

STATE OF SOUTH CAROLINA)
)
COUNTY OF ALLENDALE)

IN THE COURT OF COMMON PLEAS

ALLENDALE COUNTY BANK, individually)
and on behalf of all those similarly situated,)

v.)

FAX.COM, INC., f/k/a FaxId, Inc.)
120 Columbia Ste 500)
Aliso Viejo, CA 92656)

c/o Registered Agent)
JOSEPH E MUDD)
8001 Irvine Center Dr Ste 1170)
Irvine, CA 92618)

PRELIMINARY INJUNCTION

FILED FOR RECALL
2001 DEC -7 PM 3:48
MARION FAIREY, JR.
CLERK OF COURT
ALLENDALE COUNTY, S.C.

I. Background

On November 28, 2001, Plaintiff, pursuant to Rule 65(b), SCRPC, made an application to the Defendant for a Temporary Restraining Order against the above-named Defendant. For good cause shown, the Order was granted and a Rule to Show Cause why the TRO should not be made permanent was issued, returnable at 9:30 a.m., December 6, 2001, at the Jasper County Courthouse in Ridgeland, South Carolina.

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At the hearing on the Rule to Show Cause, the Plaintiffs, represented by Marion C. Fairey, Jr. of Speights & Runyan, and Lee D. Cope, Esquire, provided an affidavit of service averring that a Vice President of the Defendant had been personally served with a Summons & Complaint, written discovery, and a filed copy of this Court's TRO and Rule to Show Cause Order. The Defendant did not appear after being called by the bailiff three times outside of the Courtroom. In the Defendant's absence, the Plaintiff requested that the TRO be made into a preliminary injunction. Finding that the Plaintiff has submitted sufficient evidence that the

Defendant was served in accordance with Rule 4, SCRPC and had notice of the Rule to Show Cause hearing, the Court grants Plaintiff's motion.

II. Discussion

The Plaintiff has submitted five (5) affidavits that aver that Plaintiff and putative class members will suffer immediate and irreparable harm if the Defendant alters or destroys certain records and databases. Based upon the preliminary showing of the Plaintiff, the Court agrees, and will enter a preliminary injunction. The basis and terms of the Preliminary Injunction are more fully set forth below:

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1. On November 8, 2001, the Plaintiff filed a Summons and Complaint against FAX.COM in the Court of Common Pleas, Allendale County, South Carolina. The Complaint alleges that the Defendant violated 47 U.S.C. §227(b)(2)(C) of the Telephone Consumer Protection Act ("TPCA") by sending an unsolicited facsimile advertisement to the Plaintiff and a class of other persons or entities. The Complaint further alleges a violation of the South Carolina Unfair Trade Practices Act and seeks the issuance of a Temporary Restraining Order to prevent the deletion, destruction or spoliation of evidence.

2. The Plaintiff's Complaint contains allegations sufficient to establish both personal and subject matter jurisdiction of this Court over the Defendant.

3. The Plaintiff has submitted five affidavits in support of its application for a Temporary Restraining Order. The affidavits are from Robert Biggerstaff, Keith M. Jensen, Harry D.

Revell, Kevin M. Tripi, and Joseph C. Wilson. With the exception of Mr. Biggerstaff, the

remaining affiants are all attorneys who have served as lead counsel in various TPCA class action litigation against the Defendant and other facsimile broadcasters in California, Texas,

Georgia and South Carolina.

4. The affidavits submitted by the Plaintiff aver that

a. Obtaining the computer records of telephone facsimile numbers called by fax broadcasters such as the Defendant is a critical step in litigation under the TCPA. (See, Affidavit of Joseph Wilson, ¶5; Affidavit of Harry Revell, ¶5; Affidavit of Keith Jensen, ¶5). Without this information it is extremely difficult and sometimes impossible to identify all potential victims of illegal facsimile broadcasts. (Wilson Affidavit, ¶ 5; Jensen Affidavit ¶¶ 5 - 7; Revell Affidavit, ¶¶ 5-7).

b. In past litigation against fax broadcasters including the Defendant, defendants have either refused to produce their records or have claimed that such records have been inadvertently destroyed. (See, Affidavit of Joseph Wilson, ¶7; Affidavit of Harry Revel, ¶¶. 7; Affidavit of Keith Jensen, ¶5, 9; Affidavit of Robert Biggerstaff, ¶ 6).

c. The Defendant in this case, FAX.COM, has been recently and severely sanctioned in the case styled Bruns v. E-Commerce Exchange, et al., Case No. 0CC02450 pending in the Superior Court of the County of Orange, California, for failing to produce records and databases requested in discovery. (Affidavit of Kevin Tripi, ¶¶ 3, 4, 5).

d. The Defendant in this case, FAX.COM, through its attorneys, received a subpoena in Charleston County litigation requiring the production of a computer located in Charleston County that contained records and databases that were believed to identify the names and phone numbers of persons to whom advertising facsimiles have been sent. After receipt of those subpoena, but before the computer could be inspected, this computer and its contents was removed from Charleston County. (Biggerstaff Affidavit, ¶14).

e. Despite claims by the Defendant and other fax broadcasters that the identify of persons to whom they have sent facsimile advertisements cannot be recovered from records and databases even if they are not destroyed, such information has been recovered easily by experts in computer databases. (Affidavit of Robert Biggerstaff, ¶¶ 6, 11, 12).

5. Based solely upon the affidavits submitted, Plaintiff has made a *prima facie* showing that

~~the destruction, deletion or spoliation of records or databases that contain any information regarding~~
who received advertising facsimiles broadcast by the Defendant would cause immediate and

irreparable injury to Plaintiff and class members. It appears from the affidavits that if such records are destroyed, deleted, or spoliated in any way, it will be difficult or impossible to identify persons to whom the Defendant sent allegedly illegal facsimiles. In other words, the Defendant's records appear to be critical evidence in this lawsuit and the destruction, deletion or spoliation of those records could seriously impair the Plaintiff's ability to prove its case. Furthermore, once the information is deleted, destroyed or spoliated, it appears that such information could be lost forever.

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IT IS THEREFORE ORDERED, that the Defendant, FAX.COM, is hereby enjoined from destroying, deleting, or otherwise spoliating any data, documents, information, records, databases, computer files, tapes, discs, or other media utilized for information storage that contains any information regarding who has received advertising facsimiles broadcast by the Defendant.

IT IS FURTHER ORDERED, any party may apply to this Court for an Order altering, amending, or vacating the terms of this Preliminary Injunction.

IT IS FURTHER ORDERED, that a copy of this Preliminary Injunction shall be served Defendant in accordance with Rule 4, SCRCP., and that Plaintiff shall file all proofs of service with the Clerk of Court for Allendale County.

IT IS FURTHER ORDERED, that the Plaintiff shall be required to maintain security in the amount of five-hundred (\$500.00) dollars. The security in that amount previously deposited by Plaintiff with the Clerk of Court for Allendale County shall satisfy the security required by this Order.

IT IS SO ORDERED.



The Honorable Perry M. Buckner
Chief Administrative Judge for the 14th
Judicial Circuit

Entered this 7th day of December, 2001