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R. HOWARD & COMPANY, P.A.., individually and as the representative of a class of similarly situated persons, *Plaintiff,* v. 395 BLOOMFIELD AVENUE CORP., RICHARD DORCHAK and RYAN DORCHAK, *Defendants.*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY DOCKET NO. ESX-L-3360-10

ORDER BARRING CLASS CERTIFICATION

This matter having opened by the Court by way of motion by Defendants, pursuant to *R.* 4:32-2, to bar Plaintiff's request for class certification in the Complaint, and the Court having considered the arguments of Defendants and Plaintiff, and the Court having heard oral argument on October 29, 2010, and for good cause shown

IT IS on this 17 day of December, 2010

ORDERED that Plaintiff's request for class certification in the Complaint be and is hereby barred; and it is further

ORDERED that Plaintiff may not maintain this action as a class action; and it is further

ORDERED that Defendants shall serve a copy of this Order on Plaintiff within 5 days of receipt of same from the Court. Please see the attached opinion.

So Ordered:

Hon. Denise A. Cobham, J.S.C.

Opposed: [✓]
Unopposed: [ ]
284215

SUPERIOR COURT OF NEW JERSEY

CIVIL DIVISION
ESSEX VICINAGE

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December 17, 2010

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Re: R. Howard & Company v. 395 Bloomfield Ave. Corp.
Docket No. L-3360-10

Dear Counsel:

The court has before it a motion by defendant 395 Bloomfield Avenue Corp. to bar class certification. The court will begin its analysis by explaining the underlying statutory basis for this lawsuit and how this issue has been dealt with by other courts.

TCPA Litigation

In 1991, Congress enacted the Telephone Consumer Protection Act ("TCPA" or "the Act"), 47 USCA § 227. The Act seeks to protect the public from unwanted solicitations to both telephone and facsimile lines. Zelma v. Market U.S.A., 343 N.J. Super. 356, 359 (App. Div. 2001). The instant litigation and numerous other lawsuits around the country have stemmed from the following provisions regarding telephone facsimile solicitations:

(b) Restrictions on use of automated telephone equipment.
(1) Prohibitions. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

...

(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 the date of enactment of the Junk Fax Prevention Act of 2005 [enacted 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);

....

(3) Private right of action. 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.
If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.
47 U.S.C.A. § 227 (b)(1)(C). (emphasis added).

The cases filed throughout the United States seem to be factually similar. A local business sends a facsimile advertisement to a number of recipients. One recipient initiates a claim for violation of the TCPA, seeking statutory damages on behalf of others similarly

situated.[1] In Essex County alone, there are at least 40 TCPA cases of this sort. It is the court's understanding that at least one of the cases currently pending involves approximately 160,000 facsimile recipients.

The issue facing this court, and several others around the country, is whether class certification is appropriate for TCPA violations. To date, state appellate courts in eight states have either affirmed class certification or reversed orders denying class certification:

1. Arizona: ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc., 50 P.3d 844 (Ariz. App. 2002);
2. California: Kaufman v. ACS Sys., Inc., 2 Cal. Rptr. 3d 296 (Cal. App. 2003); Hypertouch, Inc. v. Superior Court ex rel. Perry Johnson, Inc., 27 Cal. Rptr. 3d 839 (Cal. App. 2005);
3. Florida: Guy's World, Inc. v. Condon, 1 So. 3d 240 (Fla. App. 2008);
4. Georgia: American Home Servs. Inc. v. A Fast Sign Co., 651 S.E.2d 119 (Ga. App. 2004); Hooter's of August, Inc. v. Nicholson, 537 S.E.2d 468 (Ga. App. 2000);
5. Indiana: Core Funding Group, LLC v. Young, 792 N.E.2d 547 (Ind. App. 2003);
6. Louisiana: Display Funding Group, Inc. v. Graphic House Sports Promotions, Inc., 992 S.2d 510 (La. App. 2007); Display South, Inc. v. Express Computer Supply, Inc., 961 So. 2d 451 (La. App. 2007);
7. North Carolina: Blitz v. Aegean, Inc., 677 S.E.2d 1 (N.C. App. 2009);

[1] It appears that the real defendants in TCPA lawsuits are the insurance carriers, and not the business owners themselves. Thus, in most cases where the plaintiff settles with the named defendant, generally at a substantial figure, the plaintiff agrees not to collect from the defendant and takes an assignment of the defendant's rights to sue the defendant's carrier. Much of the TCPA litigation in New Jersey specifically, and in the country generally, consists of declaratory judgment actions between plaintiffs and the defendants' carriers. See Myron Corp. v. Atlantic Mutual Insurance Co., 407 N.J. Super. 302, 308 (App. Div. 2009) ("Noting that the 'legal battleground [over TCPA coverage] is littered on both sides with the detritus of an incrementally waged war on multiple fronts,' the Bergen County judge determined that Atlantic had a duty to defend Myron...he deferred a decision on the indemnity issue pending the outcome of the underlying TCPA suit.")

8. Oklahoma: Lampkin v. GGH, Inc., 146 P.3d 847 (Okla. App. 2006).

In addition, the following trial courts have approved class certification:

1. Alabama: Frostman & Cutchen, LLP v. Away Travel, No. CV 04-2043, 2006 WL 4535543 (Ala. Cir. Ct. Dec. 6, 2006).
2. Illinois: Travel 100 Group, Inc. v. Empire Cooler Serv., Inc., 2004 WL 3105679 (Ill. Cir. Ct. Oct. 19, 2004); Whiting Corp. v. Sungard Corbel, Inc., No. 03 CH 31135, 2005 WL 5569575 (Ill. Cir. Ct. Nov. 9, 2005); Rawson v. C.P. Partners, LLC, 2005 TCPA Rep. 1407 (Ill. Cir. Ct. Sept. 30, 2005); Brill v. Beckford Enters., Inc., No. 06 CH 1520, 2009 TCPA Rep. 1856 (Ill. Cir. Ct. Jan. 16, 2009); CE Design, Ltd. v. Letrix USA, Inc., No. 06 CH 26834 (Ill. Cir. Ct. Aug. 30, 2010); CE Design, Ltd. v. Matrix LS, Inc., No. 05 L 269 (Ill. Cir. Ct. Apr. 16, 2010).
3. Kansas: Anderson Office Supply, Inc. v. Advanced Med. Assocs., 09-CV-178 (Harvey City Dist. Ct. Nov. 17, 2010).
4. Massachusetts: Collins v. Locks & Keys of Woburn, Inc., No. 07-4207-BLS2 (Mass. Sup. Ct. Suffolk, SS July 3, 2009); Fray-Witzer v. Metro. Antiques, LLC, No. 02-5827-BLS (Mass. Sup. Ct. Suffolk, SS June 14, 2005).
5. Missouri: Missouri Info. Solutions, Inc. v. KC Subs, Inc., No-0516-CV17319 (Cir. Ct. Jackson County, MO Dec. 16, 2008); Hoops & Assocs., P.C. v. Fin. Solutions, No. 07SL-CC-00938 (Cir. Ct. St. Louis County, MO Dec. 18, 2008); Clean Carton Co. v. Prime TV, LLC, No. 0AC-11582, 2004 TCPA Rep. 1294 (Cir. Ct. St. Louis County, MO July 13, 2004); Karen Little, LLC v. Brinker Missouri, Inc., No. 02CC-003965, 2005 WL 6191055 (Cir. Ct. St. Louis County, MO Sept. 23, 2005).

6. Ohio: Jemiola v. XYZ Corp., No. 411237, 2001 TCPA Rep. 1129 (S.C.C.P Feb. 20, 2001); Jacobson v. Doctor's Assistance Corp., No. 07CV000871, 2007 WL 5357367 (Ohio C.P. June 25, 2008).
7. South Carolina: Biggerstaff v. The Ramada Inn, 2000 TCPA Rep. 1128 (S.C.C.P. Feb. 20, 2001); Biggerstaff v. Marriot Int'l, 2001 TCPA Rep. 1129 (S.C.C.P. Feb. 20, 2001).
8. Texas: Coontz v. Nextel Commc'n, Inc., 2003 TCPA Rep. 1237 (Tex. Dist. Oct. 10, 2003).
9. Washington: Transportation Inst. v. Seattle PC-Magic, Inc., 2003 WL 5267529 (Wash. Super. June 8, 2005).
10. West Virginia: Mey v. Herbalife, Inc., 2006 TCPA Rep. 1445 (W.Va. Cir. Apr. 21, 2006).

However, a Law Division judge in New Jersey has stated that:

> [t]he majority of courts that have considered the vitality of class actions under the TCPA have held that class actions are invalid. See, e.g. Livingston v. U.S. Bank, N.A., 58 P.3d 1088 (Ct. App. Colo. 2002) (finding class action is inappropriate because individual issues predominate over common issues in cases involving unsolicited faxes under the TCPA.); Kondos v. Lincoln Property Co., 110 S.W.3d. 716 (Tex. App. 2003) (same); Kenro Inc. v. Fax Daily, Inc., 962 F. Supp. 1162 (S.D. Ind. 1997) (same)....

Freedman v. Advanced Wireless Cellular Communications, Inc., 2005 WL 2122304 at *2 (Law Div. June 24, 2005). The judge's statement in Freedman is supported by several cases around the country denying class certification:

1. Colorado: Livingston v. U.S. Bank, N.A., 58 P.3d 1088 (Ct. App. Colo. 2002);
2. Connecticut: Weber v. U.S. Sterling Securities, Inc., 282 Conn. 722 (2007) (applying New York law);

3. Georgia: Carnett's, Inc. v. Hammond, 279 Ga. 125 (2005); McGarry v. Cingular Wireless, LLC, 267 Ga. App. 23 (2004);

4. Illinois: Damas v. Ergotron, Inc., 2005 WL 1614485 (Ill. Cir. Ct. 2005); Kim v. Sussman, 2004 WL 3135348 (Ill. Cir. Ct. 2004);

5. Indiana: Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162 (S.D. Ind. 1997);

6. Louisiana: Gene & Gene, L.L.C. v. Biopay, L.L.C., -- F.3d ----, 2010 WL 4137737 (5th Cir. Oct. 22, 2010).

7. Maryland: Levitt v. Fax.com, 2007 WL 3169078 (D. Md. 2007);

8. New York: McGaughey v. Treistman, 2007 WL 24935 (S.D.N.Y. 2007); J.A. Weitzman, Inc. v. Lerner, Cumbo & Associates, Inc., 46 A.D.3d 755 (2d Dept. 2007); Leyse v. Flagship Capital Services Corp., 22 A.D.3d 426 (1st Dept. 2005); Rudgayzer & Gatt v. Cape Canaveral Tours and Travel, Inc., 22 A.D.3d 148 (2d Dept. 2005); Weber v. Rainbow Software, Inc., 21 A.D.3d 411 (2d Dept. 2005); Giovanniello v. Hispanic Media Group USA, Inc., 21 A.D.3d 400 (2d Dept. 2005); Bonime v. Discount Funding Associates, Inc., 21 A.D.3d 393 (2d Dept. 2005); Weitzner v. Sciton, Inc., 2008 WL 1840768 (E.D.N.Y. 2008); Gratt v. Etourandtravel, Inc., 2007 WL 2693903 (E.D.N.Y. 2007); Holster v. Gatco, Inc., 485 F. Supp. 2d 179 (E.D.N.Y. 2007); Bonime v. Avaya, Inc., 2006 WL 3751219 (E.D.N.Y. 2006); Giovanniello v. New York Law Pub. Co., 2007 WL 2244321 (S.D.N.Y. 2007); Rudgayzer & Gratt v. LRS Communications, Inc., 6 Misc. 3d 20 (App. Term 2004); Ganci v. Cape Canaveral Tour and Travel, Inc., 4 Misc. 3d 1003(A) (Sup. Ct. 2004)[2];

[2] Since New York's Rules of Civil Procedure prohibit class actions for statutory remedies when the statute does not expressly authorize recovery in a class action (N.Y. C.P.L.R. § 901(b)), the New York cases are less instructive than those of other states.

9. North Carolina: Blitz v. Xpress Image, Inc., 2006 WL 2425573 (N.C. Super. Ct. 2006);

10. Ohio: Boehm, Kurtz & Lowry v. Interstate Ins. Services Agency, 2010 WL 4514255 (Ohio App. 1st Dist. Nov. 10, 2010); Cicero v. U.S. Four, Inc., 2007 WL 4305720 (Ohio Ct. App. 10th Dist. 2007).

11. Pennsylvania: Forman v. Data Transfer, Inc., 164 F.R.D.400 (E.D. Pa. 1995).

12. Texas: Kennard v. Electronic Data Systems Corp., 1998 WL 34336245 (Tex. Dist. Ct. 1998); Intercontinental Hotels Corp. v. Girards, 217 S.W.3d 736 (Tex. App. 2007); Pinnacle Realty Mgmt Co. v. Kondos, 130 S.W.3d 292 (Tex. App. 2004); Apartment Inv. and Mgmt Co. v. Suggs & Associates, P.C., 129 S.W.3d 250 (Tex. App. 2004); Kondos v. Lincoln Prop. Co., 110 S.W.3d 716 (Tex. App. 2003); Kenro Inc. v. Fax Daily, Inc., 962 F. Supp. 1162 (S.D. Ind. 1997);

(Def.'s Supplemental Memorandum 8-9).

Thus, it appears that in actuality, 13 states (including New Jersey) have denied class certification, and courts in 18 states have allowed class certification (four states have courts which have ruled both ways). We recognize of course that the court's task is not to necessarily follow the majority approach in deciding these matters. Indeed, as Judge Dreier pointed out in Delgozzo v. Kenny, 266 N.J. Super. 169, 191 (App. Div. 1993), in deciding a class action matter, "New Jersey is free to take the minority approach should it choose to do so."

In New Jersey there are three unpublished TCPA decisions (one Appellate Division, one trial court, and one Federal District Court) holding that class certification was not appropriate.[3]

[3] Plaintiff's counsel has also provided the court with a copy of a 2003 order granting class certification under R. 4:32-1(b)(2) in a TCPA action brought in the Chancery Division of Camden County. See Spectracom, Inc. v. CellDirect Corp., No. C-116-02, 2003 TCPA Rep. 1137 (Ch. Div. May 30, 2003). Unlike the instant case in which plaintiff is seeking monetary damages, counsel for Spectracom has informed this court that the class certified in that case was only seeking declaratory and injunctive relief.

Freedman v. Advanced Wireless Cellular Communications, Inc., supra, 2005 WL 2122304 (Law Div. June 24, 2005); Levine v. 9 Net Avenue, Inc., No. A-1107-00T1, 2001 WL 34013297 (App. Div. June 7, 2001); and Goodrich Mgmt Corp. v. Afgo Mechanical Servs., Inc., No. 09-00043, 2009 WL 2602200 (D.N.J. Aug. 24, 2009). In addition, Judge Schott of this court has denied class certification in an oral decision; that decision is on appeal before the Appellate Division.[4] Local Baking Products, Inc. v. Kosher Bagel Munch, Inc., Dkt. No. L-45695-09.

Factual Background

Defendant, 395 Bloomfield Avenue Corporation, is the corporation for the restaurant known as the Cloverleaf Tavern in Caldwell, New Jersey ("The Cloverleaf"). (Dorchack Cert. ¶ 1). In 2009, Ryan Dorchack, the manager of the Cloverleaf and a defendant herein, "paid a vender known as 'FaxVantage' for a list of recipients limited to certain towns in Essex County and for FaxVantage to send a one page flyer advertising Cloverleaf's $6.95 lunch special to persons and businesses in Essex County, but limited to the towns immediately surrounding the Cloverleaf." (Def.'s Br. 4-5). Mr. Dorchack claims that he limited the geographic scope of his facsimile because he wanted to target the areas in which the Cloverleaf had established business relationships. In July of 2009, Mr. Dorchack received an invoice from a company called "Profax, Inc...claiming to have sent approximately 1128 faxes for the invoice amount of $78.39." (Dorchack Cert. ¶ 4). Mr. Dorckack contends that he had no prior contact with Profax and that FaxVantage used the services of Profax without his knowledge or consent. (Id.)

In May of 2010, Cloverleaf was served with a Summons and Complaint against Cloverleaf, Mr. Dorchack, and his father Richard for violation of the TCPA and for common law

[4] Plaintiff points out that Judge Vichness of this court has signed two class certification orders after the defendants consented to class certification as part of a settlement agreement. Those would not seem to be of great importance since there was no opposition to class certification.

conversion. The Complaint was brought by R. Howard & Co., an accounting firm in Roseland, New Jersey that allegedly received Cloverleaf's lunch special facsimile.[5] The Complaint seeks certification of a class consisting of:

> [a]ll persons who (1) on or after four years prior to the filing of this action, (2) were sent telephone facsimile messages of material advertising...services by or on behalf of Defendants, (3) with respect to whom Defendants did not have prior express permission or invitation...(4) with whom Defendants did not have an established business relationship. (Compl. ¶ 18).

Mr. Dorchack alleges that he submitted this lawsuit to his insurer, but by letter dated June 30, 2010 his insurer has disclaimed coverage.[6] (Dorchack Cert. ¶ 8). Thus, defendant claims his family-run business would be forced to file for bankruptcy if this court grants class certification to plaintiff. (Id.)

Legal Analysis

In order to qualify for class certification, plaintiff must satisfy all four prerequisites of R. 4:32-1(a):

> (1) the class is so **numerous** that joinder of all members is impracticable, (2) there are questions of law or fact **common** to the class, (3) the claims or defenses of the representative parties are **typical** of the claims or defenses of the class, and (4) the representative parties will fairly and **adequately** protect the interests of the class. (emphasis added).

In addition, at least one prerequisite of 4:32-(1)(b) must be satisfied:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk either of:
> (A) inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class, or
> (B) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

[5] R.Howard & Co. is also the plaintiff in at least five other TCPA lawsuits.
[6] Counsel for the Cloverleaf informed the court during oral argument that the Cloverleaf's insurance policy has a specific TCPA exclusion.

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
(3) the 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 factors pertinent to the findings include:
(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
(C) the desirability or undesirability in concentrating the litigation of the claims in the particular forum; and
(D) the difficulties likely to be encountered in the management of a class action.
(emphasis added)

"The burden of satisfying the requirements of Rule 4:32 remains upon the party seeking class certification. It does not shift merely because that party has failed to move for certification." Levine v. 9 Net Avenue, Inc., supra, (citing Parker v. Time Warner Entertainment Co., 198 F.R.D. 374, 376-77 (E.D.N.Y. 2001). Thus, regardless of the fact that plaintiff has not yet filed a motion for class certification, plaintiff must satisfy the requirements of R. 4:32-1(b)(3), in addition to the requirements of 4:32-(1)(a) which are required for every class.[7]

1. Rule 4:32-1(a):

Plaintiff's complaint alleges that its proposed class includes "forty or more members and is so numerous that joinder of all members is impracticable." (Compl. ¶ 19). As set out above, R. Howard & Co. claims that the Cloverleaf sent out 1,128 faxes. Without further discovery about the logistics of the class and the amount of members, it seems premature to determine whether plaintiff has satisfied the numerosity requirement. With respect to the adequacy of R. Howard & Co. as a representative for the class, it seems clear that it would represent the interests

[7] Plaintiff's complaint seems to invoke class certification under 4:32-1(b)(3). "There are questions of fact or law common to the class predominating over questions affecting only individual class members...[a] class action is an appropriate method for adjudicating this controversy fairly and efficiently." (Compl. ¶¶ 19, 21). Nothing in the record suggests that R. 4:32-1(b)(1) or (b)(2) are applicable to this case.

of the other class members who received unsolicited faxes. While the complaint does not directly address the requirements of commonality or typicality, it alleges that there are eight questions of fact or law common to the class and predominating over questions affecting individual members. The eight allegedly common questions of fact or law are:

(i) Whether defendants sent unsolicited fax advertisements
(ii) Whether Defendant's facsimiles advertised the commercial availability of property, goods, or services;
(iii) The manner and method Defendants used to compile or obtain the list of fax numbers to which it sent [the faxed advertisement] and other unsolicited fax advertisements;
(iv) Whether Defendants faxed advertisements without first obtaining the recipients' express permission or invitation;
(v) Whether Defendants violated the provisions of 47 U.S.C. § 227;
(vi) Whether Plaintiff and other class members are entitled to statutory damages;
(vii) Whether Defendants should be enjoined from faxing advertisements in the future; and
(viii) Whether the court should award trebled damages.[8]

(Id.) The allegedly individual questions include: (i) whether the fax was received by email or fax machine, (ii) whether a facsimile received via email was printed, (iii) whether the class member had a prior business relationship with the defendant, and (iv) whether the class member gave defendant permission to send the fax.

The courts in Levine and Goodrich[9] found the plaintiff may not be able to satisfy the test for commonality or typicality because of these allegedly individual questions:

> However, even with additional discovery, Plaintiff would not be able to demonstrate that its TCPA claim is typical of the claims of the entire class as required by 23(a)(3). There are too many crucial factual determinations to be made with respect to claims and defenses that will vary from party to party. Most notably among these are consent to receive faxes and the existence of a prior business relationship with Defendant.

[8] Certain of these allegedly common questions or fact or law are (a) not really fact questions—of course defendant sent the faxes, of course the faxes advertise the lunch special; or (b) not really questions at all—of course defendant would consent to an injunction not to violate the TCPA by advertising its "crock of homemade chili" and of course this court would not award treble damages for advertising said crock of homemade chili through a fax machine.
[9] While these opinions are not controlling authority, they are persuasive given their discussion of the same subject matter and factual circumstances. Further, even though Goodrich is applying R. 23, the Federal Rule of Civil Procedure on class certification, R. 4:32-1 mirrors the language of R. 23.

Goodrich, 2009 WL 2602200 at *5. The court in Levine found that similar issues preclude plaintiffs from satisfying the commonality requirement. "Persons who receive transmission [by email] only print them out on a fax machine if they so elect. Such an elective printing would constitute consent....[i]n addition to their relevance on the R. 4:32-1(b) issues, the commonality required by R. 32-1(a) is brought into question...." Levine, 2001 WL 34013297 at *5.

According to the defendant herein, it is particularly difficult to ascertain whether a fax was received by a computer or a traditional fax machine:

> With regard to issue (1), the determination of whether the fax was received by a computer rather than on a traditional fax machine can only be made by two methods. The first method is to ask the recipient of the fax on what equipment the fax was received. The second method is to physically see the equipment on which the fax was allegedly received. There is no technology (nor was there such technology in 2009) that would allow the sender of the fax to determine the type of equipment (*i.e.*, a computer device or through a fax machine with paper) on which the fax was received. Even where a blast fax is sent (one sender sends a fax to multiple recipients at the same time), the answer to issue (1) is the same. A person would have to make an inquiry of each recipient or inspect the equipment of each recipient. Further, there is no technology that would tell the sender if the fax was actually printed onto paper, regardless of whether it was received by a computer or a traditional fax machine.
>
> With regard to issue (2), receipt of faxes on a computer, rather than through a fax machine with paper, is very common in today's workplace as it was in 2009. Fax to computer technology existed in the 1990s and was common place at large corporations. As of the new millennium, the technology became cheaper and, therefore, over the past decade, has become common in the small and mid-size commercial setting and for personal use. In my role as technology consultant, I recommend fax receipt and transmission by computer to all of my clients and consider it as common a form of fax transmission and receipt by a computer device is a common form of communication. In fact, all of the clients I have provided consulting services for in the past five years, where appropriate and relevant, I recommend a computer based faxed solution. The amount of reduced paper and toner use alone is a substantial cost savings for my clients, in addition to the time saved by not having to transmit faxes by paper through a traditional fax machine. (Jefric Consulting Cert. ¶¶ 8-9).

While this court is tempted to follow Levine and Goodrich on the commonality and typicality issue, it must acknowledge that the Federal Communications Commission ("F.C.C.")

ruled, subsequent to Levine, that "faxes sent to personal computers equipped with, or attached to, modems and to computerized fax servers are subject to TCPA's prohibition on unsolicited faxes." Report and Order, 2003 WL 21517853 at ¶ 200 (July 2003). Since Congress specifically gave the F.C.C. the authority to pass regulations to implement the Act, it would be difficult for this court to ignore the F.C.C.'s ruling. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer....") This court is aware that neither the Freedman or Goodrich decision, both of which postdated the F.C.C. ruling, mentioned the ruling, but there is no indication that the ruling was briefed to those tribunals. See, in addition, Hinman v. M&M Rental Center, Inc., 596 F. Supp. 2d 1152, 1159 (N.D. Ill. 2009), which discusses the F.C.C. ruling and states that "to the extent the authorities defendant cites (Illinois, Pennsylvania, and New Jersey state courts) support its argument, they are inconsistent with the text of the statute and the FCC Order and are unpersuasive." On balance, therefore, this court believes that the question of whether the fax was received by a computer should not effect the typicality or commonality decision, leaving only the issues of whether some or all of the 1,128 fax recipients had a prior business relationship with Cloverleaf or consented to receive the fax. In sum, the question of whether plaintiff can satisfy the requirements of R. 4:32-1(a) is a close issue. The court need not, however, decide this issue because plaintiff cannot prevail under R. 4:32-1(b).

2. Rule 4:32-1(b):

A. Predominance

The first prong of R. 4:32-1(b) requires that questions in common to the class predominate over individual questions. This test is more burdensome then 4:32-1(a) (2) which

only requires that there are common issues of law or fact within the class. Predominance focuses on "whether the proposed classes are 'sufficiently cohesive to warrant adjudication by representation.'" Carroll v. Cellco, 313 N.J. Super. 488, 499 (App. Div. 1998) (quoting Amchem Prods., Inc. v. Windsor,521 U.S. 591, 623 (1997)). Such a determination is not made "by adding up the number of common and individual issues and determining which is greater." Id. at 500. Further, [r]emainder individual issues . . .are distinguishable from individual questions that eclipse common questions." Id. In Carroll, Judge Dreier found that plaintiff's proposed class of telephone purchasers from Bell Atlantic Mobile did not, with one possible exception, meet the predominance criteria because the plaintiff's "claims of fraud and negligent misrepresentation [did] not arise out of the same transaction or similar fact....Each plaintiff had a different interaction with defendant's representatives, and the ability to prove reliance depend[ed] on circumstances peculiar to each plaintiff." Thus, the individual questions "could well overwhelm the common issues."

Likewise, in Saldana v. City of Camden, 252 N.J. Super 188 (App. Div. 1991), the individual questions predominated over common issues. In Saldana, plaintiffs asserted a common theory that the properties of the proposed class members were damaged by a fire "caused by defendants' failure to implement or administer a policy concerning City-owned structures." Id. at 197. But the court found that the common issues to the class did not predominate over the individual fact-sensitive inquiries "resolved by fact-specific proofs" such as "the cause of each fire, and whether the absence of a City protective or maintenance policy contributed to it will." Id. Thus, the mere presence of individual questions does not preclude class certification. But if the individual questions "eclipse common questions" and require

highly fact-sensitive inquiries, plaintiffs have not met the burden of satisfying predominance under R. 4:32-1(b).

In the instant case, determining whether each proposed class member had a prior business relationship with the defendant or consented to receiving the fax would require an individualized inquiry into each class member's claim. As discussed above, the court does not agree with the defendant that the court would need to assess whether each recipient received the fax by a traditional facsimile machine, given the 2003 F.C.C. ruling. The court need not decide, however, whether these individual questions eclipse the common questions because, as set out below, the plaintiff clearly fails to meet the "superiority" test under Rule 4:32-1(b)(3).

B. Superiority

1. Cost of Recovery Compared to Actual Recovery

The second prong of R. 4:32-1(b) requires that the class action mechanism is superior to adjudication through alternative methods. Courts throughout the country have repeatedly recognized that the principal purpose of the class action mechanism is to allow individuals with very small claims—claims which would not ordinarily justify an individual lawsuit—to band together and file cost efficient suits. As the United States Supreme Court observed, "[a] class action solves [the incentive problem created by small damages] by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997). That comment echoed an earlier observation by the Court: "[n]o competent attorney would undertake the complex antitrust action to recover so unconsequential an amount [as $70]." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974).

The lower Federal courts have also recognized that the central purpose of the class action procedure is to enable small claims to be efficiently aggregated so that they can be redressed in court. See Carnegie v. Household Int'l Inc., 376 F.3d 656, 661 (7th Cir. 2004) (where the Seventh Circuit stated rather colorfully that "only a lunatic or fanatic sues for $30"). In the case of In re Monumental Life Ins. Co., 365 F.3d 408, 411, n.1 (5th Cir. 2004) the Fifth Circuit agreed, commenting that the small suits "would be uneconomical to litigate individually." And see Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 234 (D.N.J. 2005), noting that "[a]bsent class certification, very few individuals would have the incentive. . .to bring individual claims."

Likewise, class actions in New Jersey are a favored mechanism when the amount recoverable by each plaintiff would not be sufficient to make an individual litigation cost efficient and would not provide adequate redress, and/or when the plaintiff has unequal bargaining power. "The class action in New Jersey also helps to equalize adversaries, a purpose that is even more compelling when the proposed class consists of small claims...[t]he class action's historic mission of taking care of the smaller guy has been widely recognized." Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 104 (2007). See also Riley v. New Rapids Carpet Center, 61 N.J. 218, 225 (1972) ("[w]hen the selling pitch is directed to the unsophisticated poor...the dollar impact upon the victim is intensified ...[i]f each victim were remitted to an individual suit, the remedy could be illusory, for the individual loss may be too small to warrant a suit or the victim too disadvantaged to seek relief."); and Muhammad v. County Bank of Rehoboth Beach, 189 N.J. 1, 17 (2006) (finding that "[t]he class-action vehicle remedies the incentive problem facing litigants who seek only a small recovery."). Thus, an analysis of the adequacy of individual litigation is essential for determining whether "a class action is superior to other

available methods for the fair and efficient adjudication of the controversy," as the third prong of R. 4-32(b) requires.

The overwhelming bulk of cases in New Jersey wherein class actions were certified involve very small sums of money that can be recovered by individual plaintiffs. See Iliadis, 191 N.J. at 116 (plaintiffs were hourly Wal-Mart employees pursuing small claims because they were allegedly denied breaks); Muhammad, 189 N.J. at 22 (finding that the proposed class may have claims of $60); Lee v. Carter-Reed, 203 N.J. 496, 528 (class members stood to recover the cost of a bottle of diet pills); Riley, 61 N.J. at 223 (plaintiffs claimed they were victims of bait-and-switch tactics by defendant household carpet company).

While there are two New Jersey cases in which class certification was permitted involving potential individual recovery of over $1000 in damages, both were complex product liability cases where the costs of recovery would have exceeded any individual recovery. See In Re Cadillac, 93 N.J. 412, 421 (1983) (plaintiff demanded damages of $7,042.45 and filed a complaint against GM on behalf of itself and other similarly situated arising out of a design defect in the vehicle); and Delgozzo v. Kenny, 266 N.J. Super. 169 (App. Div. 1993) (plaintiffs sought damages arising out of a design defect in "blue flame" furnaces that they purchased for approximately $2000). In Cadillac, the Supreme Court affirmed the trial court's finding that a class action met the superiority test despite the plaintiff's potential individual recovery. In so doing, the Court considered the expensive and prolonged task of proving that the vehicles suffered from a design defect. The Court noted that each individual lawsuit would "doubtless require substantial discovery, expert testimony, and trial time, all of which would render uneconomical an individual suit by a single disgruntled customer." Id. at 437. Similarly, in Delgozzo, the Appellate Division found that individual litigation was not superior to a class

action and considered "the remarks of our Supreme Court in In Re Cadillac [to be] directly on point" with respect to the expenses of litigating an individual products liability case.

Clearly, the claims of the plaintiffs in the instant matter are distinguishable from the complex products liability claims brought by the plaintiffs in Cadillac and Delgozzo. Bringing a lawsuit for a TCPA claim does not require the production of an expert, nor does it require substantial discovery, if any.

A recent Supreme Court decision explains why class actions should only be certified when the sums at issue are too small to justify individual lawsuits. In International Union of Operating Eng'rs Local No. 86 Welfare Fund v. Merck & Co., 192 N.J. 372 (2007), the Law Division judge granted the plaintiff's motion "to certify a nationwide class of third-party[,] non-government payors who ... paid any person or entity for the purchase of a prescription anti-inflammatory arthritis and acute pain medication marketed by defendant Merck & Company, Inc. ... under the brand name Vioxx." 192 N.J. at 375. The Appellate Division affirmed that decision. The Supreme Court reversed the Appellate Division, finding that plaintiffs were "well-organized institutional entities" and there was no evidence that "the claims were individually so small that they will not be pursued." Id. at 394. In fact, the plaintiffs alleged they had been damaged in large sums. Thus, the Court held that the proposed class did not meet the test for superiority. Id. Certifying such a class would not be in line with the class action's "historic mission."

Likewise, the Appellate Division has reversed class certification when the proposed class consisted of members who were seeking to recover for rather extensive property damage allegedly caused by fires in buildings the defendant owned.

> We recognize that the lack of financial wherewithal on the part of potential class members has been an important factor in causing the named plaintiffs to move for class action. Such an action would permit plaintiffs' counsel to pool available resources and present their proofs, expert or otherwise, in a single case. Counsels' motive is both practical and laudable. However, in the circumstances present here, we cannot conclude that the interest of economy makes the class action "superior" to other available means of adjudicating the controversy. This is not a case where, because the individual claims are too small to warrant recourse to case-by-case litigation, the "wrongs would go without redress" if class action certification is not granted. See In re Cadillac, 93 N.J. at 435, 461 A.2d 736. **Each class member asserts substantial damage or total destruction to his or her dwelling, a virtual "taking" of property, and thus has a sufficient stake to prosecute his or her claim individually or with a group of other plaintiffs.**

Saldana v. City of Camden, 252 N.J. Super 188, 200 (App. Div. 1991). (emphasis added).

As the Court noted in International, "the quintessential example of facts and circumstances that would support class-wide relief" is found in Iliadis, supra. In Iliadis, the plaintiffs were former hourly employees of Walmart who were allegedly denied breaks and forced to work "off the clock." Id. at 95. "The nominal value of each class members' claim counsels in favor of class litigation and against adjudication before the [Wage Collection Division]." Id. at 115. In addition, the Court considered their unequal bargaining position to Walmart Corporation in ultimately holding that class action lawsuit was the superior method for adjudication. While defendants contended that the plaintiffs' claims could have been adequately adjudicated before the Wage Collection Division, the Court was concerned that the reason no aggrieved employees had yet brought claims before the Division was because of their "lack of motivation to redress their small claims, legitimate fears concerning employer retaliation, lack of resources, or a sense of powerlessness when confronting their would-be corporate adversary." Id. at 116. Thus, the Court found that class-action resolution of the plaintiffs' claims was necessary and superior to alternative methods of adjudication. Unlike the class certified in Iliadis, whose

members consisted of hourly employees, the plaintiffs in the present case can recover the $500 per fax in Small Claims Court without an attorney.

In Lee, supra, the Supreme Court also reversed a decision denying class certification and held that "a class action, rather than the prosecution of thousands of individual small claims, is the superior method for proceeding in this case" when the proposed class consisted of consumers who purchased dietary pills which were allegedly valueless. The plaintiffs were deemed unlikely to recover without a class-action lawsuit:

> Under plaintiff's scenario, the ascertainable loss here is the purchase price of a bottle of broken promises... We are satisfied that the class action is a superior vehicle -- and perhaps the only practical vehicle -- for consumers who were allegedly deceived into purchasing Relacore. It is not likely that thousands of individual consumers, purportedly duped into purchasing a worthless product that cost only about $ 40, will file actions in small claims court. The discovery and litigation costs, including expert-witness fees, make a lawsuit against a determined corporate adversary a costly undertaking. **The whole point of a class action is to provide a diffuse group of persons, whose claims are too small to litigate individually, the opportunity to engage in collective action and to balance the scales of power between the putative class members and a corporate entity.**

Id. at 528-29. (emphasis added). Defendant argued that the refund policy for dissatisfied purchasers was a superior alternative to suit. Id. at 529. The Court rejected this argument, finding that the refund policy was not printed on the packaging so purchasers may not be aware of that remedy. Further, the money-back guarantee had to be exercised within 30 days of purchase.[10]

In the instant case, there are virtually no limitations to the $500.00 recovery in small claims court except that the plaintiff must not have consented to the receipt of the fax or have a

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[10] But see, Gross v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co., 303 N.J. Super. 336, 350-51 (Law Div. 1997) (holding that class certification was not the superior method of adjudication even though the individual claims amounted to such small sums that would "appear to be unreasonable for individual class members to bring suit.") The more recent Supreme Court decision in Lee seems to overrule the Law Division in Gross.

prior business relationship with the defendant. Small claims actions were "**sometimes met in the earlier years of the TCPA by constitutional and obstructional defenses, the record... shows that private litigants can readily succeed. We deem this to be particularly true today, as those ostensible defenses to the TPCA have been consistently struck down by state and federal courts.**" Levine, 2001 WL 34013297 at *4 (emphasis added).[11] Thus, unlike the alleged money-back guarantee in Lee for dissatisfied purchasers, the alternative remedy of small claims court is not illusory for aggrieved recipients of junk faxes. In fact, plaintiff's counsel has informed the court that he estimates approximately 10% of TCPA plaintiffs seek recovery in small claims court.

As Judge Schott of this court pointed out in an oral decision that is now before the Appellate Division, New Jersey may have a more accessible court system to pro se plaintiffs than other states that have granted class certification in TCPA cases. "Indeed, in every courthouse there is even guidance given to the pro se litigants about how to fill out the papers. There is an entire package generated from Trenton that is given to them to guide them through the process. And, so, the courts are completely accessible to a litigant who receives an unwanted fax." (Tr. of Local Baking Products, Inc. v. Kosher Bagel Munch, Inc., Nov. 20, 2009, p. 31). Therefore, even if a class action is the superior method for resolution of TCPA cases in other states, it seems clear that it is not superior in New Jersey, where pro se plaintiffs such as R. Howard & Co. can readily recover in the Special Civil Part.

No discussion of the superiority portion of R. 4:32-1 would be complete without mention of Judge Dreier's very thorough opinion in Carroll v. Cellco Partnership, supra. In Carroll, the Appellate Division reversed a trial court judge who had certified a nationwide class of "all

[11] The Levine court may have been referring to, among other decisions, Zelma, supra, wherein the Appellate Division upheld a TCPA action against various defenses.

persons who purchased BAM [Bell Atlantic Mobile] and/or BAM cellular telephone service since February 1, 1990..." On the R. 4:32-1 requirements other than the superiority requirement, Judge Dreier held that the trial court erred, except possibly for the New Jersey Consumer Fraud allegations. Id. at 505. On the superiority requirement, the Appellate Division stated that the trial judge "oversimplified the litigation by gloss[ing] over potential differences in state laws" and not properly considering several remedies: "injunctive relief in the courts could be sought, or federal or state administrative agencies might provide regulatory relief for plaintiffs." Id. at 506. Judge Dreier concluded that:

> Here, the trial court failed to undertake this analysis. The trial judge never explained why a class action was superior and failed to compare the use of other alternate methods of adjudication.
>
> . . .
>
> Although individual actions are clearly not economically feasible, possible alternatives for adjudicating plaintiffs' claims include the use of test cases. . . As noted earlier, an injunctive relief claim might serve the ends of the plaintiffs who wished to improve service. If no judicial remedy is available, it may be the responsibility of federal or state regulators or the Legislature. . . When we analyze all of the factors, we come to the inescapable conclusion that, except possibly for the Consumer Fraud Act claims, a class action is inappropriate here on the record developed in the trial court.

Id. at 510-11.

Comparing the facts of this case with those before the Appellate Division in Carroll, the court must conclude that the present case even more clearly calls for denial of class certification than did Carroll. Judge Dreier had to concede that individual actions were "not economically feasible" and was forced to consider such alternatives as injunctive claims or federal or state regulatory relief before he determined that a class action was not superior. Here, individual actions are economically feasible, making even clearer the determination that a class action is not superior.

New Jersey case law on the superiority requirement for class certification can be summarized by listing all the cases wherein the individual recovery would be less than the costs of recovery and comparing that list with a list of all the cases where individual recovery would be greater than the costs of recovery. In virtually every case wherein the individual recovery would be less than the costs, class certification was granted. Conversely, in virtually every case where the recovery would be greater than the costs, class certification was denied:

Individual Recovery < Costs of Recovery and Class Cert. Granted	**Individual Recovery > Costs of Recovery and Class Cert. Denied**
1. Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 104 (2007) (plaintiffs, hourly employees of Wal-Mart, were allegedly forced to work "off the clock;" claims appeared to be generally small.) 2. Muhammad v. County Bank of Rehoboth Beach, 189 N.J. 1, 17 (2006) (proposed class members apparently had claims approximating $60). 3. Henderson v. Camden County Municipal Utility Authority, 176 N.J. 554 (2003) (plaintiff brought an action to challenge the computation of compound interest by defendant utility company. The Court held that utility companies may only charge simple interest on delinquent customer accounts, but declined to certify a class because the Court's decision was to be	1. Int'l Union of Operating Eng'rs Local No. 86 Welfare Fund v. Merck & Co., 192 N.J. 372 (2007) (proposed class members, many of whom were buyers in the aggregate, were suing for large sums of money arising out of the purchase of Vioxx). 2. Delta Funding Corp. v. Harris, 189 N.J. 28 (2006) ("In *Muhammad*, *supra*, we found a class-arbitration waiver unconscionable in the context of low-value consumer claims...*Muhammad* is distinguishable from the instant case, as Harris is seeking more than $100,000 in damages..."). 3. Beegal v. Park West Gallery, 394 N.J. Super. 98 (App. Div. 2007) (class status reversed for class consisting of passengers on a cruise ship who allegedly overpaid for art at auctions on the ship because of defendant's fraudulent bidding practices.

applied prospectively. The Court did, however, award plaintiff attorneys fees pursuant to the fund in court doctrine, which is often applied in class actions.

4. In Re Cadillac, 93 N.J. 412, 421 (1983) (product liability plaintiffs sought damages arising out of design defect in their vehicles)

5. Riley v. New Rapids Carpet Center, 61 N.J. 218 (1972) (plaintiffs alleged they were victims of a "bait and switch" tactic by defendant carpet company)

6. Silverstein v. Shadow Lawn Savings & Loan Ass'n, 51 N.J. 30 (1968). (homeowner-mortgagors brought class actions challenging bank's computation of interest (360 or 365 days). There was no allegation of usery.)

7. Lee v. Carter-Reed, 203 N.J. 496 (App. Div. 2010) (plaintiffs sought damages amounting to the cost of a bottle of diet pills).

8. United Consumer Financial Services Co. v. Carbo, 410 N.J. Super. 280 (App. Div. 2009) (consumers who bought vacuum cleaners signed installment sales contract which were illegal because they called for a $20 fee for cancelled check: statutory minimum

The court found that the proposed class did not satisfy the test for predominance. The court did not discuss superiority, but it is reasonable to assume that some of the plaintiffs may have overpaid for art by large sums).

4. Castro v. NYT Television, 384 N.J. Super. 601 (App. Div. 2006). (The Appellate Division reversed class certification of a class of patients who were videotaped or observed by defendant while at Jersey Shore Medical hospital. The class asserted causes of action for invasion of privacy. The decision did not address the amount of damages sought, but it found that common issues did not predominate over individual issues and that a class action was not superior "for substantially the same reasons plaintiffs failed to show that issues common to members of the class predominate over issues affecting only individual members).

5. Levine v. 9 Net Avenue, Inc., No. A-1107-00T1, 2001 WL 34013297 (App. Div. June 7, 2001) (proposed class consisted of recipients of a fax advertisement)

6. Saldana v. City of Camden, 252 N.J. Super 188 (App. Div. 1991) (proposed class consisted of members alleging substantial fire damage to their properties)

civil penalty was $100 or actual loss).

9. Delgozzo v. Kenny, 266 N.J. Super. 169 (App. Div. 1993) (product liability plaintiffs brought claims for faulty furnaces; expert testimony possibly required.)

10. Kronisch v. Howard Savings Institution, 133 N.J. Super. 128, 131 (Ch. Div. 1975) (plaintiffs were homeowner mortgagors of federally insured mortgages who sought an accounting for monies earned on tax escrows: the average amount was $12 a year.)

11. Lusty v. Capazzo Brothers, 113 N.J. Super. 369 (App. Div. 1972) (Appellate Division reversed a trial court denial of class certification brought on behalf of 7,000 property owners alleging that garbage collectors overcharged. The court stated that a class action was "a superior form of litigation to the multiple **small claims** action to which the members of the proposed class would be relegated." Id. at 373. (emphasis added).

12. Pratt v. Panasonic Consumer Electronics Corp., 2006 WL 1933660 at *13-14 (Law Div. July 12, 2006) (plaintiffs moved for class certification

7. Goodrich Mgmt Corp. v. Afgo Mechanical Servs., Inc., No. 09-00043, 2009 WL 2602200 (D.N.J. Aug. 24, 2009) (proposed class members were the recipients of a fax solicitation).

8. Hearn v. Rite Aid Corp, No. SSX-L-429-06, 2010 WL 4552975 (Law Div. November 1, 2010) (plaintiffs, co-managers and ASM's of Rite-Aid, allege that they were improperly denied overtime in violation of the NJ Wage and Hour Law. Plaintiffs were higher level employees with likely higher level claims than the employees in Iliadis. The court denied class certification and found a class action was not superior because plaintiffs could bring individual lawsuits or claims with the Wage Collection Division).

9. Freedman v. Advanced Wireless Cellular Communications, Inc., No. SOM-L-611-02, 2005 WL 2122304 (Law Div. June 24, 2005) (proposed class members were the recipients of a fax solicitation).

10. Local Baking Products, Inc. v. Kosher Bagel Munch, Inc., Dkt. No. L-45695-09. (proposed class members were the recipients of an unsolicited fax solicitation).

for damages arising out of a defective design in certain DVD players manufactured by defendant. Class certification was denied because plaintiffs did not meet the requirements for typicality or predominance. The court, however, did find that the plaintiffs met the requirement for superiority because plaintiffs would have to expend large amounts of money to prevail on their consumer fraud claims.)	

There are only two New Jersey cases which do not fit easily into this formula. One was Carroll, supra. As discussed above, Judge Dreier's opinion in Carroll is consistent with denial of class certification herein, even though the claims in Carroll were quite small. The other anomalous case was Gross, supra. As discussed above in footnote nine, the Law Division decision in 1971 denying class certification for purchasers of allegedly overpriced pills was more or less impliedly overruled by the Supreme Court this year in Lee. In sum, with almost no exception, the critical factor in granting or denying class certification on superiority grounds is whether the costs of recovery exceed the potential recovery. Here, the costs of recovery in the Small Claims Section of the Special Civil Part under R. 6:11 do **not** exceed the potential $500.00 recovery. On this basis, there is no superiority in a class action.[12]

[12] During oral argument, counsel for R. Howard contended that a class action would be superior to individual litigation because the Special Civil Part would be inundated with individual plaintiffs seeking their $500 recovery. While the court appreciates counsel's concern, this argument is speculative, at best. It is unclear exactly how many

2. The Parity Between the Parties

The chart set out above demonstrates not only that class actions are generally certified only when the costs of individual recovery exceed the potential recovery; the chart also demonstrates that class actions are generally certified only when the plaintiffs have substantially less resources than the defendant. Indeed, the court has found no New Jersey case where a class action was certified on behalf of plaintiffs possessing equal resources to the defendant. Here, R. Howard & Co., an accounting firm, has resources equal to, if not greater than, the Cloverleaf, a local business that advertised its $6.95 lunch special. Indeed, although the Cloverleaf is incorporated as 395 Bloomfield Ave Corp., it is hardly the type of "determined corporate adversary" or "corporate entity" that the Supreme Court described as generally being the defendant in a class action. See Lee at 528-529. Obviously, the Cloverleaf is in no way like Wal-Mart, Cadillac, the Howard Savings Institute, Carter-Reed, Panasonic, or the Camden County Municipal Authority—named defendants in the above chart. The court does not wish to generalize about the defendants in these TCPA suits, but the Cloverleaf is somewhat similar to the Florham Park Diner and the Cleansing Center, which are both named as defendants in the other R. Howard & Co. suits before the court; nor is the Cloverleaf dissimilar to Kosher Bagel Munch, Inc., the defendant in the case decided by Judge Schott. In sum, this case does not involve the "smaller guy" problem described by the Court in Iliadis, supra at 104 as being the classic situation calling for a class action.

3. The $500 Statutory Minimum Recovery

Obviously, the superiority portion of Rule 4:32-1(b) must contain an analysis of more than the costs of recovery versus the actual recovery or even the parity between the plaintiffs and

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of the proposed class members would bring an individual claim. Further, the TCPA was enacted 19 years ago and there is no evidence that the Special Civil Part has been flooded with TCPA claims.

defendant. One additional factor was set out in Levine where the Appellate Division focused on the $500 minimum recovery under the TCPA:

> We are also uncertain about the effect of the TCPA mandate for a $500 minimum damage award in private actions. Given this expression of congressional intent, there is at least a serious question whether a state class action or a state court's rules can supersede that federally fixed minimum by a settlement which provides members of a class in a private action with a lesser amount. See Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412, 416 n. 7 (S.D.N.Y. 1972) (rejecting class certification in part because seeking less than the minimum $100 per violation mandated by the Truth In Lending Act was not allowed). A New Jersey TCPA class action might therefore have to run its full course by trial, rather than settlement.[13]

Levine, 2001 WL 34013297 at *5.

The Appellate Division analysis in Levine makes clear that plaintiff's proposed class falters under Rule 4:32-1(b)(3)(D), "the difficulties likely to be encountered in the management of a class action." Levine also sets a framework for understanding (and to the limited extent necessary) distinguishing United Consumer Financial Corp. v. Carbo, 410 N.J. Super. 280 (App. Div. 2009). The defendant-counterclaimants in United bought Kirby vacuum cleaners sold by door-to-door distributors. When one of them, William Carbo, was sued by a company which bought his retail installment debt he sought class certification for all those who signed the type of installment contracts in question. The trial judge certified class status for claims of violation of three New Jersey statutes dealing with installment sales: NJSA 17:16C-61.1 to 61.9, NJSA 17:16C-1 to 61 and NJSA 56:12-14 to 18. The trial court then granted the class members summary judgment on certain statutory claims. According to the Appellate Division "each of the 16,845 class members was awarded a civil penalty of $100..." Id. at 292. The Appellate Division explained that the critical statute in question, NJSA 56:12-17, set a minimum "civil

[13] The Appellate Division was presumably referring to the New Jersey public policy in favor of settlement. See Tefft v. Tefft, 191 N.J. Super. 561, 570 (App. Div. 1983) (noting that "New Jersey has always had a strong public policy favoring settlements"). That public policy would be frustrated in a class action, where the statutory minimum would virtually foreclose settlement.

penalty of $100." Id. at 306. The plaintiff appealed both denial of its motion to de-certify the class and the decision on the merits, which had awarded the defendant-counterclaimants $1,684,500.

The Appellate Division discussed several out-of-state conflicting decisions on the issue of whether class actions could be appropriate in cases involving the aggregation of civil penalties, and concluded that class action is or can be appropriate in a civil penalty case. Id. at 308-09. [14] On the merits, the Apellate Division stated that:

> the violation that gave rise to the civil penalty was a contract provision allowing a $20 fee for returned checks clearly prohibited by R.I.S.A. [the Retail Installment Sales Act]. The potential to reap a benefit from the unauthorized fee is apparent and the $100 civil penalty is not unreasonably disproportionate when viewed in that context, whether it is considered with respect to an individual consumer or the 16, 845 customers whose contracts included the prohibited fee.

Id. at 310.

Under the United reasoning, if the minimum civil penalty under the TCPA were $100 it is *possible* a class action could be certified, since an individual suit for $20 or even $100 could never be cost effective. Since the minimum civil penalty under the Act is $500, however, the Levine and United reasoning compels denial of class certification.

4. Legislative History of the TCPA:

Finally, the court would be remiss if it did not take into account, in its superiority analysis, the intent of the drafters of the TCPA. In that regard, the court notes the remarks of Senator Hollings of South Carolina, as reported in the Congressional Record:

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[14] In that discussion, the Appellate Division cited the Pennsylvania decision in Forman, supra, which denied class certification under the TCPA. One could argue that that the citation to Forman is somewhat critical, although that is not clear. This court will leave to the Appellate Division the difficult task of determining whether an ambiguous paragraph of dicta in an published decision (United) is more or less compelling than the two clear unpublished holdings (Freedman and Levine).

> Mr. President, I rise today to urge the Senate to approve *S. 1462*, the Automated Telephone Consumer Protection Act. The substitute amendment before the Senate addresses an enormous public nuisance. Computerized telephone calls are invading our homes and destroying our privacy. Consumers around the country are crying out for Congress to put a stop to these computerized telephone calls. Congress has a clear opportunity to protect the interests of our citizens, and we should not pass up this chance.
>
> Mr. President, the substitute bill I am offering today contains a number of small changes to the bill that was reported by the Commerce Committee. These changes address concerns that were raised at the hearing in Washington and hearings in South Carolina, and in the additional comments that were received from the public.
>
> 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. Nevertheless, **it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court**. The consumer outrage at receiving these calls is clear. Unless Congress makes it easier for consumers to obtain damages from those who violate this bill, these abuses will undoubtedly continue.
>
> **Small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this bill.**

137 Cong. Rec. S16204 (daily ed., November 7, 1991) (emphasis added).

Undoubtedly, certifying a class action herein would be contrary to Senator Hollings' intent. The Senator conceded that, constitutionally, the Congress could not dictate in which state court venue suits would be brought under the TCPA. But he did indicate a preference for (a) small claim courts as the appropriate venue and (b) cases being brought without an attorney. See Zelma v. Market U.S.A., supra, where the Appellate Division observed "[t]he Senator then expressed a hope that states would divert such actions to small claims courts, where a consumer could appeal without an attorney, in order to avoid the burden of counsel fees." Id. at 364. A class action would violate both of Senator Hollings' stated goals.

Conclusion

Without additional discovery, the court is uncertain that plaintiff can satisfy the requirements of 4:32-1(a) regarding numerosity, commonality, and typicality. Further, the court seriously doubts whether the plaintiff can satisfy the predominance requirement of R.4:32-1(b). Finally, plaintiff cannot satisfy R. 4:32-1(b)(3). This court does not find that a class-action lawsuit is "superior to other available methods for the fair and efficient adjudication of the controversy," R. 4:32-1(b)(3), for the four reasons explained above: any individual plaintiff can obtain a $500 recovery for very little cost in a Civil Part, Small Claims action; the Cloverleaf has no greater resources than R. Howard & Co. or the other proposed class members; class actions would conflict with the $500 minimum recovery set by Congress; and class actions would conflict with the legislative history of the Act. The defendant's motion to bar class certification is granted.

Very truly yours,

JAMES S. ROTHSCHILD, JR., JSC