

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address): Jason A. Levine Covington & Burling 1201 Pennsylvania Avenue, N.W. Washington, D.C. 20004 ATTORNEY FOR (Name): Covington & Burling	TELEPHONE NO.: 202 662-5369	FOR COURT USE ONLY
NAME OF COURT: Superior Court for the District of Columbia STREET ADDRESS: 500 Indiana Avenue, N.W. MAILING ADDRESS: CITY AND ZIP CODE: Washington, D.C. 20001 BRANCH NAME: Civil Division		
PLAINTIFF: Covington & Burling DEFENDANT: Int'l Mktg & Research, Inc., Fax.Com, Inc., Kevin Katz, Eric Wilson, Advanced Cellular Commun., Inc., Colorjet, Inc.		
NOTICE OF ENTRY OF JUDGMENT ON SISTER-STATE JUDGMENT		CASE NUMBER: 030002903

1. TO JUDGMENT DEBTOR (name): Fax.Com, Inc.

2. YOU ARE NOTIFIED

a. Upon application of the judgment creditor, a judgment against you has been entered in this court as follows:

(1) Judgment creditor (name): Covington & Burling

(2) Amount of judgment entered in this court: \$ 2,288,224.50

b. This judgment was entered based upon a sister-state judgment previously entered against you as follows:

(1) Sister state (name): Superior Court for the District of Columbia

(2) Sister-state court (name and location): 500 Indiana Avenue, N.W., Washington, D.C. 20001

(3) Judgment entered in sister state on (date): April 16, 2003; modified May 14, 2003

(4) Title of case and case number (specify): Covington & Burling v. Int'l Mktg & Research, Inc., et al., Civ. No. 01-0004360

3.

A sister-state judgment has been entered against you in a California court. Unless you file a motion to vacate the judgment in this court within 30 DAYS after service of this notice, this judgment will be final.

This court may order that a writ of execution or other enforcement may issue. Your wages, money, and property could be taken without further warning from the court.

If enforcement procedures have already been issued, the property levied on will not be distributed until 30 days after you are served with this notice.

Date: JUL 18 2003

Clerk, by W. STEVENS, Deputy

4. NOTICE TO THE PERSON SERVED: You are served

- a. as an individual judgment debtor.
- b. under the fictitious name of (specify):
- c. on behalf of (specify): Fax.Com, Inc.

Under:

- CCP 416.10 (corporation)
- CCP 416.20 (defunct corporation)
- CCP 416.40 (association or partnership)
- other:
- CCP 416.60 (minor)
- CCP 416.70 (conservatee)
- CCP 416.90 (individual)

(Proof of service on reverse)



PROOF OF SERVICE

(Use separate proof of service for each person served)

1. I served the Notice of Entry of Judgment on Sister-State Judgment as follows:

a. on judgment debtor (name): Fax.Com, Inc.

b. by serving judgment debtor other (name and title or relationship to person served):
Eric Wilson, Director and Chief Technology Officer

c. by delivery at home at business
(1) date:
(2) time:
(3) address: Fax.Com, Inc.

120 Columbia Street, Suite 500, Aliso Viejo, CA 92656

d. by mailing
(1) date:
(2) place:

2. Manner of service (check proper box):

a. Personal service. By personally delivering copies. (CCP 415.10)

b. Substituted service on corporation, unincorporated association (including partnership), or public entity. By leaving, during usual office hours, copies in the office of the person served with the person who apparently was in charge and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 415.20(a))

c. Substituted service on natural person, minor, conservatee, or candidate. By leaving copies at the dwelling house, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of the office or place of business, at least 18 years of age, who was informed of the general nature of the papers, and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 415.20(b)) (Attach separate declaration or affidavit stating acts relied on to establish reasonable diligence in first attempting personal service.)

d. Mail and acknowledgment service. By mailing (by first-class mail or airmail, postage prepaid) copies to the person served, together with two copies of the form of notice and acknowledgment and a return envelope, postage prepaid, addressed to the sender. (CCP 415.30) (Attach completed acknowledgment of receipt.)

e. Certified or registered mail service. By mailing to an address outside California (by first-class mail, postage prepaid, requiring a return receipt) copies to the person served. (CCP 415.40) (Attach signed return receipt or other evidence of actual delivery to the person served.)

f. Other (specify code section):
 Additional page is attached.

3. The "Notice to the Person Served" was completed as follows:

a. as an individual judgment debtor.

b. as the person sued under the fictitious name of (specify):

c. on behalf of (specify): Fax.Com, Inc.

under: CCP 416.10 (corporation) CCP 416.60 (minor) other:
 CCP 416.20 (defunct corporation) CCP 416.70 (conservatee)
 CCP 416.40 (association or partnership) CCP 416.90 (individual)

4. At the time of service I was at least 18 years of age and not a party to this action.

5. Fee for service: \$

6. Person serving:

- a. California sheriff, marshal, or constable.
- b. Registered California process server.
- c. Employee or independent contractor of a registered California process server.
- d. Not a registered California process server.
- e. Exempt from registration under Bus. & Prof. Code 22350(b).

f. Name, address and telephone number and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(For California sheriff, marshal, or constable use only)
I certify that the foregoing is true and correct.

Date:

Date:


(SIGNATURE)

(SIGNATURE)

JASON A. LEVINE, ESQ. COVINGTON & BURLING 1201 Pennsylvania Avenue, N.W. Washington, D.C. 20004 Atty for: PLAINTIFF	(202 662-5369)	For Court Use Only
SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF ORANGE - CENTRAL JUSTICE CENTER COVINGTON & BURLING vs. INT'L MKTG & RESEARCH, INC.		
PROOF OF SERVICE		03CC02903

1. *At the time of service I was at least 18 years of age and not a party to this action, and I served copies of the following documents: NOTICE OF ENTRY OF JUDGMENT ON SISTER-STATE JUDGMENT*
2. a. *Party Served:* Fax.Com, Inc.
b. *Person Served:* Earl Lee, agent authorized to accept service of process.
c. *Address:* 120 Columbia Street, Suite 500
Aliso Viejo, Ca 92656
3. *I served the party named in item 2*
a. *by personally delivering the copies (1) on (date): July 23, 2003 (time): 4:05 P.M.*
b. *by leaving the copies with or in the presence of: (Name and title or relationship to person indicated in item 2b):*
(1) **(business)** a person at least 18 years of age apparently in charge at the office or usual place of business of the person served. I informed him or her of the general nature of the papers.
(2) **(home)** a competent member of the household (at least 18 years of age) at the dwelling house or usual place of abode of the person served. I informed him or her of the general nature of the papers.
(3) *on (date):* (4) *at time:*
(5) **A declaration of diligence** is attached.
c. **by mailing** the copies to the person served, addressed as shown in item 2c, by First Class Mail, postage prepaid,
(1) *on (date):* (2) *from (city):*
(3) with two copies of the Notice and Acknowledgment of Receipt and a postage-paid return envelope addressed to me.
(4) to an address outside California with return receipt requested.
d. **by causing** copies to be mailed. A declaration of mailing is attached
e. **other:**
4. *The "Notice to the Person Served" (on the Summons) was completed as follows:*
a. *as an individual defendant.*
b. *as the person sued under the fictitious name of:*
c. *on behalf of:*
5. *Person Serving:*
Phil Thomas
FIRST LEGAL SUPPORT SERVICES
1212 N. BROADWAY, SUITE 210
SANTA ANA, CA. 92701
(714) 541-1110
a. *Fee for service: \$*
d. *Registered California process server*
(1) *Employee or independent contractor*
(2) *Registration No.: 1573*
(3) *County: Orange*
6. *I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.*

Date: July 24, 2003

Signature 

3. ORDERED that in all other respects, defendants' Motion for Reconsideration shall be and hereby is DENIED; and

4. ORDERED that the Judgment of the Court shall issue forthwith, in accordance with the Order Granting Plaintiff's Summary Judgment Motion, Denying Defendants' Summary Judgment Motion and Citing Defendants for Willful and Knowing Violations of the TCPA (April 17, 2003), as amended herein.

A. Blackburne-Rigsby

Anna Blackburne-Rigsby
Judge, District of Columbia Superior Court

Date: May 14, 2003

DOCKETED MAY 14 2003

MAILED MAY 14 2003

("TCPA"). A hearing on Covington's motion for summary judgment was held on August 7, 2002.

Defendants' Motion for Summary Judgment challenges the constitutionality of the TCPA on First Amendment grounds. The Court granted the United States Motion to Intervene in this case and the United States filed an amicus brief defending the constitutionality of the TCPA. Upon review of the Defendants' summary judgment motion, the Plaintiff's opposition and the United States' amicus brief, the Court granted Defendants' request for a hearing on their motion for summary judgment. That hearing was held on February 13, 2003. This order incorporates the Court's decision on both the Plaintiff's and Defendants' summary judgment motions.

II. Factual Background

The following facts are undisputed. Covington received 1,634 unsolicited fax advertisements sent by Fax.Com during the week of June 4-June 8, 2001. The faxes sent to Covington were advertisements on behalf of Defendants American Cellular Communications ("ACC"), Colorjet, and International Marketing & Research, Inc. ("IMR").

On June 4, 2001, Covington received 163 fax advertisements for vacation packages from Fax.Com on behalf of IMR, which included a telephone number for removal from the company's database. The same day, both Covington's Chief Information Officer, Stephen Roberts, and technical services employee Christine Dimitch, called the removal number, reaching Fax.Com, and demanded that Covington's fax numbers be removed from the database and that the company stop sending faxes to Covington. Roberts Aff. ¶ 8.

The following day, June 5, 2001, Covington received 172 additional faxes advertising vacation packages on behalf of IMR and 104 fax advertisements for laser printer supplies on behalf of Colorjet from Fax.Com. Roberts Aff. ¶ 10. Once again, Mr. Roberts called Fax.Com demanding that the company stop sending faxes to Covington. *Id.* On June 5, 2001, Covington received 147 more fax advertisements for vacation packages on behalf of IMR from Fax.Com. Covington received 140 additional fax advertisements for vacation packages on behalf of IMR on June 7, 2001. Covington partner Gerard Waldron sent an overnight letter to Mr. Katz and Jose Silva, the registered agent for International Marketing & Research, Inc., demanding that the company stop sending faxes to Covington. On June 8, 2001, Covington received 140 more fax advertisements for vacations on behalf of IMR and 768 faxes advertising cellular phone service on behalf of American Cellular Communications. That day, Mr. Martin, a Fax.Com employee, left a message for Mr. Roberts and Mr. Waldron, stating that Covington's fax numbers had been removed from the database. Roberts Aff. ¶ 12.

Between June 4 – June 8, 2001, Covington received 762 fax advertisements for vacations on behalf of IMR, 768 fax advertisements for cellular phones on behalf of American Cellular Communications, and 104 fax advertisements for laser printers on behalf of Colorjet. A total of 1471 fax advertisements were sent even after Covington called to demand that the faxes stop.

III. Legal Standard and Analysis

Summary judgment entitles the moving party to judgment as a matter of law when no genuine issue of material fact is present at the time the motion is made. Super. Ct. R. Civ. P. 56(c), *Sturdivant v. Seaboard Serv. Sys.*, 459 A.2d 1058 (1983). The moving party for summary judgment has the burden of showing that no material fact is in

dispute. Only after the requisite showing has been made by the moving party does the burden shift to the nonmoving party to show sufficient evidence supporting the claimed factual dispute to require a jury or judge to resolve the parties' differing versions of the truth at trial. *Id.*

IV. ANALYSIS

A. The TCPA does not violate the First Amendment of the Constitution.

The Defendants' Motion for Summary Judgment, challenges the constitutionality of the TCPA. The United States has intervened on behalf of itself and the Federal Communications Commission to defend the constitutionality of the TCPA. After reviewing the defendant's motion for summary judgment, the plaintiff's opposition thereto, the United States' brief, and oral argument from all parties, the Court concludes that the TCPA does not violate the United States Constitution. This determination is consistent with the decisions of the Ninth Circuit and three federal district courts. *See Texas v. American Blastfax Inc.*, 121 F. Supp.2d 1085 (W.D. Tex. 2000); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162 (S.D. Ind. 1997); *Destination Ventures, Ltd. v. FCC*, 844 F. Supp 632 (D. Or. 1994), *aff'd*, 46 F.3d 54 (9th Cir. 1995). Additionally, since the February 13, 2003 hearing before this Court on Defendants Motion for Summary Judgment, the Eighth Circuit Court of Appeals, upheld the constitutionality of the advertising provisions of the TCPA in an opinion issued on March 21, 2003. *See* 2003 WL1391192 (8th Cir. Mo.)

The TCPA satisfies the four-part test set forth by the Supreme Court for evaluating commercial speech restrictions in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). First, the speech being restricted must be lawful activity and not misleading. *Id.* at 566. Second, the

government interest must be substantial. *Id.* Third, the court must determine "whether the regulation directly advances the governmental interest asserted," and finally, whether the regulation is "not more extensive than necessary to serve that interest." *Id.*

Covington argues that the fax advertisements are misleading and therefore do not fall under the protection of the First Amendment. The TCPA states in the "technical and procedural standards" that:

It shall be unlawful for any person within the United States ... to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

47 U.S.C. §§ 227(d)(1). The fax advertisements sent by Fax.Com to Covington & Burling mention neither the sender Fax.Com nor the advertisement sponsors. Plaintiffs argue that because the faxes do not identify their senders, they are therefore misleading and not protected by the First Amendment. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985) (government is "free to prevent the dissemination of commercial speech that is false, deceptive, or misleading"). The Plaintiffs make a valid argument that the faxes are misleading as defined by the TCPA. However, the other prongs of the test are more compelling to the Court and provide a stronger basis for the holding.

Congress has a substantial interest in both protecting consumers from the economic burdens caused when the advertiser shifts the cost of advertising to consumers through unwanted fax solicitations. Additionally, Congress has a substantial interest in preventing business disruptions caused by the receipt of numerous unsolicited faxes. The legislative history of the TCPA details the reasoning behind the enactment of the statute.

According to the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, the sending of unsolicited faxes “shifts some of the costs of advertising from the sender to the recipient. Second, it occupies the recipient’s fax machine so that it is unavailable for legitimate business messages while processing and printing the junk fax.” H.R. Report No. 317, 102d Cong., 1st Sess., at 10 (1991). These legitimate concerns are exactly the problems Covington encountered when defendant Fax.Com sent 1,634 unsolicited faxes to Covington between June 4-8, 2001.

With respect to the third prong, Fax.Com argues that the costs associated with receiving unsolicited faxes are minimal, because the faxes were received by a fax server and stored and were actually not printed until Covington printed them for purposes of litigation. The Court finds this unpersuasive. The number of unsolicited transmitted faxes that were actually printed out is not dispositive since the critical fact is that Covington’s fax server was unavailable to receive or transmit other faxes. Covington’s memorandum and affidavits in support of their summary judgment motion are persuasive that attorneys and staff at Covington reported delays in sending or receiving faxes on the dates in question. Moreover, Fax.Com advertises on its web site that it can “[b]roadcast faxes to millions of consumers daily to promote last-minute deals or special offers” using its database that “exceeds 30 million fax numbers.” It states that “[w]ith the advent of Internet faxing and e-mail, faxing output is estimated to double within five years.” The TCPA clearly advances the government interest in protecting consumers and businesses from bearing the costs of unwanted advertisements.

The fourth prong of the *Central Hudson* test requires that the regulation not be more extensive than necessary. *Central Hudson* at 566. In enacting the TCPA, Congress did not ban the use of fax advertising entirely, but instead required that advertisers

receive prior consent before sending faxes for which the recipient would have to bear the cost. Defendants argue that using a "do-not-call" list similar to one created for telemarketing calls would be sufficient to meet the Government's goals. However, this regulation would still allow fax advertisers to send one fax to every fax number for which the recipient would have to bear the cost. Moreover, the consumer would still have to bear the cost and the burden of receiving at least one fax and then contacting the sender of the unsolicited fax to be removed from the database. As we have seen from this case, this may still not immediately stop the unwanted faxes. The TCPA is not more extensive than necessary to address the government's substantial interest in preventing the shifting of advertising costs from the sender to the recipient.

B. The TCPA is not unconstitutionally vague.

Defendants argue that the TCPA is unconstitutional under the void-for-vagueness doctrine because it fails to give potential fax senders adequate warning of the prohibited conduct. They correctly state that the void-for-vagueness doctrine forbids the enforcement of a law that contains "terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984) quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Statutes must explain terms "with a reasonable degree of clarity" in order to allow individuals to act in a lawful manner. *Id.*

Defendants challenge the term "unsolicited advertisement" which is defined in the TCPA as "any material *advertising the commercial availability or quality of any property, goods or services* which is transmitted to any person without that person's express invitation or permission." 47 U.S.C. § 227(a)(4) (emphasis added). The Court fails to find any of these terms to be impermissibly vague. There is no guesswork

necessary to ascertain the meaning of the common words "property," "goods," "services," or "quality." Courts have also failed to find the word "commercial" to be vague. See e.g., *Infinity Outdoor, Inc. v. City of New York*, 165 F. Supp.2d 403,424 (E.D.N.Y. 2001).

The faxes sent by Fax.Com to Covington & Burling were clearly prohibited by the TCPA. The faxes advertised cell phones, printer supplies, and vacations. This therefore falls under the United States Supreme Court's holding that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).

C. The fax advertisements were unsolicited and sent without the permission of Covington & Burling.

In its motion for summary judgment, Covington requests damages pursuant to the TCPA, which provides that "[i]t shall be unlawful for any person within the United States to use any facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." As discussed above, an "unsolicited advertisement" is defined by the TCPA as "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." 47 U.S.C. § 277(a)(4). The Act also allows for a private right of action by the recipient of the unsolicited advertisements to recover \$500 in damages for each violation. 47 U.S.C. §227(b)(3). Additionally, under the TCPA treble damages may be collected [i]f the court finds that the defendant willfully or knowingly violated" the prohibition on unsolicited fax advertisements. *Id.*

Defendants assert that the fax advertisements sent by Fax.Com to Covington did not violate the TCPA because the faxes were received via a "fax server" and not a

"telephone facsimile machine." Fax.Com interprets the TCPA to apply only to a standard fax machine. This argument lacks merit. The fact that Covington utilizes a fax server, which does not automatically print out transmittals like a standard fax machine, is irrelevant. Fax.Com transmitted faxes to Covington's fax numbers for the purpose of advertising the goods and services of its clients. Fax.Com clearly intended for the faxes it sent to be printed in order for the advertisements to reach an audience. Additionally, as Covington argued in its pleadings and oral argument, while its fax server was occupied with the 1,634 faxes sent by Fax.Com, the server was unavailable for Covington's intended uses.

The Defendants argue that Covington failed to present evidence that the fax advertisements were unsolicited. However, it is the Defendants' burden to prove that prior consent was given for Covington to receive 1,634 faxes. The Defendants did not present any evidence in their pleadings or oral argument of a Covington employee authorizing the faxes to be sent to the Covington office. In addition, Defendants did not deny receiving notification from Covington on June 4, 2001 that the fax advertisements were unwanted and demanding the removal of Covington fax numbers from the company's database. Fax.Com Response to Requests for Admission No. 20. Covington demonstrates by way of affidavits in support of its summary judgment motion that its administrator did not solicit the faxes. The burden therefore shifted to Fax.Com to show that permission was given by Covington to receive the faxes. *See Landow v. Georgetown Inland W. Corp.* 454 A.2d 310 (1982). (Once required showing has been made by the moving party, the burden shifts to the nonmoving party to show the existence of an issue of material fact.)

D. Personal Jurisdiction Over Mr. Kevin Katz and Mr. Eric Wilson is Proper.

Covington seeks summary judgment against corporate officers Kevin Katz and Eric Wilson in their individual capacity. The District of Columbia extends personal jurisdiction over nonresidents who (1) transact business in the District of Columbia or (2) cause "tortious injury" in the District by an act or omission elsewhere if the defendant "regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial business revenue from goods used or consumed, or services rendered in the District of Columbia." See D.C. Code Ann. §§ 13-423(a)(1), (4) (2003). In addition, there must be some "act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

Fax.Com purposefully availed itself of the privilege of conducting activities in the District of Columbia by sending 1,634 faxes to Covington & Burling. Because Mr. Katz and Mr. Wilson are the only corporate officers of Fax.Com and are involved with all functions of the company, personal jurisdiction can also be extended to them. Defendants rely on *Flocco v. State Farm Mutual Automobile Insurance Company*, 752 A.2d 147, stating that "[p]ersonal jurisdiction over the employees or officers of a corporation in their individual capacities must be based on their personal contacts with the forum and not their acts and contacts carried out solely in a corporate capacity. Thus, the corporation *ordinarily* insulates the individual employee from the court's personal jurisdiction. *Id.* at 163. However, in this case, Mr. Katz and Mr. Wilson are more than employees of the corporation, they are the only corporate officers of Fax.Com and set company policies and procedures. See Katz Depo. at 62; Wilson Dep. at 31-32. They

also admit they are active in day-to-day operations of the company. See Katz Depo. at 7, 8; Wilson Depo. at 7; Katz and Wilson Responses to Request for Admission No. 6. Due to their involvement and supervision of all aspects of the company, Mr. Katz and Mr. Wilson are more than mere employees of Fax.Com and are not insulated from this court's jurisdiction.

E. Fax.Com's corporate officers may be sued in their individual capacity.

The D.C. Court of Appeals stated in *Vuitch v. Furr*, 482 A.2d 811, 821 (D.C. 1984) that a corporate officer may be held liable for acts of the corporation "when there is an act or omission by the officer which logically leads to the inference that he had a share in the wrongful acts of the corporation which constitute the offense." Under this definition both Mr. Katz and Mr. Wilson can be found liable. As the only corporate officers of Fax.Com, they set company policies and oversee day-to-day operations. Therefore, they are clearly involved in the business practices that led to Covington receiving 1,634 unsolicited faxes in a five day period. The Court in *Vuitch* further explained the liability of corporate officers:

Corporate officers, charged in law with affirmative official responsibility in the management and control of the corporate business, cannot avoid personal liability for wrongs committed by claiming that they did not authorize and direct that which was done in the regular course of that business, with their knowledge and with their consent or approval, or such acquiescence on their part as warrants inferring such consent or approval. *Id.* [quoting 3A *Fletcher, supra*, § 1135 (1969)], see also Plaintiff's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment.

Covington points out that other jurisdictions have found corporate officers of "blast fax" companies personally liable for violations of the TCPA. In *Texas v. American Blastfax, Inc.* 164 F. Supp. 2d 892, 898 (W.D. Tex. 2001), a case similar to the one before us, the Court found that:

[The defendants] were the "guiding spirits" and the "central figures" behind the TCPA violations. They were the two persons who controlled all of Blastfax's day-to-day operations. They both had direct, personal involvement in and ultimate control over every aspect of Blastfax's wrongful conduct that violated the TCPA, and/or directly controlled and authorized this conduct ... [The defendants] had good reason to believe they were running a business that violated the TCPA ... Yet they continued to direct their company to send unsolicited intrastate fax advertisements.

Defendants cite *Lawlor v. District of Columbia*, 758 A.2d 964, 977 (D.C.

2000) to support the position that Fax.Com corporate officers should not be held personally liable. *Lawlor* held that "[l]iability must be premised upon a corporate officer's meaningful participation in the wrongful acts." *Id.* at 977. "Sufficient 'meaningful' participation can exist when there is 'an act or omission by the officer which logically leads to the inference that he or she had a share in the wrongful acts of the corporation which constitute the offense." *Id.* at 977. This case actually *provides support* for holding Mr. Katz and Mr. Wilson personally liable. The Court has already noted that the two officers are the only officers of Fax.Com and they have testified to their involvement with all aspects of Fax.Com from marketing to supervising employees.

F. Fax.Com clients American Cellular Communications, Colorjet, and IMR are liable for violations of the TCPA.

Courts have interpreted the TCPA to apply not only to the actual sender of the unsolicited faxes, but also to the companies whose products are advertised. In *Neil Zeid v. The Image Connection, Inc.*, No. 01AC-002885-Z-CV (Cir. Ct. MO, St. Louis County, Oct. 30, 2001) at 5, the court reasoned that

The FCC obviously construes the term "use" in the TCPA's prohibitions to include both direct use, and indirect use by way of an agent.... This is wholly reasonable, since if liability could be avoided by using an intermediary, advertisers could use a series of fly-by-night fax advertising firms to send waves of unsolicited faxes, and be insulated from liability. Such a construction would clearly allow avoidance of the statute, and such a construction is to be avoided.

Fax.Com admitted that the faxes sent to Covington were sent on behalf of its clients American Cellular Communications, Colorjet and IMR. *See* Fax.Com Response to Interrogatory 11. ACC and Colorjet admitted they hired Fax.Com to transmit fax materials on their behalf. *See* ACC and Colorjet Responses to Interrogatory No. 6.

In sum, Covington has presented compelling evidence demonstrating that Fax.Com sent 1,634 unsolicited faxes in violation of the TCPA and that Fax.Com, the company's corporate officers Mr. Katz and Mr. Wilson, and clients American Cellular Communications, Colorjet, and IMR, are liable for violating the TCPA.

G. The fax advertisements were sent willfully and knowingly.

Covington has also provided compelling evidence to support their claim for treble damages against Fax.Com. Defendant Fax.Com argues against liability for treble damages alleging that the Plaintiff failed to show Defendants "willfully" or "knowingly" violated the TCPA. Based on the pleadings and oral arguments, the Court finds that Fax.Com's violations of the TCPA were both "willful" and "knowing."

Fax.Com's violations of the TCPA were "willful." Fax.Com is in business to send faxes on behalf of clients and has not presented evidence that the faxes to Covington were sent in error. In addition, Fax.Com continued to send faxes to Covington even after they were asked to stop. Defendants admit that Covington gave notice both over the telephone and in writing to immediately cease sending faxes to Covington. Fax.Com's Responses to Requests for Admission No. 20 and 21. Mr. Katz also testified at deposition that it takes seven days to remove a fax number from its database. Katz. Dep. at 58-59. This illustrates that Fax.Com does not immediately remove fax numbers from its database when requested to do so by recipients receiving unwanted faxes. Therefore, Fax.Com sent the fax advertisements to Covington "willfully."

Defendants also "knowingly" sent unsolicited faxes to Covington. The Federal Communications Commission interpreted the term "knowingly" under the Federal Communications Act, which the TCPA amended, to determine what the defendant "knew or should have known." See *In re Intercambio, Inc.*, 3 FCC Rcd. 7247 ¶ 29 (1988). An individual acts "knowingly" if the individual "either had reason to know or should have known that [he or she] engaged in acts which could constitute a violation of the statute." *Id.* ¶ 41.

Fax.Com admitted it was aware of the TCPA. Fax.Com Responses to Requests for Admissions No. 22. This is not the first time Fax.Com has been involved in litigation regarding unsolicited fax advertisements. The company has been sued by both private parties and state governments. For example, in *Aronson v. Fax.Com, Inc.*, 149 P.L.J. 157; 51 Pa. D. 2 C. 4th 421 (2001), Fax.Com was sued under the TCP by a plaintiff who received five unsolicited fax advertisements on his fax machine. Fax.Com has also been cited by the FCC for sending unsolicited fax advertisements.

The TCPA gives the court discretion to increase damages up to three times for willful or knowing violations of the statute. Treble damages, historically were to guard against unscrupulous business practices and conduct that constitutes willful and knowing violations of existing laws. Treble damages are a form of punitive damages, the purpose of which are to punish the person or entity doing the wrongful act and to discourage that person or entity from similar conduct in the future. See *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639,(1981). See also *Restatement (Second) of Torts § 908 (1979)*. Many states and the federal government have enacted statutes which allow for the imposition of punitive damages to punish and deter certain proscribed conduct. Congress has done exactly this with the treble damages provision of the TCPA. Treble

damages are appropriate in the instant case to send a clear message to Fax.Com that they can not seek to do their business at the expense of other businesses. Their right to free speech cannot literally "cost" another business or person. The Court elects to award treble damages against Fax.Com for the faxes sent to Covington after oral and written notice was given by Covington requesting that Fax.Com cease sending faxes. This conduct was willful and knowing and was done with reckless disregard for Covington's rights.

CONCLUSION

Accordingly, upon consideration of Plaintiff's and Defendants' Cross-Motions for Summary Judgment and opposition, thereto, and the Intervenor's (the United States) amicus brief and there being no material facts in dispute, it is this 16th day of April 2003 hereby;

ORDERED that Defendants' Motion for Summary Judgment is **DENIED**.

FURTHER ORDERED that the Plaintiff's Motion for Summary Judgment is **GRANTED** against Fax.Com, the corporate officers Kevin Katz and Eric Wilson, in their individual capacity, American Cellular Communications, Colorjet and International Marketing & Research, Inc.

FURTHER ORDERED that the Defendants IMR, Fax.Com, and the individual corporate officers Kevin Katz and Eric Wilson are jointly and severally liable to Plaintiff and a judgment is awarded to Covington & Burling in the amount of \$381,000, \$500 per fax for the 762 faxes sent on behalf of IMR by Fax.Com between June 4-8, 2001.

FURTHER ORDERED that the Defendants American Cellular Communications, Fax.Com, and the individual corporate officers Kevin Katz and Eric Wilson are jointly

and severally liable to Plaintiff and a judgment is awarded to Covington & Burling in the amount of \$384,000, \$500 per fax for the 768 faxes sent on behalf of American Cellular Communications, by Fax.Com on June 8, 2001.

FURTHER ORDERED that the Defendants Colorjet, Fax.Com, and the individual corporate officers Kevin Katz and Eric Wilson are jointly and severally liable to Plaintiff and a judgment is awarded to Covington & Burling in the amount of \$52,000, \$500 per fax for the 104 faxes sent on behalf of Colorjet by Fax.Com on June 5, 2001.

FURTHER ORDERED that Defendant Fax.Com is liable to Covington & Burling for treble damages for Fax.Com's willful and knowing violation of the TCPA. Accordingly a judgment in the additional amount of \$2,206,500.00 is entered against Fax.Com. This represents an additional \$1,500.00 per fax for the 1,471 faxes sent by Fax.Com between June 5-8th, after Covington expressly requested, orally and in writing, that Fax.Com cease sending faxes.

SO ORDERED.

April 16, 2003
DATE

A Blackburne-Rigsby
Judge A. Blackburne-Rigsby

MAILED APR 17 2003

SOCKETED APR 17 2003

Copies to:

John P. Quinn
1667 K Street, N.W.
Washington, DC 20006

Peter F. Axelrad
Council, Baradel, Kosmerl & Nolan, P.A.
125 West St., 4th Floor, P.O. Box 2289
Annapolis, MD 21404

Gerard J. Waldron
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004

Samuel C. Kaplan
Federal Programs Branch
Civil Division
Department of Justice
901 E Street, .W., Room 944
Washington, DC 20044