

**IN THE CIRCUIT COURT OF THE 19TH JUDICIAL DISTRICT
LAKE COUNTY, ILLINOIS**

DR. STEVEN ARKIN, a Florida resident,)
individually and as the representative of a)
class of similarly-situated persons,)
)
Plaintiff,)
)
v.)
)
SMITH MEDICAL PARTNERS, LLC and)
H.D. SMITH, LLC, Delaware limited)
liability companies,)
)
Defendants.)

Civil Action No. 18CH00000984

CLASS ACTION COMPLAINT

Plaintiff, DR. STEVEN ARKIN (“Plaintiff”), brings this action on behalf of himself and all other persons similarly situated, through his attorneys, and except as to those allegations pertaining to Plaintiff or his attorneys, which allegations are based upon personal knowledge, alleges the following upon information and belief against Defendants, SMITH MEDICAL PARTNERS, LLC and H.D. SMITH, LLC (“Defendants”):

PRELIMINARY STATEMENT

1. This case challenges Defendants’ practice of sending unsolicited facsimiles.
2. The federal Telephone Consumer Protection Act of 1991 (“TCPA”), as amended by the Junk Fax Prevention Act of 2005, 47 USC § 227 (“JFPA” or the “Act”), and the regulations promulgated under the Act, prohibit a person or entity from faxing or having an agent fax advertisements without the recipient’s prior express invitation or permission. The JFPA provides a private right of action and provides statutory damages of \$500 per violation. Upon information and belief, Defendants has caused facsimile transmissions of unsolicited advertisements to be sent to Plaintiff and the Class in violation of the JFPA, including, but not

limited to, the facsimile transmission of an advertisement on or about September 15, 2017, and any other fax advertisements sent to Plaintiff and other members of the class (“the Fax”), a true and correct copy of which is attached hereto as Exhibit A, and made a part hereof. The Fax describes the commercial availability or quality of Defendants’ goods and services. Plaintiff is informed and believe, and upon such information and belief avers that Defendants has sent, and will continue to send, unsolicited advertisements via facsimile transmission in violation of the JFPA.

3. Unsolicited faxes damage their recipients. A junk fax recipient loses the use of its fax machine, paper, and ink toner. An unsolicited fax wastes the recipient’s valuable time that would have been spent on something else. A junk fax interrupts the recipient’s privacy. Unsolicited faxes prevent fax machines from receiving authorized faxes, prevent their use for authorized outgoing faxes, cause undue wear and tear on the recipients’ fax machines, and require additional labor to attempt to discern the source and purpose of the unsolicited message.

4. On behalf of himself and all others similarly situated, Plaintiff brings this case as a class action asserting claims against Defendants under the TCPA and JFPA.

5. Plaintiff is informed and believes, and upon such information and belief, avers that this action is based upon a common nucleus of operative facts because the facsimile transmissions at issue were and are being done in the same or similar manner. This action is based on the same legal theory, namely liability under the JFPA. This action seeks relief expressly authorized by the JFPA: (i) injunctive relief enjoining Defendants, its employees, agents, representatives, contractors, affiliates, and all persons and entities acting in concert with them, from sending unsolicited facsimile advertisements in violation of the JFPA; and (ii) an

award of statutory damages in the minimum amount of \$500 for each violation of the JFPA, and to have such damages trebled, as provided by Section 227(b)(3) of the Act.

6. Plaintiff seeks an award of statutory damages for each violation of the TCPA.

7. Another class action suit was filed based upon the same allegations which tolled the statute of limitations for Plaintiff and the entire class. No class determination was made in that suit.

JURISDICTION AND VENUE

8. Jurisdiction is conferred by 735 ILCS 5/2-209 in that Defendants have transacted business and committed tortious acts related to the matters complained of herein.

9. Venue is proper in Lake County pursuant to 735 ILCS 5/2-101, et seq. because some of the tortuous acts complained of occurred in Lake County.

10. Plaintiff's individual claims are worth less than \$75,000.00, inclusive of all forms of damages and fees. Plaintiff expressly disclaims any individual recovery in excess of \$75,000.00, inclusive of all forms of damages and fees.

PARTIES

11. Plaintiff, DR. STEVEN ARKIN, is a Florida resident.

12. On information and belief, Defendants, SMITH MEDICAL PARTNERS, LLC and H.D. SMITH, LLC, are Delaware limited liability companies.

FACTS

13. On information and belief, on or about September 15, 2017, Defendants transmitted by telephone facsimile machine an unsolicited facsimile to Plaintiff. A copy of the facsimile is attached hereto as Exhibit A.

14. On information and belief, Defendants receive some or all of the revenues from the sale of the products, goods and services advertised on the Fax, and Defendants profit and benefit from the sale of the products, goods and services advertised on the Fax.

15. Plaintiff had not invited or given permission to Defendants to send the facsimile.

16. On information and belief, Defendants sent the same and similar facsimiles to Plaintiff and more than 39 other recipients without first receiving the recipients' express invitation or permission.

17. There is no reasonable means for Plaintiff (or any other class member) to avoid receiving illegal faxes. Fax machines are left on and ready to receive the urgent communications their owners desire to receive.

18. Defendants' advertisements did not display a proper opt out notice as required by 47 C.F.R. § 64.1200.

19. On September 26, 2017, a class action was initiated against Defendants which tolled the statute of limitations for the class. The court did not decide class certification in that action.

TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. § 227

20. In accordance with 735 ILCS 5/2-801, Plaintiff brings this action pursuant to the Telephone Consumer Protection Act, 47 U.S.C. § 227, on behalf of the following class of persons:

“All persons who were sent, by or on behalf of H.D. Smith, LLC or Smith Medical Partners, LLC, one or more advertisements by facsimile from September 26, 2013 through the date of preliminary approval”

Excluded from membership in this class are: (a) the Defendants and their present and former members, managers and their successors, heirs, assigns, and legal representatives; (b) the Court and its officers.

21. A class action is warranted because:

(a) On information and belief, the class includes forty or more persons and is so numerous that joinder of all members is impracticable.

(b) There are questions of fact or law common to the class predominating over questions affecting only individual class members, including without limitation:

(i) Whether Defendants sent unsolicited fax advertisements;

(ii) Whether Defendants' facsimiles advertised the commercial availability or quality 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 Exhibit A and other unsolicited faxed advertisements;

(iv) Whether Defendants faxed advertisements without first obtaining the recipients' express permission or invitation;

(v) Whether Defendants violated the provisions of 47 USC § 227;

(vi) Whether Plaintiff and the other class members are entitled to statutory damages;

(vii) Whether Defendants should be enjoined from faxing advertisements in the future;

(viii) Whether the Court should award trebled damages; and

(ix) Whether Exhibit A and Defendants' other advertisements displayed a proper opt out notice as required by 47 C.F.R. § 64.1200.

22. Plaintiff will fairly and adequately protect the interests of the other class members. Plaintiff's counsel are experienced in handling class actions and claims involving

unsolicited advertising faxes. Neither Plaintiff nor Plaintiff's counsel has any interests adverse or in conflict with the absent class members.

23. A class action is an appropriate method for adjudicating this controversy fairly and efficiently. The interest of each individual class member in controlling the prosecution of separate claims is small and individual actions are not economically feasible.

24. The TCPA prohibits the "use of any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine...." 47 U.S.C. § 227(b)(1).

25. The TCPA defines "unsolicited advertisement," as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's express invitation or permission." 47 U.S.C. § 227(a)(4).

26. The TCPA provides:

3. Private right of action. A person 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.

27. The Court, in its discretion, can treble the statutory damages if the violation was knowing. 47 U.S.C. § 227.

28. **The Fax.** Defendants sent the on or about September 15, 2017, advertisement and any other advertisements sent to Plaintiff and other members of the class via facsimile

transmission from telephone facsimile machines, computers, or other devices to the telephone lines and facsimile machines of Plaintiff and members of the Plaintiff Class. The Fax constituted an advertisement under the Act. Defendants failed to comply with the Opt-Out Requirements in connection with the Fax. The Fax was transmitted to persons or entities without their prior express invitation or permission and/or Defendants are precluded from asserting any prior express invitation or permission or that Defendants had an established business relationship with Plaintiff and other members of the Class because of the failure to comply with the Opt-Out Notice Requirements. By virtue thereof, Defendants violated the JFPA and the regulations promulgated thereunder by sending the Fax via facsimile transmission to Plaintiff and members of the Class. Plaintiff seeks to certify a class which includes this fax and others sent during the class period.

29. **Defendants' Other Violations.** Plaintiff is informed and believes, and upon such information and belief avers, that during the period preceding four years of the filing of this Complaint and repeatedly thereafter, Defendants has sent via facsimile transmission from telephone facsimile machines, computers, or other devices to telephone facsimile machines of members of the Plaintiff Class faxes that constitute advertisements under the JFPA that were transmitted to persons or entities without their prior express invitation or permission (and/or that Defendants are precluded from asserting any prior express permission or invitation or that Defendants had an established business relationship because of the failure to comply with the Opt-Out Notice Requirements in connection with such transmissions). By virtue thereof, Defendants violated the JFPA and the regulations promulgated thereunder. Plaintiff is informed and believes, and upon such information and belief, avers that Defendants may be continuing to send unsolicited advertisements via facsimile transmission in violation of the JFPA and the

regulations promulgated thereunder, and absent intervention by this Court, will do so in the future.

30. Defendants violated the 47 U.S.C. § 227 *et seq.* by sending advertising faxes (such as Exhibit A) to Plaintiff and the other members of the class without first obtaining their prior express invitation or permission and by not displaying a proper opt out notice as required by 47 C.F.R. § 64.1200.

31. The TCPA is a strict liability statute, so the Defendants are liable to the Plaintiff and the other class members even if their actions were only negligent.

32. The Defendants knew or should have known that (a) the Plaintiff and the other class members had not given express invitation or permission for the Defendants or anybody else to fax advertisements about the Defendants' goods or services; (b) the Plaintiff and the other class members did not have an established business relationship; (c) Defendants transmitted advertisements; (d) the Faxes did not contain the required Opt-Out Notice; and (e) Defendants' transmission of advertisements that did not contain the required opt-out notice or were sent without prior express permission or invitation was unlawful.

33. The Defendants' actions caused damages to the Plaintiff and the other class members. Receiving the Defendants' junk faxes caused the recipients to lose paper and toner consumed in the printing of the Defendants' faxes. Moreover, the Defendants' faxes used the Plaintiff's and the other class members' telephone lines and fax machine. The Defendants' faxes cost the Plaintiff and the other class members time, as the Plaintiff and the other class members and their employees wasted their time receiving, reviewing and routing the Defendants' unauthorized faxes. That time otherwise would have been spent on the Plaintiff's and the other

class members' business activities. The Defendants' faxes unlawfully interrupted the Plaintiff's and other class members' privacy interests in being left alone.

WHEREFORE, Plaintiff, DR. STEVEN ARKIN, individually and on behalf of all others similarly situated, demands judgment in his favor and against Defendants, SMITH MEDICAL PARTNERS, LLC and H.D. SMITH, LLC, jointly and severally, as follows:

- A. That the Court adjudge and decree that the present case may be properly maintained as a class action, appoint Plaintiff as the representative of the class, and appoint Plaintiff's counsel as counsel for the class;
- B. That the Court award \$500.00 in damages for each violation of the TCPA;
- C. That the Court enter an injunction prohibiting Defendants from engaging in the statutory violations at issue in this action; and
- D. That the Court award costs and such further relief as the Court may deem just and proper, inclusive of all damages and fees.

DR. STEVEN ARKIN, individually and as the representative of a class of similarly-situated persons

By: s/ Brian J. Wanca
Brian J. Wanca – ARDC #3126474
ANDERSON + WANCA
3701 Algonquin Road, Suite 500
Rolling Meadows, IL 60008
Telephone: 847/368-1500 / Fax: 847/368-1501
bwanca@andersonwanca.com

EXHIBIT A



Smith Medical Partners

Trusted, experienced and knowledgeable pharmaceutical distributor serving treatment centers across the US.

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PRODUCT	NDC NUMBER	MATERIAL NUMBER	PACK SIZE	COST
BUPRENORPH 2MG ODT	62756045983	5665195	30	\$15.00
BUPRENORPH-NAL 2-5MG ODT	50383029493	5574140	30	\$29.00
BUPRENORPH 8MG ODT	50383093093	2560324	30	\$30.00
BUPRENORPH-NAL 8-2MG ODT	50383028793	5574132	30	\$35.00
METHADONE 10MG TAB	67877011601	2579506	100	\$10.12
METHADONE 40MG TAB	00406254001	1973569	100	\$23.76
METHADONE 5MG/5ML 50L500ML	00054355563	670042	1	\$36.68
METHADONE CHRY 10MG/ML 1L	00054039268	2322782	1	\$45.92
NALTREXONE 50MG TAB	47335092683	3509015	30	\$20.72
SUBOXONE 2-5MG FILM	12496120203	2356160	30	\$133.85
SUBOXONE 4-1MG FILM	12496120403	3562485	30	\$239.78

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- Fast, secure distribution services
- On-time, accurate order delivery
- Competitive pricing
- No minimum orders
- No contracts
- Flexible shipping and payment options
- Responsive, knowledgeable account team

To place your order or for more information about our substance abuse product portfolio, call 800.292.9853.

If you do not have an account with Smith Medical Partners and would like additional pricing, please email smpsales@smpspecialty.com.

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