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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Common Pleas of Ohio.

Cynthia J. **JEMIOLA** Plaintiffs  
v.  
XYZ CORPORATION Defendant

No. CV-411237.

Dec. 11, 2003.

*FINDINGS OF FACT, CONCLUSIONS OF LAW,  
FINAL JUDGMENT, AND ORDER*

BOYLE, J.

\***1** This matter came before the Court on July 22, 2003 on plaintiff Cynthia J. **Jemiola**'s June 30, 2000 complaint against defendant XYZ Corporation, filed on behalf of herself as an individual and as a class action on behalf of all others similarly situated, such claims arising under the Federal Telephone Consumer Protection Act (TCPA), [47 U.S.C. § 227](#); to which an amended complaint was filed on August 22, 2000, and a second amended complaint was filed on October 10, 2000, to which defendant XYZ Corporation filed its December 4, 2000 Answer. Plaintiff filed her July 14, 2003 trial brief in support of liability and damages.

Trial was held on July 22, 2003. The defendant, although duly notified, failed to appear. Thus, the only evidence presented was by and on behalf of plaintiff. Plaintiff's attorney, Joseph Compoli, Jr. then filed his August 8, 2003 supplemental affidavit in support of attorneys' fees.

The TCPA specifically prohibits and makes it unlawful for anyone "to use any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine." [47 U.S.C. § 227\(b\)\(1\)\(C\)](#). The term "unsolicited advertisement" is defined by the statute as "any material advertising the commercial availability of quality or any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."

[47 U.S.C. § 227\(a\)\(4\)](#).

Plaintiff Cynthia J. **Jemiola**'s complaint alleges that she received six (6) unsolicited facsimiles containing advertisements for defendant XYZ Corporation, and that the sending of these advertisements to her facsimile machine was a violation of [47 U.S.C. § 227\(b\)\(1\)](#) of the federal TCPA and also [O.R.C. § 1345.02\(A\)](#) of the Ohio Consumer Sales Practices Act (CSPA).

Upon due notice and hearing, this Court finds and orders as follows:

*FINDINGS OF FACT*

In the period from February 2, 2000 through April 9, 2000, plaintiff Cynthia J. **Jemiola** received six (6) unsolicited advertisements on her facsimile machine in Cleveland, Ohio. These facsimile ("fax") advertisements were sent by defendant XYZ Corporation, promoting the availability of various seminars, training programs and workshops.

Plaintiff filed suit against defendant under the TCPA and CSPA on June 30, 2000. Plaintiff's complaint was timely filed. The statute of limitations for plaintiff's claims is four (4) years under the TCPA and two (2) years under the CSPA. See, [28 U.S.C. § 1658](#); [O.R.C. § 1345.10\(C\)](#).

Plaintiff has stated in sworn affidavits filed with this Court that she did not ever give prior express invitation or permission to have these fax advertisements transmitted to her. Defendant has not submitted any evidence to the contrary.

On December 21, 2001, this Court issued an order granting plaintiff's motion for class certification of this action. See, Civil Journal Volume 2682, Pages 0630-0643.

The Court also takes judicial notice of the fact that plaintiff Cynthia J. **Jemiola** has an individual claim in this case under the Ohio Consumer Sales Practices Act against defendant XYZ Corporation and that this claim is unrelated to the class action portion of this litigation. This individual claim does not affect plaintiff's class claims in any way, nor does it render plaintiff untypical or antagonistic as a class member.

*CONCLUSIONS OF LAW*

\***2** The TCPA prohibits the transmittal of fax advertisements without first obtaining the "prior express invitation or permission of the recipient." [47](#)

U.S.C. §§ 227(a)(4) and 227(b)(1)(C). A recipient of an unsolicited fax advertisement has a cause of action under the TCPA for statutory damages and injunctive relief. Each transmittal of an unsolicited fax page containing an advertisement is an independently actionable tort. 47 U.S.C. §§ 227(B)(1)(C) and 227(b)(3).

These protections apply to both individuals and businesses. In addition, the TCPA prohibits the sending of unsolicited fax advertisements regardless of whether they were transmitted interstate or intrastate. *See, e.g., State of Texas v. American Blast Fax, Inc.*, 121 F.Supp.2d 1085, 1087-90 (2000). The TCPA applies to defendant XYZ Corporation despite the fact that it transmitted its fax advertisements solely to recipients within Ohio.

The sending of unsolicited commercial fax advertisements is not a right protected by the Constitution. It is well-settled that nothing in the First or Fourteenth Amendments authorizes a merchant to print its advertisements by using someone else's fax machine, paper and ink without prior consent to do so. There is simply no "right" to force commercial advertising material into another person's property at the property owner's expense. *See, e.g., Missouri v. Am. Blast Fax, Inc.*, 323 F.3d 649 (8th Cir., 2003); *Destination Ventures Ltd. v. FCC*, 46 F.3d 54 (9th Cir.1995), aff'g 844 F.Supp. 632 (D.Or.1994); *Texas v. American Blast Fax*, 121 F.Supp.2d 1085 (W.D.Tex., 2000). Defendant is not restricted from publishing its advertisements on its own paper, with its own ink, and on its own printing press.

For consent to send fax advertisements to be valid according to 47 U.S.C. § 227(6)(1)(c), the recipient must be *expressly* told that the materials to be sent are *advertising* materials, and will be sent *by fax*. In the absence of each clear prior notice, express invitation or permission to send fax advertisements is not obtained.

Proof of "prior express invitation or permission" is the only complete defense to a claim that a defendant sent unsolicited fax advertisements in violation of the TCPA.

Furthermore, since it is the legal obligation of the *advertiser* to obtain "prior express invitation or permission" before sending its fax advertisements, the recipients of unsolicited facsimile advertisements are not required to ask that senders stop transmitting such materials. Consent may not be implied from a recipient's failure to make such a request. This would be contrary to the statutory requirement for *prior*

express invitation or permission.

An advertiser has the burden of proof with regard to the issue of "prior express invitation or permission." This is plain from the legislative history of the TCPA.

The House Report on the TCPA discusses the phrase "prior express invitation or permission" and makes clear that advertisers have a duty to "establish specific procedures for obtaining prior permission and maintaining appropriate documentation with respect to such permission." U.S. House Rep. 102-317, at 13. This responsibility "is the minimum necessary to protect unwilling recipients from receiving fax messages that are detrimental to the owner's uses of his or her fax machine." U.S. Senate Rep. No. 102-178, at 8. Hence, a fax advertiser has an obligation to obtain prior express consent from the recipients of its advertisements, and to keep and maintain records of such consent.

\*3 Consent may not be inferred from the mere distribution or publication of a fax number, or the existence of a previous business relationship between an advertiser and the recipient, in the absence of specific evidence of "prior express invitation or permission" to send advertisements by fax. The touchstone is *consent*. This is self-evident from the fact that "prior express invitation or permission" is the sole statutory defense to a cause of action based upon unsolicited fax advertisements. *See, 47 U.S.C. § 227(a)(4)*.

This Court has jurisdiction and authority to hear plaintiff's claims under the TCPA. 47 U.S.C. § 227(b)(3); *Compoli v. AVT Corp.*, 116 F.Supp.2d 926, 928 (N.D.Ohio, 2000) (state courts have exclusive jurisdiction to hear TCPA claims); *International Science & Tech. Ins. Inc. v. Inacom Comm. Inc.*, 106 F.3d 1146, 1156 (1997) (no special enabling legislation is necessary for state courts to hear TCPA claims.)

**PLAINTIFF CYNTHIA J. JEMIOLA'S CLAIM  
UNDER THE OHIO CONSUMER SALES  
PRACTICES  
ACT (CSPA)**

This Court has specific statutory jurisdiction and authority to hear plaintiff's individual claims under the Ohio CSPA. *See, O.R.C. § 1345.04*. The sending of unsolicited fax advertisements is an inherently unfair and deceptive act or practice, in violation of O.R.C. § 1345.02(A) of the Ohio CSPA, since the advertiser is using someone else's

fax equipment, paper, ink and supplies to print its advertisements without prior express consent to do so. For the same reason, an advertiser's failure to comply with the requirements of the TCPA is a violation of [O.R.C. § 1345.02\(A\)](#) of the CSPA. The CSPA provides for minimum damages, injunctive relief and attorneys' fees for any violation. *See, O.R.C. § 1345.09.*

The TCPA and CSPA are remedial laws. "Legislation providing means or method whereby causes of action may be effectuated, wrongs redressed and relief obtained is remedial." *Black's Law Dictionary* (6th Ed., 2000). As remedial laws, the TCPA and CSPA must be liberally construed to protect the rights and interests of the plaintiff and the general public. *See, e.g., O.R.C. § 1.11; Einhorn v. Ford Motor Co.*, 48 Ohio St.3d 27, 30 (1990).

The TCPA provides for minimum statutory damages of Five Hundred Dollars (\$500.00) per violation, and treble damages of One Thousand Five Hundred Dollars (\$1,500.00) if the fax advertisements were sent "willfully." [47 U.S.C. § 227\(b\)\(3\)](#). The definition of the term "willfully" is merely that the defendant acted voluntarily, under its own free will, and regardless of whether the defendant knew that it was acting in violation of the statute. *See, e.g., 47 U.S.C. § 312(f)(1); Smith v. Wade*, 461 U.S. 30, 41 (1983).

The Ohio CSPA provides for minimum statutory damages of Two Hundred Dollars (\$200.00) per violation. [O.R.C. § 1345.09\(B\)](#). In addition, the CSPA further authorizes an award of reasonable attorneys' fees to a prevailing plaintiff if the defendant knowingly committed an act or practice which constitutes a violation of the statute. [O.R.C. § 1345.02\(F\).](#)

\*4 The plaintiff has no obligation to mitigate damages since the amount of damages is specifically set by statute and is therefore mandatory. In addition, mitigation of damages would undermine the legislative purpose by effectively rewarding the wrongdoer.

Defendant was served with proper notice of class certification by this Court. This case, in part, has subsequently continued as a class action.

The Court is authorized, pursuant to [Ohio Civil Rule 23\(D\)](#), to enter appropriate orders to control the action. This includes the authority to modify or amend the order granting class certification or any subsequent order issued in this case, as justice

requires.

The Court finds as follows:

1. The evidence presented is unrefuted in that defendant XYZ Corporation sent six (6) fax advertisements to plaintiff Cynthia J. **Jemiola** without first obtaining her prior express invitation or permission. The Court therefore finds that defendant acted willfully and that plaintiff Cynthia J. **Jemiola** is entitled to the maximum damages allowed under the TCPA. [47 U.S.C. § 227\(b\)\(3\)](#). However, plaintiff has provided no concrete evidence of faxes being sent to any other member of the class; therefore, judgment is only in favor of plaintiff Cynthia J. **Jemiola**, individually.

2. Judgment is hereby entered in favor of plaintiff Cynthia J. **Jemiola** and against defendant XYZ Corporation in the amount of Nine Thousand Dollars (\$9,000.00), representing the sum of One Thousand Five Hundred Dollars (\$1,500.00) per each of the six (6) unsolicited fax advertisements received by plaintiff Cynthia J. **Jemiola**, pursuant to [47 U.S.C. § 227\(b\)\(3\)](#).

3. Judgment is also granted in favor of plaintiff Cynthia J. **Jemiola** and against defendant XYZ Corporation on her individual claims under the Ohio CSPA in the amount of One Thousand Two Hundred Dollars (\$1,200.00), representing the sum of Two Hundred Dollars (\$200.00) per each of the six (6) unsolicited fax advertisements which she received.

4. Defendant XYZ Corporation does not dispute that it knew it was sending fax advertisements without first obtaining the prior express invitation or permission of the recipients. The Court therefore finds that defendant XYZ Corporation acted knowingly, and that plaintiff Cynthia J. **Jemiola** is entitled to a judgment of attorneys' fees under the Ohio CSPA. [O.R.C. § 1345.09\(F\)](#). However, while plaintiff presented evidence seeking attorneys' fees in the amount of Seventy Thousand Dollars (\$70,000.00)- Forty Thousand Dollars (\$40,000.00) to Joseph R. Compoli, Jr., and Thirty Thousand Dollars (\$30,000.00) to James R. Goodluck - a review of said attorneys' fees sought shows the majority of said fees are for time and expense incurred in pursuing the class action claims. Since TCPA [47 U.S.C. § 227](#), *et seq.*, does not provide attorneys' fees as damages for recovery in violation of this act, plaintiff is not entitled to such attorneys' fees. Plaintiff Cynthia J. **Jemiola** is entitled to recover attorneys' fees as damages for defendant XYZ Corporation's six (6) willful violations under

Ohio CSPA, [§ 1345.09 of the Ohio Revised Code](#). Based upon the law and evidence, plaintiff Cynthia J. **Jemiola** is not entitled to the full amount of attorneys' fees sought. The Court has considered the following factors which a court may take into account in determining "reasonable attorney's fees" as identified in *Bittner v. Tri- County Toyota, Inc.*, 58 Ohio St.3d [143](#):

- \*5 (a) the time and labor involved in maintaining the litigation;
- (b) the novelty and difficulty of the questions involved;
- (c) the professional skill required to perform the necessary legal services;
- (d) the attorney's inability to accept other cases;
- (e) the fee customarily charged;
- (f) the amount involved and the results obtained;
- (g) any necessary time limitations;
- (h) the nature and length of the attorney/client relationship;
- (i) the experience, reputation, and ability of the attorney; and
- (j) whether the fee is fixed or contingent.

Additionally, the Court has considered that in the supplemental affidavit filed August 8, 2003, attorneys Compoli and Goodluck indicate there is no intention by them to charge fees for duplicate services. The Court shall apply the requested attorneys' fee rate of Two Hundred Fifty Dollars (\$250.00) per hour, finding that reasonable.

For the foregoing reasons, the Court reduces significantly plaintiff's request for attorneys' fees to Seven Thousand Two Hundred Fifty Dollars (\$7,250.00), as the remainder of the requested fees relates directly and proximately to the class action or

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2003 WL 23010146 (Ohio Com.Pl.)

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represent fees for duplicate services.

Further, the Court will not make separate determinations as to attorneys' fees to be awarded to Compoli and Goodluck, but shall make an award to plaintiff Cynthia J. **Jemiola** for attorneys' fees incurred relative to her Ohio CSPA action. The Court awards the amount of Seven Thousand Two Hundred Fifty Dollars (\$7,250.00) to plaintiff as and for attorneys' fees under her Ohio CSPA action only.

For the foregoing reasons, it is therefore ORDERED, ADJUDGED AND DECREED that:

1. Judgment is entered in favor of plaintiff Cynthia J. **Jemiola** and against defendant XYZ Corporation in the amount of Nine Thousand Dollars (\$9,000.00) pursuant to [47 U.S.C. § 227\(B\)\(3\)](#).
2. Judgment is entered in favor of plaintiff Cynthia J. **Jemiola** and against defendant XYZ Corporation in the amount of One Thousand Two Hundred Dollars (\$1,200.00) pursuant to the Ohio CSPA.
3. Plaintiff is awarded attorneys' fees in the amount of Seven Thousand Two Hundred Fifty Dollars (\$7,250.00).

IT IS SO ORDERED.

*CERTIFICATE OF SERVICE*

A copy of the foregoing Order and Decision was sent by ordinary U.S. mail this 11 day of December, 2003, to: