

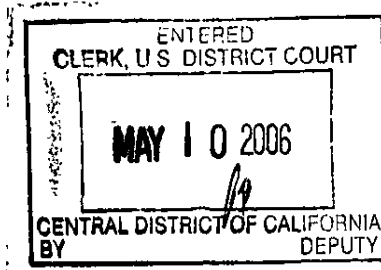
SCANNED

Priority
Send
Enter
Closed
JS-5/JS-6
JS-2/JS-3
Scan Only

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

J2 GLOBAL COMMUNICATIONS, INC.,
Plaintiff,
v.
VISION LAB TELECOMMUNICATIONS, INC., et al.,
Defendants.

CV 05-6348 RSWL (Ex)
ORDER



Currently before this Court are (1) Defendants Vision Lab Telecommunications, Inc., Amin El-Gazzar, Uwe Hinderer, Thomas Wawra, and Pasquale Giordano's Motion to Dismiss Plaintiff's Third Amended Complaint under FRCP 12(b)(6); and (2) Motion for More Definite Statement under FRCP 12(e); and (3) Defendants Amin El-Gazzar, Uwe Hinderer, Thomas Wawra,

1
THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

59

SCANNED

1 and Pasquale Giordano's Motion to Dismiss for lack of
2 personal jurisdiction; and (4) Venali, Inc., and VL.Net
3 Technologies, Inc.'s Joinder in Defendants' Motion to
4 Dismiss the Third Amended Complaint.

5

6 Pursuant to Rule 78 of the Federal Rules of Civil
7 Procedure and Central District Local Rule 7-15, the motions
8 were taken under submission on April 4, 2006. Having
9 considered all of the papers submitted on the matters, **THE**
10 **COURT NOW FINDS AND RULES AS FOLLOWS:**

11

12 As a preliminary matter, Defendants Venali, Inc., and
13 VL.Net Technologies, Inc.'s Motion for Joinder in
14 Defendants' Motion to Dismiss the Third Amended Complaint is
15 **GRANTED.**

16

17 Regarding, Defendants' Motion to Dismiss for lack of
18 personal jurisdiction, this Court continues the motion
19 allowing for limited discovery and requires the parties
20 submit additional briefing. This Court finds that general
21 jurisdiction does not exist, but a question remains whether
22 Individual Defendants are subject to this Court's specific
23 jurisdiction.

24

25 Plaintiff's Third Amended Complaint makes it difficult
26 to distinguish between the alleged conduct of the Corporate

STAMPED

1 Defendants and the Individual Defendants. There is no
2 delineation as to what behavior is specifically alleged as
3 to the Individual Defendants. Nor is there a distinction
4 amongst the Individual Defendants as to what conduct
5 subjects each of them to personal jurisdiction in this
6 forum.

7
8 Therefore, this Court **GRANTS** Plaintiff's request to
9 conduct limited discovery on the question of personal
10 jurisdiction over the Individual Defendants. Plaintiff is
11 given 90 days of limited discovery from the date of this
12 Order.

13
14 This Court continues Defendants Amin El-Gazzar, Uwe
15 Hinderer, Thomas Wawra, and Pasquale Giordano's Motions to
16 Dismiss for lack of personal jurisdiction and for a more
17 definite statement and requires the parties submit
18 additional briefing for a hearing set on September 11, 2006.

19
20 As to Defendants Vision Lab Telecommunications, Inc.,
21 Amin El-Gazzar, Uwe Hinderer, Thomas Wawra, and Pasquale
22 Giordano's (1) Motion to Dismiss Plaintiff's Third Amended
23 Complaint under FRCP 12(b)(6) and (2) Motion for More
24 Definite Statement under FRCP 12(e), this Court **GRANTS IN**
25 **PART** and **DENIES IN PART**.

26 //

SCANNED

1 Regarding Plaintiff's claims for violations of the
2 Telephone Consumer Protection Act (the "TCPA") 47 U.S.C.
3 227(b)(2)(C), this Court **DENIES** Defendants' Motion to
4 Dismiss.

5
6 This Court finds that Plaintiff has standing to bring
7 claims pursuant to Section 227(b)(3), since Plaintiff
8 alleges it has suffered injury due to the violations. This
9 Court also finds that Plaintiff has standing to bring claims
10 assigned to it by its customers.

11
12 This Court finds that the TCPA is silent as to whether
13 claims arising under it are assignable. But, where there is
14 a federal question which cannot be answered by federal
15 statutes alone, common law may be used to fill the gaps.
16 D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 469-72 (1942).

17
18 Here, purely personal tort causes of action are not
19 assignable in California. Murphy v. Allstate Ins. Co., 17
20 Cal. 3d 937, 941 (1976). However, torts affecting property
21 are assignable. Auslen v. Thompson, 38 Cal. App. 2d 204, 214
22 (1940). A Colorado has held that the TCPA is "designed to
23 protect privacy interests." US Fax Law Center, Inc. v.
24 iHire, Inc., 362 F. Supp. 2d 1248, 1252 (D.C. Colo. 2005);
25 see also, Martinez v. Green, 131 P.3d 492 (Ariz. Ct. App.
26 Apr. 6, 2006).

SCANNED

1 But, this Court finds that an examination of the
2 statute's legislative history shows that the purpose of the
3 TCPA is not solely to protect privacy. Rather, when
4 Congress enacted section 227, privacy was not the only
5 interest it sought to protect.

6
7 Congress enacted the TCPA as a supplement to state
8 efforts to regulate telemarketing activities. This
9 nonconsensual telemarketing activity was viewed by
10 Congress as an invasion of privacy, an impediment
11 to interstate commerce, and a disruption to
12 essential public safety services.

13
14 Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507,
15 513 (5th Cir. 1997).

16
17 This Court also finds that when the TCPA was amended to
18 include the Junk Fax Prevention Act in July, 2005,
19 Congressman Markey stated at the hearing that:

20
21 Every time someone junk faxes you, it is your paper
22 that is coming out of the machine. You are paying
23 for that paper. Your machine is tied up. It is
24 just absolutely one of the most irritating things
25 to people, to have to pay for someone else coming
26 into your home or your business when you do not

1 want them there. It is essentially a tax which is
2 paid by the recipient of something that they never
3 asked for in the first place.

SCANNED

4
5 Hence, this Court finds that the ban on unsolicited
6 faxes in the TCPA addresses both property violations and
7 privacy concerns. As property torts, the clients' claims
8 are assignable to Plaintiff.

9
10 While there is some debate among courts, this Court
11 finds that the TCPA is remedial and not penal in nature; and
12 therefore the claims are assignable. See Hooters of Augusta
13 v. American Global Ins. Co., 272 F. Supp. 2d 1365, 1375
14 (S.D. Ga. 2003) (citing to U.S. v. NEC Corp., 11 F.3d 136,
15 137 (11th Cir. 1993)); but see, US Fax Law Center, Inc. v.
16 iHire, Inc., 362 F. Supp. 2d 1248, 1252 (D.C. Colo. 2005).

17
18 The Georgia court's reasoning is more convincing for
19 several reasons. First, the court looked closely at the
20 lawmakers intent in framing the TCPA. Specifically, it
21 considered the aims of the facsimile provision within the
22 TCPA. Second, the court took into account the lost use of
23 the fax machine in considering the damages, while the
24 Colorado court only assessed the cost of paper. Finally,
25 the Colorado court is the only court to construe the TCPA as
26 a penal statute. See Jemiola v. XYZ Corp., 802 N.E.2d 745

1 (Ohio 2003) (finding the TCPA is remedial); Western Rim Inv.
2 Advisors, Inc. v. Gulf Ins. Co., 269 F. Supp. 2d 836 (N.D.
3 Tex. 2003) (finding TCPA is not penal).

SCANNED

4
5 In determining whether a statute is penal or remedial,
6 the Ninth Circuit looks to whether the wrong sought to be
7 redressed is a wrong to the public or a wrong to the
8 individual. Rivera v. Anaya, 726 F. 2d 564, 567 (9th Cir.
9 1984). Along with the reasoning articulated in Hooters of
10 Augusta v. American Global Ins. Co., the Ninth Circuit's
11 test favors a finding that the TCPA is remedial.

12
13 The wrongs sought to be redressed by the TCPA are wrongs
14 to the individual including property damage. First, the
15 TCPA remedies the shifting of advertising costs passed onto
16 the consumer by the sending of "junk faxes" from
17 advertisers. Additionally, the TCPA redresses the invasion
18 of privacy individuals experience when they receive calls or
19 fax solicitations that they did not request or consent to.

20
21 Therefore, this Court finds that the TCPA is a remedial
22 statute and claims for its violation are assignable. Hence,
23 this Court **DENIES** Defendants' Motion to Dismiss Plaintiff's
24 assigned 47 U.S.C. § 227(b)(2)(C) claims brought on behalf
25 of its customers.

26 //

1 Regarding Plaintiff's claims for violations of 47 C.F.R.
2 § 68.318(d), the Ninth Circuit has not determined whether
3 this regulation carries a private right of action. The
4 district courts that have examined this issue are split. SCANNED
5 See, Adler v. Vision Lab Telecommunications, Inc., 393 F.
6 Supp. 2d 35, 37-39 (D.D.C. 2005) (finding that 47 C.F.R. §
7 68.318(d) did not provide a private right of action because
8 47 U.S.C. § 227(b)(3) explicitly stated it was only for
9 regulations prescribed under that subsection, which only
10 addresses unsolicited faxes and not improperly identified
11 faxes); Klein v. Vision Lab Telecommunications, Inc., 399 F.
12 Supp. 2d 528, 538-39 (S.D.N.Y. 2005) (finding no private
13 right of action in 47 C.F.R. § 68.318(d)); but see Yavitch &
14 Palmer Co., LPA v. U.S. Four Inc, 2005 WL 3244052, *5
15 (2005) (reasoning that 47 C.F.R. § 68.318 was promulgated
16 under section 227, generally, and was therefore actionable).

17
18 In agreement with Adler and Klein, this Court finds that
19 Congress explicitly added a private right of action for
20 violations of Section 227(b), but did not give a private
21 right of action for violations of Section 227(d). Further,
22 this Court finds that the Junk Fax Prevention Act, which was
23 added to Section 227(b) in 2005, contains extensive notice
24 requirements mandating senders of faxes to identify numbers
25 that recipients can call or contact in order to be placed on
26 a do-not-call list. The Junk Fax Prevention Act

1 specifically addressed notice features, but was silent on
2 requirements for identifying (1) the fax sender; or (2) the
3 actual fax number from which the fax was sent. Had Congress
4 intended to include these identification requirements under
5 Section 227(b), it would have done so.

6
7 Instead, all such identification requirements are found
8 in Section 227(d), which was intended to regulate facsimile
9 machines manufactured after December 20, 1992. It requires
10 facsimile machines to mark on the fax the date, time, and
11 identification of the sender and the telephone number from
12 which the fax was sent.

13
14 As such, this Court finds that 47 C.F.R. § 68.318(d)
15 was promulgated pursuant to 47 U.S.C. §227(d)(2), which does
16 not contain a private right of action. Therefore, this
17 Court finds that Congress intended the Federal
18 Communications Commission, and not private citizens, to
19 remedy violations by facsimile manufacturers for failing to
20 comply with the identity requirements found in Section
21 227(d).

22
23 However, even if the Federal Communication Commission
24 promulgated 47 C.F.R. § 68.318(d) pursuant to 47 U.S.C. §
25 227(b), it can only promulgate regulations within the scope
26 of Congress' legislation. Here, 47 U.S.C. § 227(b) does

SECRET

1 not require individual facsimile users (1) to provide the
2 specific fax number from which the facsimile transmissions
3 are sent; (2) the identity of the fax sender; and (3) the
4 date and time of the transmission.

5
6 47 U.S.C. § 227(b) is silent as to these identification
7 requirements. This section also does not regulate
8 individual facsimile users who disguise or remove such
9 identifying information once the machine leaves the
10 manufacturer. Therefore, this Court cannot infer that
11 Congress intended to give a private right of action to
12 remedy violations not articulated in the statute.

13
14 Therefore, as to Plaintiff's claims for violations of 47
15 C.F.R. § 68.318(d), this Court **GRANTS WITH PREJUDICE**
16 Defendants' Motion to Dismiss.

17
18 Regarding Plaintiff's claims for trespass to chattels,
19 this Court finds that Plaintiff has sufficiently alleged
20 that Defendants knew they were interfering with Plaintiff's
21 equipment by sending the "junk faxes." Therefore, this
22 Court **DENIES** Defendants' Motion to dismiss the trespass to
23 chattels claim.

24
25 Regarding Plaintiff's claims pursuant to California
26 Business & Professions Code § 17200 et seq, Plaintiff has

SCANNED

1 sufficiently alleged that Defendants engaged in a number of
2 business practices that are forbidden by law. Plaintiff has
3 alleged injury to itself and has alleged the requisite
4 standing to bring claims under section 17200 et seq.
5 Therefore, this Court **DENIES** Defendants' Motion to Dismiss
6 as to the Section 17200 claims.

7
8 **IT IS SO ORDERED.**

RONALD S.W. LEW

RONALD S.W. LEW
United States District Judge

10
11 DATE: May 9, 2006

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26