

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 1999-020649

10/03/2003

HONORABLE ROBERT L. GOTTSFIELD

CLERK OF THE COURT
M. Johnson
Deputy

FILED: 10/09/2003

ESI ERGONOMIC SOLUTIONS LLC

CHRISTOPHER A LAVOY

v.

UNITED ARTISTS THEATER CIRCUIT INC, et al. KEITH BEAUCHAMP

AMERICAN BLAST FAX INC
16200 ADDISON RD
STE 250
ADDISON TX 75001-0000
DEAN D HUNT PRO HAC VICE
BRACEWELL & PATTERSON
711 LOUISIANA #2900
HOUSTON TX 77002-2781

MINUTE ENTRY

10:00 a.m. This is the time of oral argument on motions. Counsel Christopher A. LaVoy and Edward Moomjian are present on behalf of plaintiffs. Counsel Keith Beauchamp, Robert Schaffer and Thomas Gilson are present on behalf of defendant. All are present in person.

Court Reporter Lorraine Chalkey is present.

Arguments are held.

11:07 a.m. Court stands at recess.

11:43 a.m. Court reconvenes with respective counsel present.

Court Reporter Lorraine Chalkey is present.

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Further arguments are held.

After extended argument the court takes the matter under advisement.

Later:

After further consideration the court orders as follows:

1. Based on prior admissions of the defendant United Artists, the findings made in the June 12, 2003 ruling; the decision of Division One (203 Ariz. 94) and under the pertinent authorities the court now grants plaintiff's motion for partial summary judgment finding that defendant violated the Telephone Consumer Protection Act (TCPA) when it transmitted a one-page fax add in 1999 and is liable for the statutory amount of \$500 per violation. The court specifically finds that governmental entities are also protected by the Act; that a computer with a fax modem board qualifies as a "telephone facsimile machine"; reaffirms the prior ruling that there is no "established business relationship" defense for junk faxing; and that defendant's "Receipt" argument does not avoid summary judgment. The court agrees with defendant, however, that the fax must be received not just sent so that a receipt-based class is required and not just a sent-based class. The court rejects all past dispute issues except that plaintiff must prove the receipt of the fax which plaintiff has done at least for a certain number of faxes, hereafter determined. The court specifically rules that a judgment may be awarded to plaintiff before notice is given to class members as hereafter explained in the following paragraph.
2. Denying defendant's motion to stay the court's ruling on plaintiff's motion for partial summary judgment pending class certification. The court understands although normally class certification and notice should precede a ruling on the merits, it agrees with plaintiff that defendant by its past conduct in this case has waived these rules; and, further, because the ruling on the merits will help define the scope of the class and the size of any resulting judgment. In making this decision the court adopts plaintiff's solution to any prejudice which might occur by a determination of liability by not informing absent class members about the ruling in the class notice so a "blind" decision can be made by such members about whether to join the lawsuit. The defendant has previously advised the court in view of its bankruptcy that it is not concerned by the possibility absent class members would opt-out and file new lawsuits should defendant prevail on plaintiff's pending motion for partial summary judgment. Moreover, if class members should opt-out after this ruling by the court, the amount awarded in any summary ruling on liability will be reduced by the number of opt-outs. The ruling this date will help define the scope of the class and the size of any resulting judgment.

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3. In the interests of justice, the court relieves the defendant from any prior admission that 90,000 faxes were "received" as that does not appear to be the case. The court now awards a judgment in favor of plaintiff and against defendant in the amount of \$500 for each fax estimated to have been received using defendant's concessions and conclusions which number 57,600 faxes (Rev. US Separate SOF paragraph 16 and 19, and see argument ESI Reply P.16, 1-12).
4. A trial shall be held in the future on whether more than 57,600 faxes were received as to which there are fact issues.

12:13 p.m. Matter concludes.

IT IS FURTHER ORDERED that the requirements of Rule 58(d) are waived out of necessity, on the part of the Court, to shorten the administrative time involved in the processing of a separate written Order and to conserve judicial resources. This minute entry is accordingly signed as the formal written Order of the Court.

/S/ ROBERT L. GOTTSFIELD

HONORABLE ROBERT L. GOTTSFIELD
JUDGE OF THE SUPERIOR COURT