SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
CIVIL DIVISION, DOWNTOWN SUPERIOR COURT

ANNA WYLDER, Plaintiff, vs. DIALAMERICA MARKETING, Inc., Defendant.	Case No. CV810946 MEMORANDUM OF DECISION AND ORDER

The small claims appeal/trial de novo was heard before the Honorable Kevin E. McKenney on October 18, 2002, at 1:30 p.m. in Department 16. The matter having been submitted, the Court orders as follows:

The appeal is denied.

PRODECURE

The *Pro Hac Vice* application of William E. Raney, Esq., was denied because it did not comply with California Rule of Court §983(a) because there was no declaration from Ms. Gannon, there was no proof of service on the California State Bar. Additionally, the service on plaintiff did not comply with Code of Civil Procedure §1013(a) because it was not timely served.

Testimony was heard from plaintiff, Mr. Raney, and Mr. Robert Michael Jannicelli, Assistant Director of Quality Assurance for defendant. Mr. Raney was not permitted to give any legal opinions regarding interpretation of the law since that is the exclusive province of the court. [*Summers v A. L. Gilbert Co.* (1999) 69 Cal. App.4th 1155.]

FACTS

Plaintiff received 4 documented telemarketing phone calls from defendant. They were on January 28, 2002, for 47 seconds, February 1, 2002, for 2 minutes 15 seconds, February 2, 2002, for 1 minute 48 seconds, and February 5, 2002, for 1 minute 10 seconds. [Appellant Exhibit B]

The calls were solicitations for *Victoria* magazine. Plaintiff was already a subscriber.

Plaintiff testified that in response to the phone solicitations, she said "do not call again" on 1/28/02, "not interested" and "do not call" on 2/1/02, refused and said "not interested" on 2/2/02, and "do not call" and hung up on 2/05/02.

Mr. Jannicelli testified that defendant required a solicited person to specifically ask to be added to the "do-not-call" list in order to stop any further phone solicitations. Further, Defendant's written "Do not call policy" [Appellant's Exhibit D] states that "a "do not call" is a customer...who informs us orally...that he or she does not want further telemarketing solicitation from DialAmerica Marketing and/or a DialAmerica Marketing Client. ... ALL REQUESTS WILL BE HONORED."

FINDINGS

1. Plaintiff was credible.

2. There was an "established business relationship" with the customer. (47USCS §227(a)(3)(B))

3. This relationship was severed on 1/28/02 when plaintiff said "do not call again."

4. Defendant's interpretation of the Telephone Consumer Protection Act is intolerably restrictive. Requiring a consumer to specifically ask to be added to the "do not call" list in order to stop these calls is inconsistent with the stated philosophy of the Act, which is "to protect residential telephone subscribers' privacy rights." Expressions of "not interested" and "do not call" are simple clear statements that as a matter of law should have been enough to stop repeated phone calls.

5. The phone calls of 2/1/02, 2/2/02, and 2/5/02 were placed in violation of 47 USC §227 and 47 CFR 64.1200(e)(2)(iii).

6. 47 CFR 64.1200(e)(2)(iii) states in pertinent part: "If a person or entity making a telephone solicitation ... receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name and telephone number on the do-not-call list at the time the request is made." This section does not require a subscriber to follow the procedures described by Mr. Jannicelli. A "request ... not to receive calls..." should suffice. Plaintiff's entreaty "do not call" should have resulted in placement on the do-not-call list.

7. 47 USC §227(b)(3)(B) authorizes an award of $500 damages for each of these three calls which violated 47 USC §227 and 47 CFR 64.1200(e)(2)(iii).

8. The evidence in this hearing and defendant's efforts to justify continual calls in spite of plaintiff's protestations "do not call again," "not interested," and "do not call," require the court to conclude that defendant willfully and knowingly violated

this subsection and the regulations prescribed under this subsection and therefore award plaintiff an additional $1,000 pursuant to 47 USC §227(b)(3).

ORDER

THEREFORE, IT ORDERED THAT plaintiff have judgment for $2,500 against defendant plus costs of $43.

DATED: *November 20, 2001*

KEVIN E. McKENNEY
JUDGE OF THE SUPERIOR COURT