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Attorneys for Plaintiffs

SPECTRACOM COMMUNICATIONS, on behalf of itself and all others similarly situated,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION
	:	CAMDEN COUNTY
	:	
Plaintiff	:	DOCKET NO. L-2481-02
:	:	
v.	:	CIVIL ACTION
	:	
CELL DIRECT, FAX.COM, INC., AMERICA'S PREMIERE STEAK AND SEAFOOD, INC (dba Cell Direct), PAUL GREENE, (dba Cell Direct), KEVIN KATZ,	:	CLASS ACTION
	:	COMPLAINT AND JURY DEMAND
	:	
Defendants	:	

INTRODUCTION

1. This class action is brought to remedy defendants' violations of the Telephone Consumer Protection Act of 1991, 47 U.S.C. §227, ("TCPA") including their policy of sending unsolicited fax advertisements in violation of 47 U.S.C. §227 (b)(1)(C) and their transmission of a form fax advertisement that violates the fax marking requirements of 47 U.S.C. §227(d)(1)(A), (d)(1)(B) and (d)(2). See Attachment A.

2. Despite actual and constructive notice of the unlawful nature of the practices and

policies described herein from, inter alia, the Federal Communications Commission (“FCC”), defendants continue to pursue these practices and policies.

3. The class primarily seeks injunctive and declaratory relief under 47 U.S.C. §227(b)(3) (A) to end these unlawful practices and policies, as well as an award of statutory damages as provided by 47 U.S.C. §227(b)(3)(B).

THE PARTIES

4. Plaintiff Spectracom Communications is a New Jersey Corporation with its principal place of business located in Camden County, New Jersey.

5. Defendant Cell Direct is the business name of defendants Greene and America’s Premiere Steak and Seafood (hereafter referred to collectively as “defendant Cell Direct”) with its business address located at 11136 Rockville Pike, Rockville, Maryland.

6. Defendant Paul Greene is an individual with his principal business address located at 11136 Rockville Pike, Rockville, Maryland, doing business as “Cell Direct.”

7. Defendant America’s Premiere Steak and Seafood, Incorporated is a Maryland corporation with its principal business address located at 11136 Rockville Pike, Rockville, Maryland, doing business as “Cell Direct.”

8. Defendant Cell Direct created the form fax advertisement that is attached hereto as Attachment A.

9. Defendant Fax.com Inc. is a Delaware corporation, with its principal offices located at 120 Columbia Street, Aliso Viejo, California.

10. Defendant Kevin Katz is an individual and the president of Fax.com, whose principal business address is 120 Columbia Street, Aliso Viejo, California.

11. Defendants Fax.com and Katz engage in a practice commonly known as “fax blasting,” in which they transmit, en masse, thousands of fax advertisements to recipients on behalf of clients such as defendant Cell Direct.

VENUE

12. The acts alleged herein, including defendants’ violations of the TCPA and the unlawful transmission of Attachment A to plaintiff and the class occurred, inter alia, in Camden County, New Jersey.

THE CLASS ALLEGATIONS

13. Plaintiff brings this action as a class action pursuant to R 4:32, on behalf of a class defined as:

All owners of telephone facsimile machines in the United States to whom defendants sent a facsimile advertisement which was identical or substantially similar to Attachment A between January 1, 1999 and the present.

14. Plaintiff also seeks to have a sub-class certified which consists of:

All owners of telephone facsimile machines in New Jersey to whom defendants sent a facsimile advertisement which was identical or substantially similar to Attachment A between January 1, 1999 and the present.

15. The class for whose benefit this action is brought is so numerous that joinder of all members is impracticable.

16. Plaintiff is unable to state the exact number of class members without discovery of defendants’ books, records and data bases.

17. Upon information and belief, however, it is alleged that both the class and sub-class contain several thousand members.

18. Upon information and belief, several thousand fax advertisements identical or

substantially similar to Attachment A were broadcast to class members and sub-class members by defendants during the time period relevant to this complaint.

19. There are common questions of law and fact affecting the rights of all class members, including the following:

a. whether the class is entitled to injunctive relief under 47 U.S.C. §227(b)(3)(A), prohibiting defendants from sending unsolicited fax advertisements in violation of 47 U.S.C. §227 (b)(1)(C);

b. whether the class is entitled to injunctive relief under 47 U.S.C. §227(b)(3)(A) requiring defendants to comply with the fax marking requirements of 47 U.S.C. §227(d)(1)(A), (d)(1)(B) and (d)(2) by inter alia, identifying Fax.com and/or Cell Direct as the sender of these fax advertisements in the top or bottom margin;

c. whether defendants have engaged in a policy or policies which violated the TCPA;

d. the knowledge and intent of defendants when they engaged in the practices described herein;

e. whether defendants violated 47 U.S.C. §227 (b)(1)(C) in transmitting Attachment A without regard to whether the recipient had consented to receive fax advertisements from defendants;

f. whether the TCPA places the burden on defendants to prove that a recipient of a fax advertisement gave express consent to receive a fax advertisement from Cell Direct;

g. whether the TCPA requires defendants to keep records relating to the date and manner in which a recipient allegedly gave express consent to receive a fax advertisement from Cell Direct;

h. whether the TCPA prohibits defendants from deeming consent given to an entity other

than defendants to be consent to receive a fax advertisement such as Attachment A from Cell Direct;

i. whether the transmission of Attachment A violates the fax marking requirements of 47 U.S.C. §227(d)(1) and/or (d)(2);

j. whether defendant Cell Direct had actual or constructive notice of defendant Fax.com's history of violations of the TCPA;

k. whether defendant Cell Direct had actual or constructive knowledge that the FCC had issued numerous citations and notices of violation to Fax.com for faxing unsolicited fax advertisements in violation of the TCPA;

l. whether defendant Cell Direct had actual or constructive knowledge that Fax.com had previously been cited by the Attorney General of the State of Washington for sending unsolicited fax advertisements in violation of the TCPA;

m. whether defendants Kevin Katz and Paul Greene can be held personally liable for the violations of the TCPA set forth herein;

n. whether defendants' violations of the TCPA were willful or knowing so as to entitle the class to treble statutory damages under 47 U.S.C. §227(b)(3);

o. whether defendants' conduct, in transmitting fax advertisements in a manner prohibited by a federal statute, constitutes an unconscionable commercial practice within the meaning of N.J.S.A. 56:8-1 et seq.

20. Each of these enumerated questions of law and fact is common to each member of the class.

21. Plaintiff is a member of the class which it seeks to represent and its claims arise from the same factual and legal basis as those of the class.

22.Plaintiff will thoroughly and adequately protect the interest of the class, having obtained qualified and competent legal counsel to represent itself and those similarly situated.

23.The prosecution of separate actions by individual class members would create a risk of inconsistent adjudications and would cause needless expenditure of judicial resources.

24.Plaintiff is typical of the class in that its claims, like those of the class, arise from the same conduct of defendants and arise from the same legal theories.

25.Defendants have acted on grounds generally applicable to the class.

26.A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

THE TELEPHONE CONSUMER PROTECTION ACT

27.The Telephone Consumer Protection Act of 1991, 47 U.S.C. §227, (“TCPA”) was passed by Congress to protect owners of telephones and fax machines from the growing volume of unsolicited telemarketing calls and fax advertisements.

28.In pertinent part, 47 U.S.C. §227(b)(1) provides that:

It shall be unlawful for any person within the United States:

* * *

(C) to use any telephone facsimile machine, computer or other device to send unsolicited advertisements to a telephone facsimile machine;

29.47 C.F.R. §64.1200(a), a regulation promulgated pursuant to the TCPA, provides in relevant part:

No person may:

* * *

(3) Use a telephone facsimile machine, computer, or other

device to send an unsolicited advertisement to a telephone facsimile machine.

30. As used in both the TCPA and the regulations promulgated pursuant to this federal statute, the term “unsolicited advertisement” means any material advertising the commercial availability or quality of any property, goods or services which was transmitted to any person without that person’s prior express invitation or permission. See 47 U.S.C. §227(a)(4) and 47 C.F.A. §64.1200(f)(5).

31. Under the TCPA, an entity may not rely on a recipient’s pre-existing business relationship with another entity as consent to receive a fax advertisement from anyone other than the specific entity with whom the recipient has such a relationship. 47 C.F.A. §64.1200 (c)(3) and (f)(4).

32. Thus, the TCPA prohibits defendant Cell Direct from relying on a recipient’s prior business relationship with another entity as consent to receive a fax advertisement such as Attachment A from Cell Direct.

33. The TCPA further provides that a sender must place language at the top or bottom margin of each fax advertisement which clearly identifies the name of the sender. See 47 U.S.C. §227(d)(1)(A), (d)(1)(B) and (d)(2).

34. Thus, the TCPA requires that Attachment A contain language identifying Cell Direct and/or Fax.com as the sender of this fax advertisement, in either the top or bottom margin.

35. The TCPA provides a private right of action in state court for violations of this federal statute, allowing a person who is the victim of such a violation to obtain injunctive relief, a mandatory award of \$500 in statutory damages per violation, or both. See 47 U.S.C. §227(b)(3).

36. The TCPA further provides that, if the court finds that a defendant has knowingly or

willfully violated the TCPA, the award of statutory damages may be trebled to \$1,500 per violation. Id.

37. In Zelma v. Market U.S.A., 343 N.J. Super. 356 (2001), the New Jersey Appellate Division held that private actions could be brought in New Jersey state court under the TCPA, without the need for any further enabling legislation other than the TCPA itself.

A HISTORY OF PERSISTENT TCPA VIOLATIONS

38. From the time it was founded in 1999, defendant Fax.com has pursued a uniform policy of ignoring the clear requirements of the TCPA in its transmission of fax advertisements.

39. In 2000 and 2001, Fax.com received numerous written notices of violation and citations from the FCC for sending unsolicited fax advertisements to recipients in violation of 47 U.S.C. §227(b)(1)(C).

40. Fax.com was also sued in federal court by the Attorney General of the State of Washington for violating the TCPA by sending hundreds of unsolicited fax advertisements to citizens of the State of Washington in 1999 and 2000.

41. In the federal consent decree entered into between Fax.com and the Washington State Attorney General, Fax.com admitted that it had used an automated dialer to search out thousands of fax numbers in order to identify recipients of these fax advertisements.

42. As part of this consent decree, Fax.com agreed to cease violating the TCPA and to refrain from sending unsolicited fax advertisements to citizens of the State of Washington.

43. As part of this consent decree, Fax.com agreed that it would no longer send fax advertisements into the State of Washington unless it obtained a certification from the party on whose behalf the fax was sent, stating that the recipients had given express consent to receive fax

advertisements from that party.

44. As part of this consent decree, Fax.com was also ordered to make all of its servants, employees and officers aware of the consent decree, as well as any other entities in active concert or participation with Fax.com.

45. This would have included defendant Cell Direct, who uses the “fax blasting” services of Fax.com and thus acts in concert with defendant Fax.com as described herein.

46. The president of Fax.com, Kevin Katz, also signed a certification which was made part of this consent decree, agreeing to be bound by the decree, as an officer of Fax.com and individually.

47. These FCC citations, the action filed by the Washington State Attorney General and the federal consent decree all provided defendants Fax.com and Katz with actual written notice that their policy of sending unsolicited fax advertisements was a violation of the TCPA.

48. These also provided defendant Cell Direct with at least constructive notice that this policy violated federal law and that Fax.com persistently violated the TCPA.

49. Despite this, defendants did not cease the unlawful policy of sending unsolicited fax advertisements to recipients and the other unlawful policies described herein.

50. The policy continues to this day, including defendants’ transmission of Attachment A to plaintiff and the class.

FACTS GIVING RISE TO THIS COMPLAINT

51. Like thousands of other class members, plaintiff received a form advertisement transmitted by defendants via telephone facsimile machine.

52. A true copy of this fax advertisement is attached hereto as Attachment A.

53. Like thousands of other class members, plaintiff did not give express consent to

defendants to receive fax advertisements from defendants.

54. Specifically, plaintiff, like thousands of other class members, never gave express consent to receive fax advertisements, such as Attachment A, from Cell Direct.

55. Like thousands of other class members, plaintiff did not have a pre-existing business relationship with Cell Direct, Fax.com or Katz.

56. In sending Attachment A, defendants pursued a policy of knowingly and/or willfully violating 47 U.S.C. §227.

57. As part of this policy, defendants agreed to transmit Attachment A, a form of fax advertisement which on its face violated 47 U.S.C. §227(d)(1)(A), (d)(1)(B) and (d)(2) by failing to include language which clearly identified the sender as Fax.com and/or Cell Direct.

58. As part of this policy, defendants agreed to ignore the clear requirements of 47 U.S.C. §227(b)(1)(C) by transmitting Attachment A to recipients without regard to whether they had given express consent to receive such fax advertisements from defendants.

59. As part of this policy, defendants transmitted Attachment A to thousands of recipients whose fax numbers had been provided by entities other than Cell Direct; recipients who had never consented to receive fax advertisements from defendant Cell Direct.

60. Indeed, in advertising its “fax blasting” services on its web site, Fax.com states, under a heading entitled “Fax Data: The Industry’s Largest Fax Number Database”

Fax.com is the only enhanced fax company offering the world’s largest database of fax numbers cataloged by location. Broadcast your advertising fax based on Radius, Zip Codes, Metro Area, Area Code, County, State or the entire United States.

61. Upon information and belief, what Cell Direct purchased from Fax.com was not simply Fax.com’s services in physically transmitting fax advertisements for Cell Direct, but also

the use of Fax.com's data base of fax numbers.

62. At the time Attachment A was transmitted, the defendants were aware that the owners of these fax numbers had never given express consent to receive Cell Direct fax advertisements.

63. Accordingly, it was a violation of 47 U.S.C. §227(b)(1)(C) to have Attachment A, a Cell Direct fax advertisement, transmitted to these recipients.

64. Under the TCPA, the fact that class members may have consented to receive fax advertisements from persons or entities other than the defendants does not allow the defendants to send them fax advertisements.

65. As part of defendants' policy, defendants considered the mere publication of a fax number to be consent to receive fax advertisements from defendants; something the FCC has repeatedly notified Fax.com is prohibited by the TCPA and its accompanying regulations.

66. Upon information and belief, as part of this policy, it was understood by defendants that defendants would keep no records of the date and manner in which a recipient allegedly gave consent to receive a Cell Direct fax advertisement.

67. This practice has previously allowed defendant Fax.com, when faced with allegations that it violated 47 U.S.C. §227(b)(1)(C), to unlawfully demand that the recipient "prove" the fax advertisement was not solicited by the recipient.

68. Indeed, it is defendant Fax.com's standard practice, when faced with allegations that it violated 47 U.S.C. §227(b)(1)(C), to claim that because a number was in its fax data base, the owner of that number "must" have consented to receive the fax advertisement.

69. In actuality, these tactics were part of a deliberate, uniform policy by defendants to knowingly violate 47 U.S.C. §227(b)(1)(C), under which defendants were fully aware of each of the following:

- a. that defendants were transmitting Attachment A to recipients who had never given express consent to receive a Cell Direct fax advertisement;
- b. that defendants have the legal burden of proving that each recipient of Attachment A gave consent to receive a Cell Direct fax advertisement;
- c. that the fax database used by defendants to transmit Attachment A consisted of fax numbers gathered in ways that did not involve compliance with 47 U.S.C. §227(b)(1)(C), including:
 - i. buying lists of fax numbers from third parties;
 - ii. using an automatic dialer to search out working fax numbers;
 - iii. gathering lists of published fax numbers from various other sources that did not involve obtaining express consent to receive fax advertisements from Cell Direct.

70. All of the foregoing acts were part of a concerted scheme by defendants to knowingly flout the requirements of the TCPA in the transmission of Attachment A to the class.

Count I

Telephone Consumer Protection Act

Injunctive Relief under 47 U.S.C. §227(b)(3)(A)

71. Plaintiff incorporates all prior allegations as if set forth herein.

72. By the acts alleged herein, defendants have violated 47 U.S.C. §227.

73. Plaintiff and the class are entitled to an order enjoining defendants from continuing the unlawful policies and practices outlined herein, including:

- a. transmitting unsolicited fax advertisements to the class;
- b. deeming the existence of a pre-existing business relationship between a class member and some entity other than Cell Direct to be consent to receive a fax advertisement from Cell Direct;

c. construing mere publication of a fax number to be consent to receive a fax advertisement from defendants.

74. Plaintiff and the class are also entitled to injunctive relief directing defendants to place language on fax advertisements sent by them that clearly identifies Fax.com and/or Cell Direct as the sender of such advertisements, as required by 47 U.S.C. §227(d)(1)(A), (d)(1)(B) and (d)(2).

75. Plaintiff and the class are also entitled to an order for injunctive relief requiring defendants to maintain records of the date and manner in which each recipient of a fax advertisement allegedly gave express consent to receive a fax advertisement from defendants.

Count II

Declaratory Relief

76. Plaintiff incorporates all prior allegations as if set forth herein.

77. By the acts alleged herein, defendants have violated 47 U.S.C. §227.

78. Plaintiff and the class are entitled to a declaratory judgment holding that each of the following practices violates the TCPA and/or the regulations promulgated pursuant to this statute:

- a. transmitting unsolicited fax advertisements to the class;
- b. deeming the existence of a pre-existing business relationship between a class member and some entity other than Cell Direct to be consent to receive a fax advertisement from Cell Direct;
- c. deeming mere publication of a fax number to be consent to receive a fax advertisement from defendants.

79. Plaintiff and the class are entitled to a declaratory judgment that it was a violation of 47 U.S.C. §227(d)(1)(A), (d)(1)(B) and (d)(2) for Attachment A not to contain language, in the top or bottom margin, that identified Fax.com and/or Cell Direct as the sender of this fax advertisement.

80. Plaintiff and the class are entitled to a declaratory judgment holding that defendants, as the parties sending the fax advertisement, have the legal burden under 47 U.S.C. §227(b)(1)(C) to prove that the recipient gave express consent to receive Cell Direct fax advertisements from defendants.

81. Plaintiff and the class are entitled to a declaratory judgment that defendants' failure to maintain records of the date and manner in which a recipient allegedly gave consent to receive a Cell Direct fax advertisement gives rise to a legal presumption that the transmittal of a fax advertisement was without consent.

Count III

Telephone Consumer Protection Act

47 U.S.C. §227(b)(1)(C), (d)(1) and (d)(2)

82.Plaintiff incorporates all prior allegations as if set forth herein.

83.By the acts alleged herein, defendants have engaged in a concerted scheme to violate 47 U.S.C. §227(b)(1)(C), §227(d)(1) and §227(d)(2).

84.The defendants did so with the knowledge that they were transmitting fax advertisements to recipients who had not consented or given permission to receive these fax advertisements from Cell Direct and that such conduct was in violation of the TCPA.

85.The defendants did so with knowledge that Attachment A violated 47 U.S.C. §227(d)(1)(A), (d)(1)(B) and (d)(2) since it did not clearly identify, in either the top or bottom margin, Fax.com or Cell Direct as the sender of these fax advertisements.

86.Pursuant to 47 U.S.C. §227(b)(3), the class member is entitled to a mandatory statutory penalty of no less than \$500 per violation, as well as \$1,500 per violation if the court finds these violations were knowing or willful.

Count IV

Consumer Fraud Act

N.J.S.A. 56:8-1 et seq

On Behalf of the Sub-Class Defined in ¶14

87.Plaintiff incorporates all prior allegations as if set forth herein.

88.Transmitting fax advertisements in a manner known to be in violation of federal law, as outlined herein, constitutes an “unconscionable commercial practice” within the meaning of N.J.S.A. 56:8-2.

89.By the acts alleged herein, defendants have engaged in unconscionable commercial practices relating to the advertisement of goods and/or services within the meaning N.J.S.A. 56:8-2.

90. The sub-class has suffered an ascertainable loss of money and property as a result of defendants' use of the unconscionable business practices described herein, including loss of paper, ink and staff services.

PRAYER FOR RELIEF

WHEREFORE, plaintiff asks this court to:

- a. Certify this matter as a class action pursuant to R 4:32;
- b. Enter an order for injunctive relief as provided by 47 U.S.C. §227(b)(3)(A), prohibiting defendants from continuing the unlawful practices outlined herein;
- c. Enter a declaratory judgment that defendants' practices as described herein violate 47 U.S.C. §227;
- d. Enter judgment in favor of each class member for a statutory penalty of between \$500 and \$1,500 per violation pursuant to 47 U.S.C. §227(b)(3), plus interest and pre-judgment interest, attorneys fees and costs;
- e. Award the sub-class treble damages, reasonable attorneys fees and costs pursuant to N.J.S.A. 56:8;
- g. Grant such further legal and equitable relief as the court deems just and equitable.

JURY DEMAND

Plaintiff hereby demands a trial by jury as to all issues so triable.

SHABEL & DeNITTIS, P.C.

The Law Firm of
PHILIP STEPHEN FUOCO

BY: _____
Norman Shabel
Stephen P. DeNittis

BY: _____
Philip Stephen Fuoco
Joseph A. Osefchen

Dated: April ____, 2002

CERTIFICATION DEMAND FOR TRIAL BY JURY AND CERTIFICATION

I hereby certify, pursuant to R. 4:5-1, that to the best of my knowledge, information and belief at this time the matter in controversy is not the subject of any other action pending in any court, nor of any pending arbitration proceeding, that no other action or arbitration is contemplated, and further that there are no other parties who should be joined in this action.

Pursuant to R. 4:25-4, Norman Shabel, Esquire and Philip Stephen Fuoco, Esquire are designated as trial counsel.

SHABEL & DeNITTIS, P.C.

The Law Firm of
PHILIP STEPHEN FUOCO

BY: _____
Norman Shabel
Stephen P. DeNittis

BY: _____
Philip Stephen Fuoco
Joseph A. Osefchen

Dated: April ____, 2002