by implication, that Defendants have obtained the
11 consent of the facsimile recipients where Defendants have only offered an
12 opportunity for recipients to opt out of Defendants' proprietary database and the
13 recipients have not done so;

14 iii) Representing, directly or by implication, that Defendants may legally send
15 facsimile advertisements to persons from whom Defendants have not obtained
16 express invitation or permission when they may not legally send such facsimile
17 advertisements;

18 iv) Representing, directly or by implication, that Defendants will remove the
19 recipient's facsimile number from Defendants' proprietary database when the
20 recipient requests removal, but removal of the number does not occur; and/or
21 if the number is removed, it is only temporarily removed;

22 v) Failing to disclose and/or misrepresenting the identity of the sender of
23 unsolicited faxes in order to conceal Defendants' identity as the sender from the
24 recipient by any means, including, but not limited to, the following:

25 (1) Failing to identify Defendants as the entities responsible for sending the
26 fax;

27 (2) Failing to identify Defendants in the opt-out telephone message recordings
28 a consumer hears when s/he calls the opt-out number to request removal;

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- (3) Failing to include the actual facsimile number of the sender or number the fax was sent from on the unsolicited facsimiles Defendants send, or using the opt-out toll free telephone number as the sender's "sent from" number;
- (4) Varying the toll-free opt-out telephone numbers that are displayed on different unsolicited fax advertisements Defendants send;
- (5) Varying the location and font size used to disclose the toll-free opt-out telephone numbers that are displayed on different unsolicited fax advertisements Defendants send;
- (6) Failing to identify the advertiser's name in the text or body of the unsolicited fax advertisement Defendants send;
- (7) Using an 800 number which does not belong to Defendants as their toll free opt-out number;

b) Representing, directly or by implication, that by agreeing to the "Your Permission Please" facsimile, a true and correct copy of which is attached hereto as Exhibit 1 and incorporated herein by this reference as though set forth in full, which agreement Defendants claim they have if the recipient of the "Your Permission Please" facsimile does not respond to it with an objection, recipients will receive no more than one unsolicited facsimile per week from Defendants when:

- (1) Defendants do not have the ability to keep track of the numbers of facsimile transmissions they send to each recipient;
- (2) Defendants often send more than one facsimile per week to each recipient;
- or
- (3) Defendants vary the toll-free opt-out telephone numbers that are displayed on different unsolicited fax advertisements they send which makes it difficult, for the recipient to determine whether or not Defendants have honored the one fax per week promise.

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- c) Representing, directly or by implication, in the "Your Permission Please" facsimile, see Exhibit 1, that the recipient can delete himself/herself from the program at any time by calling the toll-free number on the bottom of every fax they send out when:
 - (1) Recipients are unable to ascertain whether they have been removed from the program after they request such removal because Defendants do not identify the sender by name on the unsolicited fax advertisements they send;
 - (2) Recipients are unable to ascertain whether they have been removed from the program after they request such removal because when recipients call the toll free opt out number, Defendants do not identify the sender in the message; or
 - (3) Recipients who request removal are not removed from Defendants' proprietary database, or are only removed from Defendants' proprietary database temporarily.

- d) Representing, directly or by implication, that they have obtained the consent of the facsimile recipients since they claim to send unsolicited fax advertisements only to those recipients who have not objected to the "Your Permission Please" facsimile, Exhibit 1;

- e) Engaging in unfair competition as defined in California Business & Professions Code § 17200. Such acts of unfair competition include, but are not limited to, the following acts or practices:
 - (1) Violating the TCPA, 47 U.S.C. § 227(b)(1)(C), or 47 C.F.R. § 64.1200(a)(3) which prohibit the use of any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine without the prior express consent of the called party;
 - (2) Violating the TCPA, 47 U.S.C. § 227 (d) or 47 C.F.R. § 68.318(d) by engaging in a pattern or practice of sending faxes without including in the margin an

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identification of the business sending the fax and the number from which the fax was sent;

(3) Violating the TCPA, 47 U.S.C. § 227(b)(1)(B) or C.F.R. § 64.1200(a)(2) which prohibit the initiation of a telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party;

(4) Violating California Business & Professions Code § 17500;

f) Using an automatic dialing-announcing device in the state of California to place a call that is received by a telephone in California during the hours between 9 p.m. and 9 a.m. in violation of California Public Utilities Code § 2872;

g) Transmitting unsolicited faxes, or causing such faxes to be transmitted, to a recipient after receiving notification by any means from that recipient of his or her request not to receive any further unsolicited faxed advertisements;

h) Varying the toll-free opt-out telephone numbers displayed on each advertisement, and the telephone facsimile machine numbers from which the advertisements are sent, or engaging in any practice which has the effect of making it more difficult for the recipient to determine whether or not Defendants have honored the recipient's request not to receive any more unsolicited faxed advertisements from Defendants;

i) Making, or causing to be made, telephone calls which deliver an unsolicited prerecorded message without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message, in violation of California Civil Code § 1770(a)(22);

j) Engaging in a pattern or practice of, when clients of Defendants who use their fax-blasting services are sued in California Small Claims Court for the dissemination of unsolicited facsimile advertisements by the recipients of those faxes, although Defendants are not named as a party in the suit, having Defendants' officers and/or

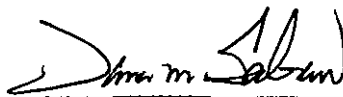
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employees appear in court on behalf of Defendants' clients and falsely profess to be officers of and/or employed by such clients, when they are not listed as officers on any corporate documents on file with the Secretary of State, and they do not receive any compensation as employees and thus are not legally able to represent such clients in Small Claims Court matters;

- k) Using an "automatic dialing system" as defined by 47 U.S.C. §227(a)(1) and 47 C.F.R. § 64.1200 (f)(1) to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers to make calls to one or more emergency telephone lines; one or more telephone lines of a guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; and one or more telephone numbers assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;
- l) Using any technology to dial any telephone number for the purpose of determining whether the line is a facsimile or voice line.

6. This Preliminary Injunction shall take effect immediately upon the entry thereof.

Dated: 10-5-04



 JUDGE OF THE DISTRICT COURT