

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

FILED \_\_\_\_\_ LODGED \_\_\_\_\_  
RECEIVED \_\_\_\_\_ COPY \_\_\_\_\_  
MAR 30 2005  
CLERK U.S. DISTRICT COURT  
DISTRICT OF ARIZONA  
BY: [Signature] DEPUTY

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Bert J. MARTINEZ,  
Plaintiff.

vs.

SUNBELT COMMUNICATIONS &  
MARKETING LLC, et al.,  
Defendants.

No. CV-03-1999-PHX-SMM

**MEMORANDUM OF DECISION AND  
ORDER**

Pending before the Court is a Motion to Dismiss filed by Defendant Greg Horne [Doc. No. 28]. Greg Horne argues that claims arising under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, are not assignable and, because Plaintiff's claim under the TCPA was assigned, it should be dismissed. After considering the arguments raised in the parties' briefs, the Court issues the following Memorandum of Decision and Order.

**BACKGROUND**

Plaintiff, Bert J. Martinez, appearing pro se, commenced this lawsuit on October 15, 2003 against Defendants for violations of the TCPA, 47 U.S.C. §§ 227(b)(1)(C)-(b)(3)(B). The TCPA provides a private right of action for violations of the TCPA, in which a person may seek either injunctive relief, monetary relief, or both. *Id.* § 227(b)(3)(A)-(C). Plaintiff received the right of recovery in this action through an assignment of the claim by Liberty Property Damage for unsolicited faxes. The TCPA permits recovery of up to \$500 per

34

1 violation of unsolicited faxes. Id. § 227(b)(3)(B). Plaintiff seeks a total of \$3,500,000 in  
2 statutory damages for unsolicited faxes, in accordance with 47 U.S.C. § 227(b)(1)(C).

### 3 STANDARD OF REVIEW

4 A complaint may be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil  
5 Procedure only if "it appears beyond doubt that the plaintiff can prove no set of facts in  
6 support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46  
7 (1957); Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). When  
8 deciding a Motion to Dismiss, all allegations of material fact in the complaint are taken as  
9 true and construed in the light most favorable to the plaintiff. W. Mining Council v. Watt,  
10 643 F.2d 618, 624 (9th Cir. 1981).

11 A court may dismiss a claim either because it lacks "a cognizable legal theory" or because  
12 it fails to allege sufficient facts to support a cognizable legal claim. SmileCare Dental Group  
13 v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 783 (9th Cir. 1996). "Dismissal without leave  
14 to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be  
15 saved by any amendment." Polich v. Burlington N., Inc., 942 F.2d 1467, 1472 (9th  
16 Cir. 1991). When exercising its discretion to deny leave to amend, "a court must be guided  
17 by the underlying purpose of Rule 15 to facilitate decisions on the merits, rather than on the  
18 pleadings or technicalities." United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981).

### 19 DISCUSSION

20 As a preliminary matter, this Motion raises a question of whether this Court has subject  
21 matter jurisdiction. A court may raise the question of subject matter jurisdiction, *sua sponte*,  
22 at any time during the pendency of the action, even on appeal. United States v. Moreno-  
23 Morillo, 334 F.3d 819, 830 (9th Cir. 2003); see also Fed. R. Civ. P. 12(h)(3).

24 Issues arising under a federal statute typically confer subject matter jurisdiction on federal  
25 courts. 28 U.S.C. § 1331. Although a federal statute, the TCPA authorizes private persons  
26 or entities to sue for its violation, "if otherwise permitted by the laws or rule of court of a  
27 State, in an appropriate court of that State." 47 U.S.C. § 227(b)(3). The United States

1 Circuit Court of Appeals for the Ninth Circuit has ruled that state courts have exclusive  
2 jurisdiction over a cause of action created by the TCPA. Murphy v. Lanier, 204 F.3d 911,  
3 915 (9th Cir. 2000). This conclusion would seem to preclude the Court from exercising  
4 jurisdiction over the instant case.

5 However, at least one court has ruled that federal courts may hear TCPA claims if  
6 jurisdiction could alternatively be predicated on another independent source of federal  
7 jurisdiction, such as 28 U.S.C. § 1332. See Accounting Outsourcing, LLC v. Verizon  
8 Wireless Pers. Communications, LP, 294 F. Supp. 2d 834, 837-40 (M.D. La. 2003).  
9 Although this decision is not binding authority, the Court nonetheless finds its reasoning  
10 persuasive. See id. at 837 (quoting Kinder v. Citibank, 2000 WL 1409762, at \*3 (S.D. Cal.  
11 2000)) ("[n]othing in [Murphy v. Lanier's] analysis suggests that the TCPA precludes district  
12 courts from hearing private TCPA claims where some other independent basis for federal  
13 jurisdiction exists, such as diversity of citizenship or supplemental jurisdiction"). Here,  
14 Plaintiff resides in Arizona, Defendant resides in Texas, and the amount in controversy  
15 exceeds \$75,000 because Plaintiff seeks \$3.5 million in damages. Therefore, diversity  
16 jurisdiction pursuant to 28 U.S.C. § 1332 is proper. Accordingly, the Court recognizes  
17 Arizona law as binding upon the matter. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78  
18 (1938).

19 Without reference to legal authority or citation, Defendant Greg Horne, seeks to dismiss  
20 this action on the grounds that TCPA claims are not assignable. It is clear that the TCPA  
21 makes it unlawful to send unsolicited faxes:

22 It shall be unlawful for any person within the United States, or any person  
23 outside the United States if the recipient is within the United States to use any  
24 telephone facsimile machine, computer, or other device to send an unsolicited  
25 advertisement to a telephone facsimile machine[.]  
26 Id. § 227(b)(1)(C).

27 It is also clear that the TCPA creates a cause of action for unsolicited faxes:

28 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 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[.]

1 Id. § 227(b)(3)(B).

2 The Court finds that the express language of the TCPA does not prohibit the assignment of  
3 TCPA claims. See generally 47 U.S.C. § 227. Consequently, because the private right of  
4 action created by the TCPA is subject to preclusion by state law, 47 U.S.C. § 227(b)(3)(B),  
5 the issue becomes whether Arizona law prohibits the assignability of TCPA claims.

6 Under Arizona law, the question of assignability often turns on whether the action  
7 assigned arises out of contract or tort. See, e.g., Premium Cigars Int'l, Ltd. v. Farmer-Butler-  
8 Leavitt Ins. Agency, 96 P.3d 555, 563-65 (Ariz. App. 2004) The present cause of action is  
9 derived from the violation of a federal statute, and not from a contract between parties. The  
10 Court finds that the action in question is therefore a tort action, similar to interference with  
11 business, and not a contract action.

12 The assignability of an action in tort depends upon the nature of the tort in question.  
13 Standard Chartered PLC v. Price Waterhouse, 945 P.2d 317, 327-28 (Ariz. App. 1996). In  
14 Standard Chartered, the court noted a prohibition on the assignment of torts only when the  
15 tort in question was one of an especially personal nature, such as personal injury or legal  
16 malpractice. Id. at 327. Tort claims of an economic nature remained assignable. Id. The  
17 difference is based upon an underlying principle of public policy that prevents individuals  
18 from trafficking in suits for pain and suffering. Id.

19 Here, the violation arose from sending unsolicited faxes to a business. The Court finds  
20 such action more like a tort of an economic nature, such as interference with business, than  
21 like a tort of a personal nature, such as battery. Assigning TCPA claims would not therefore  
22 raise the same public policy concerns in Arizona as trafficking in suits for pain and suffering  
23 would. As such, the Court finds that the TCPA claim in question is assignable under Arizona  
24 law, and Defendant Greg Home's Motion to Dismiss must be denied.

25 **CONCLUSION**

26 Accordingly, for the reasons set forth above,

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**IT IS HEREBY ORDERED** that Defendant Greg Horne's Motion to Dismiss [Doc. No. 28] is **DENIED**.

**IT IS FURTHER ORDERED** that Plaintiff Bert J. Martinez's Motion For Ruling On Defendant's Motion to Dismiss [Doc. No. 32] is **Denied as Moot**.

DATED this 29 day of March, 2005.

  
\_\_\_\_\_  
Stephen M. McNamee  
Chief United States District Judge