Case No. B155804

IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

BARRY B. KAUFMAN AND VANS, INC.,
Plaintiffs and Appellants;
v.
ACS SYSTEMS, INC., et al.,
Defendants and Respondents.

Appeal from the Superior Court of the State of California in and for the County of Los Angeles, Case No. BC222588
(The Honorable Ann Kough, Judge)

BRIEF OF THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS APPEARING AS AMICUS CURIAE IN SUPPORT OF APPELLANTS BARRY B. KAUFMAN AND VANS, INC.

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I. INTRODUCTION

The Foundation for Taxpayer and Consumer Rights ("FTCR") appears as amicus curiae on behalf of appellants and the citizens of California who are forced to endure a daily onslaught of uninvited and unwanted advertisements sent via their fax machines—a practice that has been appropriately referred to as "junk faxing." FTCR's position is that, contrary to the lower court's ruling, California citizens victimized by junk faxing have the ability to fully enforce their rights under the federal Telephone Consumer and Protection Act, (47 U.S.C. § 227(b) et. seq.) ("TCPA"), in state court.

In urging this court to reverse the lower court's ruling, amicus FTCR will address the following three points:

1) If allowed to stand, the lower court's ruling will have a profound negative impact on California's citizens and businesses who will be unfairly burdened with the shifted costs, invasion of privacy, environmental waste and lost business associated with the transmittal of unsolicited facsimile advertisements;

2) The ability of California citizens to enforce the TCPA through a private right of action is essential to preventing the illegal transmission of unsolicited fax advertisements; and

3) The lower court's ruling, that California Business and Professions Code § 17538.4 denies Californians the right to enforce the TCPA in state

court, is contrary to the Supremacy Clause of the United States Constitution, the plain language of the TCPA, the overwhelming majority of state and federal court decisions interpreting that federal law, and the intent of the California legislature.

The negative impact of junk faxing on citizens and businesses served as the impetus for the TCPA. During its passage, Senator Hollings, the TCPA's sponsor, remarked that unwanted telephone solicitations:

> wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone out of the wall…it is telephone terrorism and it has to stop.[1]

(Remarks of Sen. Hollings, 137 Cong. Rec. S16205-06 (daily ed. Nov. 7, 1991).)

Section 227(b)(1)(C) of the TCPA makes it "unlawful for any person . . . 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 TCPA defines "unsolicited advertisement" 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. § 227(a)(4); 47 C.F.R. § 64.1200(f)(5).) The TCPA confers a private right of action upon

[1] While Senator Hollings' comment was directed at telemarketers, his statements are of equal relevance to junk faxers.

citizens to enforce its ban on junk faxing and provides that such actions are to be brought in the state courts. (47 U.S.C. § 227(b)(3).)

The ruling of lower court in this case, contrary to the plain language of the federal law prohibiting junk faxing and the intent of Congress, strips California citizens of their right under the TCPA to stop the never-ending stream of unwanted fax advertisements transmitted daily to their home and business fax machines. If allowed to stand, that ruling would force California's citizens to continue to bear the substantial costs, invasion of privacy, lost business and interrupted communications associated with receiving junk fax advertisements—up to a dozen or more per day in FTCR's own experience and as reported by individuals submitting complaints over FTCR's internet Web site.

Moreover, the trial court's ruling would eliminate the most important tool individual citizens and businesses have in stopping illegal junk faxing—the private right of action. The conferring of private rights of action upon citizens by Congress has been essential to the effective enforcement of a whole host of federal laws. The TCPA is no exception. The ability of individuals to bring actions to enforce the TCPA has dramatically reduced the volume of junk faxes received by citizens in most states. (Hearings before Sen. Com. on Commerce, Science, and Transportation on Sen. No. 630, 107th Cong., 1st Sess. (2001), testimony of Harris Pogust, Esq., [reprinted in Federal News Service, April 26, 2001].)

Preserving Californians' private right of action under the TCPA, in FTCR's view, is thus essential to ensuring that illegal junk faxing activity is stopped.

Furthermore, the lower court ruling is at odds with the Supremacy Clause of the U.S Constitution, the plain language and intent of the TCPA, and the overwhelming majority of federal and state cases to interpret it. Well-reasoned opinions from other federal and state courts are plentiful and should be followed by this Court to reverse the lower court's ruling. (*See Spellman v. Securities, Annuities and Insurance Services* (1992) 8 Cal.App. 4th 452, 459 [stating that federal court decisions are persuasive authority, "especially as regards the interpretation of federal law"]; *see also Estate of Steidl* (1948) 89 Cal.App.2d 488, 494 [following reasoning of the weight of authority in other states where no California court had decided the precise issue].)

For these reasons, FTCR urges this court to reverse the lower court's ruling and interpret the TCPA in accordance with its plain language and intended goal of halting the transmittal of unsolicited faxes in California.

II. THE LOWER COURT'S RULING, IF ALLOWED TO STAND, WOULD UNFAIRLY BURDEN CALIFORNIA'S CITIZENS AND BUSINESSES BY ELIMINATING THEIR ABILITY TO ENFORCE THE TCPA.

If the lower court's ruling is allowed to stand, California would be the only known state in the nation to deny its citizens of their right to enforce the TCPA in state court. As a result, the citizens and businesses of California will be forced to bear the substantial cost of receiving "junk faxes" while enduring a daily invasion of privacy. Recipients of unsolicited faxes have neither given their consent to have their number released, nor initiated contact with the sender. In spite of this lack of consent, their fax numbers have been obtained and used to send unwanted advertisements to them at all hours of the day and night. These faxes also block the delivery of important communications. As fax machines are tied up receiving unwanted ads, important transmissions are often delayed or lost. FTCR has received numerous complaints from California citizens frustrated by the lost sleep, invasion of privacy, and interrupted transmissions resulting from the constant ringing of their fax machine initiated by junk faxers.

In addition to this continual invasion of privacy and interference with important communications, California citizens, under the trial court's ruling, would have to shoulder the cost of the paper, toner and electricity required to print the junk faxer's advertisements—one of the very evils of

junk faxing that the Congress intended to prevent when it enacted the TCPA. (*See* H.R. Rep. No. 102-317, 102nd Cong., 1st Sess. 1991; *see also Destination Ventures, Ltd. v. F.C.C.* (9th Cir. 1995) 46 F.3d 54, 56.)

A study commissioned by California's Public Utilities Commission in 1991, based on a random survey of faxes operated by businesses, home users and government agencies, found that the estimated cost of junk faxing to California's citizens and businesses was over $17 million dollars. (Cal. P.U.C., Rep. to Legis., *Unsolicited Telefacsimile Marketing Communications*, per Sen. Bill No. 993 (1991) p. 1.) At that time, businesses reported receiving an average of 9.7 faxes/month with a mean of 1.9 pages , and a cost of $14.87/month; for government offices, it was 7.2 faxes per month, 2.8 pages on average, at a cost of $12.05 per month; and, home fax users reported receiving 9.8 faxes per month, with a mean of 2.0 pages, at a cost of $15.26/month.[2] (*Id*. at pp. 3-4.)

While in more recent years, the cost per page of fax transmissions may have decreased, (*see Destination Ventures, Ltd. v. F.C.C., supra*, 46 F.3d 54, 56 [citing to FCC's evidence estimating the cost of fax transmissions at 3 to 40 cents per page]; *see also State of Texas v. American Blast Fax, Inc.* (W.D. Tex. 2001) 164 F. Supp. 2d 892, 901 [using undisputed expert evidence to find cost of fax transmissions at 7 cents per

[2] These figures were based on an average perceived cost of about $1.50 per fax per month. (*Id*. at p. 5.)

page]), the actual cost to recipients is likely even higher than at the time of the CPUC study, as the number of unsolicited faxes transmitted per day has substantially increased due to the rapid growth of the fax transmission industry.[3] Fax.com, Inc., one of the largest fax transmitters in the country, based in California, currently has approximately 400 competitors in what has become a $250 million dollar industry. (<http:www.fax.com/Company_profile/our_business.asp [as of March 11, 2002].) Fax.Com, Inc. advertises that it has a fax database that "exceeds 30 million fax numbers" and is capable of sending out millions of faxes per day. (<http.www.fax.com/Why_use_fax/direct.asp [as of March 11, 2002].) According to Fax.com, the fax advertising trend is expected to continue as the transmittal of fax advertisements doubles within the next five years. (*Id.*) The shifted costs of advertising to the recipient is staggering in light of both the cost of each fax to individuals and businesses and the fact that hundreds of millions of unsolicited faxes are transmitted yearly.

By allowing California Business & Professions Code § 17538.4[4] to trump the TCPA, the lower court's ruling unfairly thrusts an onerous and

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[3] FTCR's own office fax machines receive close to a 300 junk faxes per month; individual FTCR staff members utilizing fax machines with unpublished numbers at the office and at home received at least 2-3 junk faxes per day (60-90 per month).

[4] That statute prohibits any person or entity from sending unsolicited fax advertisements unless the sender "establishes a toll-free telephone number

disproportionate burden of preventing junk faxing onto California's citizens and businesses. Despite the fact that the TCPA clearly bans the sending of unsolicited fax advertisements and provides an enforcement mechanism for individuals in state court, California citizens will not be allowed to enforce that ban, but will instead be required to call a removal number (if there is one) listed on each individual fax they receive in order to stem the tide of unwanted fax ad transmissions. Expending precious time making these calls is not only costly, but also, in most instances, futile considering that many California citizens have reported to FTCR that they continue receiving unsolicited advertisements even after repeatedly calling fax removal numbers.

The invasion of privacy, interrupted communications, and shifted expenses suffered by Californians at the hands of junk faxers will continue unabated if the lower court's ruling is allowed to stand, and therefore, it must be reversed by this Court.

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that the recipient may call to notify the sender not to fax the recipient any further unsolicited documents." (Cal. Bus. & Prof. Code § 17538.4(a)(1).)

III. RETAINING THE PRIVATE RIGHT OF ACTION CONFERRED UPON CITIZENS BY THE TCPA IS FUNDAMENTAL TO PREVENTING THE ILLEGAL TRANSMISSION OF UNSOLICITED FAX ADVERTISEMENTS IN CALIFORNIA.

The existence of a private right of action has successfully ensured compliance with a variety of laws and regulations that state and federal government agencies have lacked adequate resources to enforce. Private rights of action have been highly instrumental in "protecting individual rights because of the limitations…of administrative enforcement mechanisms." (Mank, *Is There a Private Right of Action under EPA's Title VI Regulations? The Need to Empower Environmental Justice Plaintiffs* (1999) 24 Columbia Journal of Environmental Law 1, 48-49. Perhaps the best example is Title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodations. The existence of a private right of action in Title II has allowed private citizens to "vindicate a policy that Congress considered of the highest priority." (*Newman v. Piggie Park Enterprises* (1968) 390 U.S. 400, 401-402.) By acting as "private attorneys general," individual citizens have significantly helped to curb discrimination and ensure equal access to public accommodations.

The ability of citizens to bring private actions to enforce the law has likewise been instrumental in curbing environmental pollution where

regulatory agency enforcement is lacking. (Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, And Citizen Suits* (2000) 21 Stan. Envtl. L.J. 81 [recognizing that "the availability of the citizen suit encourages vigorous participation by pro-regulatory groups in the enforcement process and that participation can both compensate for lax agency enforcement in individual cases and discourage future laxity in general"]; *see also* Ross, *Citizen Suits: California's Proposition 65 And The Lawyer's Ethical Duty To The Public Interest*, 29 Univ. San Francisco L. Rev. 809, 812 [noting that "citizen enforcement of environmental laws and the threat of stiff civil penalties greatly reduces the financial incentive that motivates companies to disregard the law"].)

When Congress passed the TCPA, it contemplated that private citizens would be the primary enforcers of the law. (S*ee* 137 Cong. Rec. S16205-06 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings [bill sponsor]) [stating that "[u]nless Congress makes it easier for consumers to obtain damages from those who violate this bill, these abuses will undoubtedly continue"].) The importance of providing citizens with this private right of action was aptly summarized by the Third Circuit Court of Appeal in reaching its ultimate holding that state court was the appropriate venue for citizens' actions under the TCPA:

> Consumers who are harassed by telemarketing abuses can seek damages themselves, rather than waiting for federal or state agencies to prosecute violations. Although § 227(f)(1) of

> the statute does authorize states to bring actions on their citizens' behalf, the sheer number of calls made each day--more than 18,000,000--would make it impossible for government entities alone to completely or effectively supervise this activity.

(*ErieNet, Inc. v. Velocity Net, Inc.* (3rd Cir. 1998) 156 F.3d 513, 515.)

As with other federal laws conferring private rights of action, the TCPA has significantly deterred the conduct it was intended to stop. The TCPA has dramatically reduced the volume of junk faxes received in most parts of the U.S. (Hearings before Sen. Com. on Commerce, Science, and Transportation on Sen. No. 630, 107th Cong., 1st Sess. (2001), testimony of Harris Pogust, Esq.) Although the FCC lacks the resources to pursue more than small fraction of TCPA violations, the existence of a private remedy against wrongdoers has had a pronounced deterrent effect in most states. (*Id.*) Moreover, the states that recognize a private right of action have not seen a proliferation of these cases, as the deterrent effect of the private cause of action has greatly reduced the number of violations. (*Id.*)

By eliminating a private right of action for violations of the TCPA in California, the lower court's decision will result in junk faxers increasingly flouting the law on a national scale. As noted above, the California-based corporation Fax.Com, Inc. boasts of transmitting millions of fax advertisements daily. (<http.www.fax.com/Why_use_fax/direct.asp> [as of March 11, 2002].) The practice of sending unsolicited faxes continues despite the fact that Fax.Com, Inc. has received three citations from the

FCC for TCPA abuses. (TCPA Enforcement Actions <http:www.fcc.gov/eb/tcd/ufax.html> [as of March 11, 2002].) Only if the State of California respects Congress' stated intent to create a private right of action will the TCPA have the teeth needed to stop unsolicited fax ad harassment operations that operate nationwide.

IV. BUSINESS & PROFESSIONS CODE § 17538.4 DOES NOT TAKE AWAY THE RIGHT OF CALIFORNIANS TO ENFORCE THE TCPA.

The lower court's ruling allows fax advertisers and transmitters to escape liability under the TCPA by rewriting the federal law to provide that junk faxing is not prohibited if a state law allows it. According to the trial court, the passage by the California Legislature of Business & Professions Code § 17538.4 ("17538.4") precludes an action under the TCPA in California courts by private citizens. In effect, the lower court has ruled that § 17538.4 "reverse preempts" the TCPA. The lower court's decision cannot be allowed to stand, however, because its reasoning is contrary to the Supremacy Clause of the United States Constitution, the plain language of the TCPA, and the overwhelming majority of federal and state authority interpreting it.

Indeed, federal and state courts have rejected the exact reasoning adopted by the lower court to find that compliance with a state law regarding intrastate fax advertisements does ***not*** preclude liability under the

TCPA. In *State of Texas v. American Blastfax, Inc.* (W.D. Tex. 2000) 121 F.Supp.2d 1085, the court aptly reasoned:

> Blastfax also argues it is entitled to dismissal of the State's TCPA claims because Blastfax has complied with TEX. BUS. & COMM. CODE § 35.47, the state law regarding intrastate fax advertisements. This argument simply has nothing to do with the State's allegations in this lawsuit. Simply because a party complies with one law does not preclude it from violating another…Blastfax also argues that, because the Texas statute is allegedly more restrictive than the TCPA, it somehow trumps the TCPA….This argument turns the Supremacy Clause on the federal constitution on its head. … The TCPA contains no 'reverse preemption' clause for its ban on unsolicited fax advertisements. This ground for dismissal is wholly without merit.

(*State of Texas v. American Blastfax, Inc.* (W.D. Texas 2000) 121 F. Supp.2d 1085, 1089.)

Similarly, a Colorado court, following the reasoning in *State of Texas v. American Blast Fax, Inc*. held that the Colorado unsolicited fax law, [5] which is substantially the same as California's, "does not reverse-preempt the Federal [TCPA] statute." (*Mathemaesthetics, Inc. v. Reiner (*Dist. Ct. Colo. 2001) No. 00CV951, at p. 9.)

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[5] The Colorado unsolicited fax law provides as follows:

> A person engages in a deceptive trade practice when, in the course of such person's business, vocation or occupation such person…
> (b) (I) Solicits a consumer residing in Colorado by a facsimile transmission without including in the facsimile message a toll-free telephone number that a recipient of the unsolicited transmission may use to notify the sender not to transmit to the recipient any further unsolicited transmissions.

(Colo. Rev. Stat. § 6-1-702.)

A. The TCPA Expressly Provides That it Preempts All State Laws Pertaining To Unsolicited Fax Advertisement Except Those That Are More Restrictive.

The TCPA explicitly sets forth the instances in which it will ***not*** preempt state law. Section 227(e)(1) of the TCPA expressly states that:

> nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes ***more restrictive intrastate requirements or regulations***, or which ***prohibits*** . . . the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements.

(47 U.S.C. § 227(e)(1), italics added.)

Thus, two instances in which the TCPA will ***not*** expressly preempt state law are when: 1) the state law imposes a more ***restrictive*** intrastate requirement; or 2) the state law ***prohibits*** the sending of unsolicited fax advertisements. Here, the California law does not fall into either of the two explicit exceptions because § 17538.4 is ***less*** restrictive by potentially permitting unsolicited faxed advertisements otherwise made illegal under the TCPA. Thus, § 17538.4 is preempted when Congress explicitly stated that it did not intend for more permissive laws to preempt the TCPA. (*See* 47 U.S.C. § 227(e)(1); *see also English v. General Electric Co.* (1990) 496 U.S. 72, 79 [reasoning that "when Congress has made its intent known through explicit statutory language, the court's task is an easy one"].)

B. The Supremacy Clause of the U.S. Constitution Prohibits a More Permissive California Statute From Preempting the TCPA.

The Supremacy Clause provides that federal law "shall be the supreme Law of the Land" and shall be controlling on every court. (U.S. Const., art. VI, cl. 2.) As aptly encapsulated in *Howlett v. Rose* (1990) 496 U.S. 356:

> A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of 'valid excuse.' . . . An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with is content or a refusal to recognize the superior authority of its source.

(*Howlett v. Rose*, *supra*, 496 U.S. 356, 369-371, citations omitted.)

Here, the Court cannot deny California citizens the right to enforce the TCPA in state court just because the California legislature passed a state junk fax law that has outlived its intended purpose as a stop-gap measure pending implementation of the TCPA. To do so would fly in the face of well-established federal preemption principles. The California Supreme Court has elucidated the three ways in which a state law will be preempted by a federal law: 1) when Congress has expressly provided that a federal statute preempts state law; 2) when Congress has passed legislation "occupying" the field; or when 3) a state law actually conflicts with the federal law. (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 147.)

As discussed above, Congress expressly stated in the TCPA the instances when it does not preempt state law—where the state law similarly prohibits unsolicited fax advertising or is more restrictive. Not only has Congress expressly provided in the TCPA the only instances where it will ***not*** preempt state law, but in accordance with *Smiley v. Citibank*, § 17538.4 is preempted because it clearly conflicts with the TCPA when "it is impossible for a private party to comply with both federal and state requirements." (*English v. General Electric Co.*, *supra*, 496 U.S. 72, 79.) Compliance with the more permissive California law by continuing to send unsolicited fax ads, as long as a removal number is included, would clearly violate the complete ban on junk faxing under the TCPA. This unavoidable conflict requires that the TCPA preempt § 17538.4. (*See Smiley v. Citibank*, *supra*, 11 Cal.4th 138, 147.)

Indeed, the California Legislative Counsel reached that very conclusion in its recently issued opinion addressing whether the TCPA and § 17538.4 conflict and, more specifically, whether the TCPA preempts the state fax law. The Legislative Counsel's opinion recognized the inherent contradiction between the TCPA and California's less restrictive statute, stating that:

> nothing within the TCPA indicates an intention by Congress to permit the faxing of unsolicited advertising material where the material includes a statement informing the recipient of a toll-free telephone number that the recipient may call in order to request not to receive further unsolicited fax documents, as

> is the condition or restriction provided in Section 17538.4, nor is there any provision within the applicable federal regulations that permits such an exception (see 47 C.F.R. 64.1200). … Thus, the condition in Section 17538.4 that the sender provide a toll-free telephone number that may be called in order to stop the unsolicited faxing of advertising material does not conform with Congress' intent in enacting the TCPA. Therefore, in our opinion, the provisions of Section 17538.4 allowing the faxing of unsolicited advertising material [sic] conflict with the provisions of the TCPA.

(Ops. Cal. Legis. Counsel, No. 23663 (December 7, 2001) *Facsimile Advertising*, p. 6.)

Finding this inherent conflict, the Legislative Counsel thus concluded that:

> the provisions of Section 17538.4 of the Business and Professions Code that allow the faxing of unsolicited advertising material if a toll-free number is established that a recipient may call to notify the sender not to fax any further advertising materials to the recipient are preempted by the Telephone Consumer Protection Act of 1991.

(*Id.* at p. 7.)

C. It is Unnecessary for California to Affirmatively "Opt-In" to the TCPA Scheme Prohibiting the Transmission of Unsolicited Faxes.

The TCPA sets forth the intended forum for bringing actions pursuant to its provisions as follows:

> A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—
> A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
> (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
> (C) both such actions.… .

(47 U.S.C. §227(b)(3).)

The overwhelming weight of authority, including federal and state court decisions and an interpretive memorandum of the FCC, has found § 227(b)(3) to simply mean that ***as long as a state's courts are otherwise open to hearing actions under federal law, then those courts are the appropriate forum for bringing actions under the TCPA***. (*International Science and Tech. Inst., Inc. v. Inacom Commun., Inc.* (4th Cir. 1997) 106 F.3d 1146, 1156-1158; *Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Services, Ltd.* (2nd Cir. 1998) 156 F.3d 432, 435; *Murphey v. Lanier* (9th Cir. 2000) 204 F.3d 911, 914; *Schulman v. Chase Manhattan Bank* (N.Y.App. 2000) 710 N.Y.S. 2d 368, 371-372, 268 A.D.2d 174, 177-179; *Hooters of Augusta, Inc. v. Nicholson* (Ga.App. 2000) (en banc) 245 Ga.App. 363, 364-365, 537 S.E.2d 468, 470; *Worsham v. Nationwide* (Md.Ct.Spec.App. 2001) 138 Md.App. 487, 496-497, 772 A.2d 868, 874; *Kaplan v. Democrat & Chronicle* (N.Y. 4 Dept. 1999) 698 N.Y.S. 2d 799, 800, 266 A. 2d 848, 848; *Kaplan v. First City Mortgage* (City Ct., N.Y. 1999) 701 N.Y.S. 2d 859, 862, 183 Misc. 2d 24, 26; *Zelma v. Market USA* (N.J.Super. A.D., Aug. 2, 2001) 343 N.J.Super. 356, 361-367, 772 A.2d 591, 595-596; *Zelma v. Total Remodeling, Inc.* (N.J. Super. Ct. 2000) 334 N.J.Super. 140, 143-148, 756 A.2d 1091, 1093-1096; *Mathemaesthetics, Inc. v. Reiner* (Dist.Ct.Colo., August 15, 2001), No.

00CV951, p. 4; *Bailey v. Cookies in Bloom* (Dist.Ct.Colo., July 6, 2001), No. 01CV292, p. 2; *Davis, Keller, Wiggins, LLC. v. JTH Tax, Inc.* (Mo.Cir.Ct. Aug. 28, 2001), No. 00AC-023289, p. 2; *Coleman v. Varone* (Mo.Cir.Ct., Mar. 26, 2001), No. 00AC-005196, p. 3; FCC Report and Order, 7 FCC Rcd. 8752 (1992), ¶ 55.

In this regard, the New York appellate court's decision in *Schulman v. Chase Manhattan Bank, supra*, 268 A.D.2d 174 provides a cogent analysis of § 227(b)(3) and should be followed here:

> Although state courts share responsibility for enforcing Federal law, and Congress clearly intended state courts to take responsibility for enforcing private rights under the TCPA, '[t]he requirement that a state court of competent jurisdiction treat Federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented' (Howlett v. Rose, [(1990) 496 U.S. 356], 372). A state court may decline jurisdiction based on a valid excuse, such as its own neutral rules of judicial administration (see, Howlett v. Rose, supra; see also, Testa v. Katt, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967). But if the exercise of a state court's ordinary jurisdiction under established local laws is 'appropriate to the occasion and is invoked in conformity with those laws,' a state court may not refuse jurisdiction over a claim based on Federal law [citations omitted].
>
> We therefore conclude that the phrase 'if otherwise permitted by the laws or rules of court of a State' ***merely acknowledges the principle that states have the right to structure their own court systems and the state courts are not obligated to change their procedural rules to accommodate TCPA claims***. In the case at bar, [the Defendant] has not asserted the existence of any procedural rules which would prevent the [trial] Court from exercising jurisdiction over the plaintiff's claim.

(*Schulman v. Chase Manhattan Bank, supra,* 268 A.D.2d 174, 179, italics added.)

As reasoned in *Schulman,* and by the vast majority of federal and state courts cited above that have ruled on this issue, it is well-settled law that general subject matter jurisdiction state law provisions, such as that found in the California Constitution, article VI, § 10, establish state court jurisdiction for federal law-based claims. (*See Howlett v. Rose*, *supra*, 496 U.S. 356, 369-72.)

Despite this substantial and well-reasoned authority, the trial court in this case nevertheless seized upon the only state appellate court decision to hold differently, *Autoflex Leasing, Inc. v. Manufacturers Auto Leasing, Inc.* (2000) 16 S.W.3d 815 ("*Autoflex*"), and erroneously found that a state must affirmatively take steps to pass enabling legislation in order to open its courts to TCPA actions. That decision, however, has since been soundly criticized by legal commentators and courts for its faulty reasoning and misstatements regarding the holdings of the cases and TCPA legislative history upon which it relied. (*See* Biggerstaff and Miller, *Must States Opt-In? Can States Opt-Out?* (2001) 33 Conn.L.Rev. 407, 415, fn 43; *see also Zelma v. Market USA* (N.J.Super. A.D., Aug. 2, 2001) 772 A.2d 591, 596-597.) Indeed, ***no*** federal or state appellate court case decided since *Autoflex*

has followed its flawed reasoning. (*See, e.g., Hooters of Augusta, Inc. v. Nicholson* (Ga.App. 2000) (en banc) 537 S.E.2d 468, 470.)

First of all, the three federal court cases relied upon by the court in *Autoflex* do not stand for the stated proposition that states must first "opt-in" to the TCPA. The court first erroneously cited to *Nicholson v. Hooters of Augusta, Inc*. (11th Cir. 1998) 136 F.3d 1287, 1288, but the quote cited is merely the Eleventh Circuit's reference to the holding of the trial court. In restating this quote, the appellate court in *Nicholson* was not indicating its approval of the trial court's holding. The *Autoflex* court also erroneously relied on *Chair King, Inc. v. Houston Cellular Corp.* (5th Cir. 1997) 131 F.3d 507, 511 for the assertion that TCPA requires a state to "opt-in." The quote cited by *Autoflex* from *Chair King*, however, is just that court's paraphrasing of the statute's language without any indication of its approval or disapproval of the "opt-in" argument.

The third federal court decision wrongly relied upon by the *Autoflex* court is *Murphey v. Lanier* (9th Cir. 2000) 204 F.3d 911, 914. There, the issue before the court was whether the federal courts have jurisdiction over claims brought under the TCPA, and the court held that the proper forum was state court. While noting "that states may refuse to exercise jurisdiction authorized by the statute" and finding that "thus a state could decide to prevent its courts from hearing private actions to enforce TCPA's substantive rights," (*Murphey v. Lanier*, *supra*, 204 F.3d 911, 914), the

court there in no way held that states must affirmatively enact legislation to allow claims in state court under the TCPA. Most significantly, and contrary to the mischaracterization of its findings by the trial court here,[6] the Ninth Circuit Court of Appeal in *Murphey* ***did not*** make any ruling or comment whatsoever that California has opted out of the TCPA's enforcement scheme, which clearly it has not.

Furthermore, the *Autoflex* court erroneously relied on the TCPA's legislative history for its proposition that courts must "opt-in" to the federal TCPA scheme. The court in *Autoflex* quoted the TCPA's author, Senator Hollings, who expressed his desire when he introduced the bill, "that states… act reasonably in permitting their citizens to go to court to enforce this bill." (*Autoflex Leasing, Inc. v. Manufacturers Auto Leasing, Inc.*, *supra*, 16 S.W.3d 815, 817 [citing 137 Cong.Rec. S16205-06 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings)].) This statement by Senator Hollings, however, as cited in *Autoflex*, was quoted out of context, and when viewed in light of his comments as a whole, merely illustrates the senator's preference that states allow consumers to bring TCPA actions in small claims court and his view that Congress could not dictate the proper

[6] The trial court below erroneously proclaimed that the Ninth Circuit in *Murphey v. Lanier* (9th Cir. 2000) 204 F.3d 911, 914 "noted that a person who receives an unsolicited fax advertisement in California probably has no private right of action under the TCPA because of the existence of B&P § 17538.4." No such statement, however, appears on the page cited to by the trial court or on any other page in the entire opinion.

venue for such actions.[7] Thus, in light of the substantial misstatements of authorities relied upon by the court in *Autoflex* to reach its faulty conclusion, contrary to the overwhelming majority of other courts, this Court should not follow that Texas court decision.

The trial court's ruling below not only erroneously concludes that states must pass enabling legislation to allow actions under the TCPA, but further suggests that by passing § 17538.4, the California legislature has expressed its intent to preclude its citizens from enforcing the TCPA. This argument can be easily rejected, however, since there is no express language in § 17538.4, nor any other California statute or court rule, stating that actions under the federal TCPA cannot be brought in California state courts. In fact, the legislative history of § 17538.4 reveals, quite to the contrary, that it was the intent of the California legislature not to ***prevent*** actions under the TCPA, but instead to at least provide Californians with ***some protection until such time as the TCPA was fully implemented***. In

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[7] Immediately preceding the quote cited to in *Autoflex*, Senator Hollings stated as follows:

> The substitute bill contains a private right-of-action provision that will make it easier for consumers to recover damages from receiving these computerized calls. The provision would allow consumers to bring an action in State court against any entity that violates the bill. The bill does not, because of constitutional constraints, dictate to the States ***which court in each State shall be the proper venue for such an action***, as this is a matter for State legislators to determine.

that regard, the Enrolled Bill Report for Bus. & Prof. Code § 17538.4 expressly stated that:

> …the federal ban [the TCPA] will not go in effect until the FCC has adopted implementing regulations. This process could take a number of years. Assuming that any definitions the FCC adopts…do not undermine the prohibition, once the FCC's regulations are in place, the federal, law and regulations ***will supercede AB 2438 [§ 17538.4]*** since they will be more protective. But until that time, AB 2438 would California fax machine owners more protection than they would currently have against unsolicited ads.

(Enrolled Bill Report, August 1992, of AB 2438, enacting Cal. Bus. & Prof. Code § 17538.4, at p. 2, italics added.)

V. CONCLUSION

The appeal in this case raises important issues concerning Californians' ability to fully enforce the TCPA. California's citizens will be forced to unfairly bear both the shifted costs of unsolicited fax advertisements and the daily invasion of privacy that accompanies their delivery if the lower court ruling is allowed to stand. Moreover, by eliminating in the largest state in the nation a private right of action to enforce the TCPA, California would severely undermine the effectiveness of that federal law in stopping the illegal transmission of unsolicited fax advertisements. Congress expressly provided that state courts of general jurisdiction are the appropriate forum for adjudicating claims by private

(137 Cong.Rec. S16205-06 (daily ed. Nov. 7, 1991) (statement of Sen.

individuals arising out of violations of the TCPA. This principle does not require states to pass enabling legislation in order to hear TCPA claims, nor does it allow states to override the federal statute by passing weaker regulations on junk faxing. That this is true, is evidenced by the plain language of the TCPA, the Supremacy Clause of the United States Constitution, as well as the great weight of authority interpreting the TCPA.

For all the foregoing reasons, this Court must reverse the lower court's ruling and ensure that Californians are able to fully enforce their rights to be free of unwanted and unsolicited fax advertisements.

Dated: March 26, 2002

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Hollings), italics added.)