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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

MICHAEL MILLER ET AL
Plaintiff

Case No: CV-09-712486

Judge: BRENDAN J SHEEHAN

PAINTERS SUPPLY & EQUIPMENT CO. ET AL
Defendant

JOURNAL ENTRY

OPINION AND JUDGMENT ENTRY. O.S.J.

Judge Signature

Date

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MICHAEL MILLER, <i>et al.</i> ,)	CASE NO. CV 09 712486
)	
Plaintiffs,)	JUDGE BRENDAN J. SHEEHAN
)	
v.)	
)	OPINION AND JUDGMENT
)	ENTRY
PAINTERS SUPPLY & EQUIPMENT)	
COMPANY,)	
Defendant		

I. FACTS AND ISSUES PRESENTED.

This matter is before the court on Plaintiffs' Motion for Class Certification. The issues have been fully briefed to the Court and an evidentiary hearing was held on the record on July 9, 2010.

Plaintiffs Michael Miller is the owner of Plaintiff The Box Office. Plaintiffs allege that they received unsolicited advertisements via facsimile from Defendant Painters Supply & Equipment Company. They have brought their action pursuant to the Telephone Consumer Protection Act (TCPA), 47 U.S.C. §227(b)(3) and seek to certify a class defined as:

All persons and entities, within the State of Ohio, to whom a facsimile ("fax") transmission was sent, by or on behalf of the Defendant Painters Supply & Equipment Co., anytime during January and February 2008, which contained an advertisement that did not include a notice informing the recipient of the right to opt out of future fax advertisements.

II. APPLICABLE LAW

A. JUNK FAX LAW

The TCPA generally prohibits sending unsolicited advertisements by fax machine subject to certain regulations. 47 U.S.C. §227.

The TCPA defines and “unsolicited advertisement” as:

(5) The term “unsolicited advertisement” means 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, in writing or otherwise.

47 U.S.C.A. § 227.

Unsolicited advertisements are permissible subject to the defenses set forth in 47 U.S.C. §227(C), generally including an established business relationship with the recipient; the fax number was obtained through voluntary communication of the number or publication of the fax number and the fax number contains an opt-out notice.

B. CLASS CERTIFICATION

1. General Requirements for Class Certification.

Pursuant to Civ.R.23, a class action may be certified if there is an identifiable and unambiguous class, the factors of numerosity, commonality, typicality and adequacy of representation identified in Civ.R. 23(A) are met and at least one of the factors in Civ.R. 23(B) is demonstrated. A plaintiff must prove by a preponderance of the evidence that class certification is appropriate. *Ritt v. Billy Blanks Ents.* (2007), 171 Ohio App.3d 204, 212.

Plaintiffs contend that class certification is appropriate pursuant to Civ.R. 23(B) (3) in that questions of law or fact common to the members of the class predominate over any

questions affecting only individual members and a class action is superior to other methods of adjudication for the claims presented.

2. Definition of the Class.

Plaintiffs' definition of the purported class centers on their belief that the TCPA requires that all faxed advertisements contain an opt-out notice pursuant to 47 U.S.C. §227(b)(1)(C)(iii) and (b)(2)(D), which provide:

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an **unsolicited** advertisement, unless--

(i) the **unsolicited** advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through--

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the **unsolicited** advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an **unsolicited** advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the **unsolicited** advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an **unsolicited** advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future **unsolicited** advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

47 U.S.C.A. § 227(b)(1)(C)(iii)(emphasis supplied).

(D) shall provide that a notice contained in an **unsolicited** advertisement complies with the requirements under this subparagraph only if--

(i) the notice is clear and conspicuous and on the first page of the **unsolicited** advertisement;

(ii) the notice states that the recipient may make a request to the sender of the **unsolicited** advertisement not to send any future **unsolicited** advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes--

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the **unsolicited** advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d) of this section;

47 U.S.C.A. § 227 (b)(2)(D)(emphasis supplied).

As Plaintiffs note, a court must be “guided by the express language used in the statute.” *Grady v. Lenders Interactive Svcs.* (2004), 2004-Ohio-4239. Further, courts must construe statutory language “so that no word is rendered meaningless or insignificant.” *Id.*, citing *TRW Inc. v. Andrews* (2001), 534 U.S. 19, 31. “In determining legislative intent it is the duty of this court to give effect to the words used in a statute, not to delete words used or to insert words not used.” *Bockover v. Ludlow Corp.* (1986), 23 Ohio St.3d 190.

In just the provisions relied upon by Plaintiffs, the TCPA references “unsolicited advertisements” twelve times. The term “unsolicited” may not be deleted or ignored in interpreting the statute. Rather, a plain reading of the statute demonstrates that the requirements of 47 U.S.C. §227 (b) apply only to **unsolicited** faxes.

Plaintiffs’ proposed definition of the class, however, ignores the oft-repeated statutory language. It fails to differentiate between solicited faxes and unsolicited faxes transmitted by the Defendant. As such, the proposed class definition is overly broad because it potentially includes conduct outside the scope of the TCPA. Because the proposed class, by definition, includes parties who have no claim under the TCPA and no standing to pursue a claim actionable under the TCPA, the class, as proposed, must fail.

The trial court is in the best position to revise class definitions. *Marks v. C.P. Chemical Co., Inc.* (1987), 31 Ohio St.3d 200, 201. Based on the foregoing, and for purposes of its determination on class certification, the Court will consider Plaintiffs’ putative class as:

All persons and entities, within the State of Ohio, to whom an unsolicited facsimile (“fax”) transmission was sent, by or on behalf of the Defendant Painters Supply & Equipment Co., anytime during January and February 2008, which contained an advertisement that did not include a notice informing the recipient of the right to opt out of future fax advertisements.

The amended definition of the class would include only those persons or entities that received faxes arguably in violation of the TCPA and who, therefore, may have a cognizable cause of action.

However, the amended definition raises additional issues: to determine whether a person or entity was a member of the class, the court would be required to review the individual class member's conduct prior to receipt of the fax. This is not a case where mass faxes were broadcast transmitted to numbers gleaned from directories. *See, e.g., Clearbrook v. Rooflifters, LLC* (2010), 2010 WL 2635781, 1 (defendants purchased 61,366 fax numbers from directory service, then contracted with third party fax broadcaster to send 41,974 faxes to list members).

The evidence presented in this matter indicates that all of the fax recipients, other than Plaintiffs, were: 1) existing customers of Defendant who expressly solicited announcements of sales and special offers; or 2) existing customers who expressly consented to receiving advertisements. While Plaintiffs maintain that the second category are proper class members, those customers in the first category who solicited promotional materials would not be proper parties to this action. To identify the class members, then, the court would have to examine facts relevant to each individual plaintiff's conduct.

Based on the foregoing, the Court finds that the proposed definition of the class, even as amended by the Court, is not readily identifiable and the putative class may not be certified.

3. Predominance

Pursuant to Civ.R. 23(B)(3), class certification is proper where:

[T]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a)

the interest of members of the class in individually controlling the prosecution or defense of separate actions; (h) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.

Civ. R. Rule 23.

To satisfy the predominance requirement, the plaintiff must show that the common questions of law and fact represent a significant aspect of the class and are capable of resolution for all members of the class in a single adjudication. *Shaver v. Standard Oil Co.* (1990), 68 Ohio App.3d 783, 799. If the circumstances of each proposed class member must be reviewed to prove the elements of the claim or defenses thereto, then individual issues predominate and class certification is inappropriate. *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 313-314.

Additionally, Plaintiffs must demonstrate that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. In this regard, "the court must make a comparative evaluation of the other procedures available to determine whether a class action is sufficiently effective to justify the expenditure of judicial time and energy involved therein." *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 313.

This action requires a detailed examination of each plaintiff's conduct, both as to claims and defenses raised by the parties. As discussed previously, the TCPA applies only to unsolicited faxes so each plaintiff must prove by a preponderance of the evidence that it did not solicit faxed advertisements from the Defendant. Class certification, therefore, would require substantial discovery and proceedings for each class member to determine if the class member had a cognizable claim. Accordingly, common issues of law and fact do not predominate over

individual issues and a class action would not be superior to other available methods for the fair and efficient adjudication of the controversy

4. Numerosity.

The Ohio Supreme Court has cited with approval treatises interpreting the federal counterpart to Civ.R. 23 for the proposition that: "if the class has more than forty people in it, numerosity is satisfied; if the class has less than twenty-five people in it, numerosity probably is lacking; if the class has between twenty-five and forty, there is not automatic rule[.]" *Wagner v. Waste Mgmt., Inc.* (1988), 36 Ohio St.3d 91, 97 *quoting* 7A Wright, Miller & Kane, Federal Practice & Procedure (1986), Section 1760 at 22.

Plaintiffs contend that the proposed class includes at least 37 persons and/or entities. Defendant contends that Plaintiffs' proposed class includes not more than 37 persons and/or entities.

The potential number of class members includes all persons and/or entities in Ohio who allegedly received a faxed advertisement from Defendant. It does not differentiate between solicited and unsolicited faxes, however. As discussed above, only unsolicited fax advertisements are actionable under the TCPA; consequently, the actual number of class members could be as few as one upon examination of the facts unique to each potential plaintiff.

Based on the foregoing, the Court finds that the requirement of numerosity has not been satisfied.

5. Commonality.

As discussed above, the Court finds that there are common issues of law and fact related to any potential class members who received unsolicited fax advertisements from Defendant. However, those common issues do not predominate over individual issues.

6. Typicality.

Defendant contends that Plaintiffs received the faxes at issue in error—that is, Defendant contends that it mistakenly sent the faxes to a wrong number. Defendant's contention does, however, tend to establish that the fax sent to Plaintiffs was not solicited. As such, Plaintiffs' claims and defenses would be typical of proper members of a putative class.

7. Adequacy of Representation.

Both Plaintiffs and Plaintiffs' counsel have substantial experience in prosecuting TCPA claims. The Court finds that the putative class would be adequately represented.


III. CONCLUSION.

While Plaintiffs have established some of the criteria necessary to maintain a class action, they have failed to satisfy several of the requirements. Accordingly, **PLAINTIFFS' MOTION FOR CLASS CERTIFICATION IS DENIED.**

A pre-trial establishing the schedule for Plaintiffs' claims is set for September 9, 2010 at 8:15 AM. The parties are to proceed toward completing all discovery pertinent to Plaintiffs' claims without delay.


IT IS SO ORDERED.

Dated: 8/11/10


JUDGE BRENDAN J. SHEEHAN

RECEIVED FOR FILING

AUG 12 2010

GERALD E. FUERST, CLERK
BY  DEP.

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to the following this 11th day of August, 2010.

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