

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

PODIATRY IN MOTION, INC.,)
on behalf of plaintiff and)
the class members defined herein,)
)

Plaintiff,)

v.)

AMERICAN SCREENING, L.L.C., formerly)
known as AMERICAN SCREENING)
CORPORATION, and JOHN DOES 1-10,)
)

Defendants.)

Case No.:16 cv-7938

Judge: Robert M. Dow, Jr.

**DEFENDANT’S ANSWER AND AFFIRMATIVE DEFENSES
TO PLAINTIFF’S COMPLAINT**

NOW COMES the Defendant, American Screening LLC (“Defendant”), by and through its attorneys, Molly A. Arranz and John C. Ochoa of SMITHAMUNDSEN LLC, and states the following for its Answer and Affirmative Defenses to Plaintiff Podiatry in Motion, Inc.’s Complaint:

INTRODUCTION

1. Plaintiff Podiatry in Motion, Inc., brings this action to secure redress for the actions of defendant American Screening LLC, formerly known as American Screening Corporation (“American Screening”), in sending or causing the sending of unsolicited advertisements to telephone facsimile machines in violation of the Telephone Consumer Protection Act, 47 U.S.C. §227 (“TCPA”), the Illinois Consumer Fraud Act, 815 ILCS 505/2 (“ICFA”), and the common law.

ANSWER: Defendant admits only that Plaintiff brought an action against it, but denies the veracity of all allegations against Defendant as contained in Paragraph 1 of Plaintiff’s Complaint.

2. The TCPA expressly prohibits unsolicited fax advertising. Unsolicited fax advertising damages the recipients. The recipient is deprived of its paper and ink or toner and the use of its fax machine. The recipient also wastes valuable time it would have spent on something else. Unsolicited faxes prevent fax machines from receiving and sending authorize faxes, cause wear and tear on fax machines, and require labor to attempt to identify the source and purpose of the unsolicited faxes.

ANSWER: Defendant states that the allegations of this Paragraph are conclusions of law to which no answer is required. However, to the extent an answer is required, Defendant denies that the allegations contained in Paragraph 2 accurately and fully characterize the TCPA. To the extent this Paragraph contains misrepresentations of the law or is deemed to contain allegations of fact, Defendant denies the same.

PARTIES

3. Plaintiff Podiatry in Motion, Inc., is an Illinois corporation with offices in Chicago, Illinois, where it maintains telephone facsimile equipment.

ANSWER: Defendant states it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of Plaintiff's Complaint, and therefore denies the same.

4. Defendant American Screening is a limited liability company organized under Louisiana law with principal offices at 7607 Fern Ave., Ste. 703, Shreveport, LA 71105.

ANSWER: Defendant admits the allegations in Paragraph 4 of Plaintiff's Complaint.

5. Defendant American Screening is engaged in the business of selling drug testing kits.

ANSWER: Defendant admits the allegations in Paragraph 5 of Plaintiff's Complaint, but denies that selling drug testing kits constitutes the entirety of Defendant's business.

6. John Does 1-10 are other natural or artificial persons that were involved in the sending of the facsimile advertisements described below. Plaintiff does not know who they are.

ANSWER: Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6 of Plaintiff's Complaint, and therefore denies the same.

JURISDICTION AND VENUE

7. This Court has jurisdiction under 28 U.S.C. §§1331 and 1367. *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740, 751-53 (2012); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005).

ANSWER: Defendant states that the allegations contained in Paragraph 7 are conclusions of law to which no answer is required. However, to the extent an answer is required, Defendant admits that this Court has federal question jurisdiction with regard to this action.

8. Personal jurisdiction exists under 735 ILCS 5/2-209, in that defendants:
- a. Have committed tortious acts in Illinois by causing the transmission of unlawful communications into the state.
 - b. Have transacted business in Illinois.

ANSWER: Defendant states that the allegations contained in Paragraph 8 are conclusions of law to which no answer is required. However, to the extent an answer is required, Defendant denies the same. Defendant has insufficient knowledge or information to form a belief as to the truth of the other allegations about personal jurisdiction as plead against the other John Doe defendants.

9. Venue in this District is proper for the same reason.

ANSWER: Defendant denies the allegations contained in Paragraph 9 of Plaintiff's Complaint.

FACTS

10. On August 4, 2016, Podiatry in Motion, Inc., received the unsolicited two-page fax advertisement attached as Exhibit A on its facsimile machine. The fax provided the name and

address and telephone number of defendant American Screening, and offered to sell testing products marketed by American Screening.

ANSWER: Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 10 of Plaintiff's Complaint, and therefore denies the same.

11. Discovery may reveal the transmission of additional faxes as well.

ANSWER: Defendant denies the allegations contained in Paragraph 11 of Plaintiff's Complaint.

12. Defendant American Screening is responsible for sending or causing the sending of the fax.

ANSWER: Defendant states that the allegations contained in Paragraph 12 are conclusions of law to which no answer is required. However, to the extent an answer is required, Defendant denies the same.

13. Defendant American Screening, as the entity who products or services were advertised in the fax, derived economic benefit from the sending of the fax.

ANSWER: Defendant denies the allegations contained in Paragraph 13 of Plaintiff's Complaint.

14. Defendant American Screening either negligently or willfully violated the rights of plaintiff and other recipients in sending the faxes.

ANSWER: Defendant denies the allegations contained in Paragraph 14 of Plaintiff's Complaint.

15. Plaintiff had no prior relationship with defendant and had not authorized the sending of fax advertisements to plaintiff.

ANSWER: Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 15 of Plaintiff's Complaint, and therefore denies the same.

16. On information and belief, the fax attached hereto was sent as part of a mass broadcasting of faxes. It is a generic fax, not specifically addressed to any person.

ANSWER: Defendant denies the allegations contained in Paragraph 16 of Plaintiff's Complaint.

17. The fax does not contain an "opt out" notice that complies with 47 U.S.C. §227.

ANSWER: Defendant states that the allegations contained in Paragraph 17 are conclusions of law to which no answer is required. However, to the extent an answer is required, Defendant denies that the allegations contained in Paragraph 17 accurately and fully characterizes the TCPA. To the extent this Paragraph contains misrepresentations of the law or allegations of fact against Defendant, Defendant denies the same.

18. The TCPA provides for affirmative defenses of consent or an established business relationship. Both defenses are conditioned on the provision of an-opt out notice that complies with the TCPA. *Holtzman v. Turza*, 728 F.3d 682 (7th Cir. 2013); *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013).

ANSWER: Defendant states that the allegations contained in Paragraph 18 are conclusions of law to which no answer is required. However, to the extent an answer is required, Defendant denies that the allegations contained in Paragraph 18 accurately and fully characterizes the TCPA. To the extent this Paragraph contains misrepresentations of the law, Defendant denies the same.

19. On information and belief, defendant has transmitted similar unsolicited fax advertisements to at least 40 other persons in Illinois.

ANSWER: Defendant denies the allegations contained in Paragraph 19 of Plaintiff's Complaint.

20. There is no reasonable means for plaintiff or other recipients of defendant's unsolicited advertising faxes to avoid receiving illegal faxes. Fax machines must be left on and ready to receive the urgent communications authorized by their owners.

ANSWER: Defendant denies the allegations contained in Paragraph 20 of Plaintiff's Complaint.

COUNT I – TCPA

21. Plaintiff incorporates ¶¶ 1-20.

ANSWER: Defendant incorporates its answer to Paragraphs 1-20 of Plaintiff's Complaint as though fully set forth herein.

22. The TCPA makes unlawful 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)(C).

ANSWER: Defendant states that the allegations contained in Paragraph 22 are conclusions of law to which no answer is required. However, to the extent an answer is required, Defendant denies that the allegations contained in Paragraph 22 accurately and fully characterizes the TCPA. To the extent that Paragraph 22 is deemed to contain allegations of fact, Defendant denies the same.

23. The TCPA, 47 U.S.C. §227(b)(3), provides:

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 the subparagraph (B) of this Paragraph.

ANSWER: Defendant states that the allegations contained in Paragraph 23 are conclusions of law to which no answer is required. However, to the extent an answer is required, Defendant denies that the allegations contained in Paragraph 23 accurately and fully characterizes the TCPA. To the extent that Paragraph 23 is deemed to contain allegations of fact, Defendant denies the same.

24. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes, in the form of paper and ink or toner consumed as a result. Furthermore, plaintiff's statutory right of privacy was invaded.

ANSWER: Defendant denies the allegations contained in Paragraph 24 of Plaintiff's Complaint.

25. Plaintiff and each class member is entitled to statutory damages.

ANSWER: Defendant denies the allegations contained in Paragraph 25 of Plaintiff's Complaint.

26. Defendant violated the TCPA even if its actions were only negligent.

ANSWER: Defendant denies the allegations contained in Paragraph 26 of Plaintiff's Complaint.

27. Defendant should be enjoined from committing similar violations in the future.

ANSWER: Defendant denies the allegations contained in Paragraph 27 of Plaintiff's Complaint.

CLASS ALLEGATIONS

28. Pursuant to Fed. R. Civ. P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons (b) who, on or after a date four years prior to the filing of this action (28 U.S.C. §1658), (c) were sent faxes by or on behalf of defendant American Screening, promoting its goods or services for sale (d) which did not contain a compliant opt out notice. By "compliant opt out notice" is meant one (i) on the first page of the fax (ii) that states that the recipient may make a request to the sender not to send any future unsolicited

advertisements to a telephone facsimile machine (iii) that states that failure to comply, within the shortest reasonable time, as determined by the Federal Communications Commission, is unlawful; (iv) that provides instructions on how to submit an opt out request and (v) that includes a domestic contact telephone and facsimile machine number and a cost-free mechanism for the recipient to transmit such a request to the sender that permit a request to be made at any time on any day of the week.

ANSWER: Defendant admits that Plaintiff purports to bring this action on behalf of a class of individuals. To the extent that Paragraph 28 is deemed to contain allegations of fact, Defendant denies the same.

29. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

ANSWER: Defendant denies the allegations contained in Paragraph 29 of Plaintiff's Complaint.

30. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. The manner in which defendant compiled or obtained its list of fax numbers;
- c. Whether defendant thereby violated the TCPA.

ANSWER: Defendant denies the allegations contained in Paragraph 30 of Plaintiff's Complaint.

31. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business

practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

ANSWER: Defendant denies the allegations contained in Paragraph 31 of Plaintiff's Complaint.

32. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

ANSWER: Defendant denies the allegations contained in Paragraph 32 of Plaintiff's Complaint.

33. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendants is small because it is not economically feasible to bring individual actions.

ANSWER: Defendant denies the allegations contained in Paragraph 33 of Plaintiff's Complaint.

34. Numerous courts have certified class actions under the TCPA. *Holtzman v. Turza*, No. 08 C 2014, 2009 WL 3334909 (N.D.Ill. Oct. 14, 2009), *aff'd in part, rev'd in part, vacated in part*, 728 F.3d 682 (7th Cir. 2013); *Ballard RN Center, Inc. v. Kohll's Pharmacy and Homecare, Inc.* 2015 IL 118644, 48 N.E.3d 1060; *American Copper & Brass, Inc. v. Lake City Indus. Products, Inc.*, 757 F.3d 540, 544 (6th Cir. 2014); *In re Sandusky Wellness Center, LLC*, 570 Fed.Appx. 437, 437 (6th Cir. 2014); *Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.*, 821 F.3d 992, 998 (8th Cir. 2016); *Sadowski v. Med1 Online, LLC*, No. 07 C 2973, 2008 WL 2224892 (N.D.Ill. May 27, 2008); *CE Design Ltd. v. Cy's Crabhouse North, Inc.*, 259 F.R.D. 135 (N.D.Ill. 2009); *Targin Sign Systems, Inc. v. Preferred Chiropractic Center, Ltd.*, 679 F.Supp.2d 894 (N.D.Ill. 2010); *Garrett v. Ragle Dental Laboratory, Inc.*, No. 10 C 1315, 2010 WL 4074379 (N.D.Ill. Oct. 12, 2010); *Hinman v. M&M Rental Center, Inc.*, 545 F.Supp.2d 802

(N.D.Ill. 2008); *Clearbrook v. Rooflifters, LLC*, No. 08 C 3276, 2010 U.S.Dist. LEXIS 72902 (N.D.Ill. July 20, 2010) (Cox, M.J.); *G.M. Sign, Inc. v. Group C Communications, Inc.*, No. 08-cv-4521, 2010 WL 744262 (N.D.Ill. Feb. 25, 2010); *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642 (W.D.Wash. 2007); *Display South, Inc. v. Express Computer Supply, Inc.*, 961 So.2d 451, 455 (La.App. 2007); *Display South, Inc. v. Graphics House Sports Promotions, Inc.*, 992 So.2d 510 (La.App. 2008); *Lampkin v. GGH, Inc.*, 146 P.3d 847 (Ok.App. 2006); *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. 94, 50 P.3d 844 (2002); *Core Funding Group, LLC v. Young*, 792 N.E.2d 547 (Ind.App. 2003); *Critchfield Physical Therapy v. Taranto Group, Inc.*, 293 Kan. 285, 263 P.3d 767 (2011); *Karen S. Little, L.L.C. v. Drury Inns, Inc.*, 306 S.W.3d 577 (Mo.App. 2010); *Lindsay Transmission, LLC v. Office Depot, Inc.*, No. 4:12-CV-221 (CEJ), 2013 WL 275568 (E.D.Mo. Feb. 24, 2013).

ANSWER: Defendant states that the allegations contained in Paragraph 34 are conclusions of law to which no answer is required. However, to the extent an answer is required, Defendant denies the same.

35. Management of this class action is likely to present significantly fewer difficulties that those presented in many class actions, e.g. for securities fraud.

ANSWER: Defendant denies the allegations contained in Paragraph 35 of Plaintiff's Complaint.

COUNT II – ILLINOIS CONSUMER FRAUD ACT

36. Plaintiff incorporates ¶¶ 1-20.

ANSWER: Defendant incorporates its answer to Paragraphs 1-20 of Plaintiff's Complaint as though fully set forth herein.

37. Defendant engaged in unfair acts and practices, in violation of ICFA § 2, 815 ILCS 505/2, by sending unsolicited fax advertising to plaintiff and others.

ANSWER: Defendant denies the allegations contained in Paragraph 37 of Plaintiff's Complaint.

38. Unsolicited fax advertising is contrary to the TCPA and also Illinois law. 720 ILCS 5/26-3(b) makes it a petty offense to transmit unsolicited fax advertisements to Illinois residents.

ANSWER: Defendant states that the allegations contained in Paragraph 38 are conclusions of law to which no answer is required. However, to the extent an answer is required, Defendant denies that the allegations contained in Paragraph 38 accurately and fully characterizes the TCPA and 720 ILCS 5/26-3(b). To the extent that Paragraph 38 is deemed to contain allegations of fact, Defendant denies the same.

39. Defendant engaged in an unfair practice and an unfair method of competition by engaging in conduct that is contrary to public policy, unscrupulous, and caused injury to recipients of their advertising.

ANSWER: Defendant denies the allegations contained in Paragraph 39 of Plaintiff's Complaint.

40. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes, in the form of paper and ink or toner consumed as a result.

ANSWER: Defendant denies the allegations contained in Paragraph 40 of Plaintiff's Complaint.

41. Defendant engaged in such conduct in the course of trade and commerce.

ANSWER: Defendant denies the allegations contained in Paragraph 41 of Plaintiff's Complaint.

42. Defendant's conduct caused recipients of their advertising to bear the cost thereof. This gave defendant an unfair competitive advantage over businesses that advertise lawfully, such as by direct mail. For example, an advertising campaign targeting one million recipients would cost \$500,000 if sent by U.S. mail but only \$20,000 if done by fax broadcasting. The reason is that instead of spending \$480,000 on printing and mailing his ad, the fax broadcaster misappropriates the recipients' paper and ink. "Receiving a junk fax is like getting junk mail

with the postage due”. Remarks of Cong. Edward Markey, 135 Cong Rec E 2549, Tuesday, July 18, 1989, 101st Cong. 1st Sess.

ANSWER: Defendant denies that the allegations contained in Paragraph 42 accurately and fully characterizes the determinations of Congress in enacting the TCPA. Defendant denies the remainder of the allegations in Paragraph 42 of Plaintiff’s Complaint.

43. Defendant’s shifting of advertising costs to plaintiff and the class members in this manner makes such practice unfair. In addition, defendant’s conduct was contrary to public policy, as established by the TCPA and Illinois statutory and common law.

ANSWER: Defendant denies the allegations contained in Paragraph 43 of Plaintiff’s Complaint.

44. Defendant should be enjoined from committing similar violations in the future.

ANSWER: Defendant denies the allegations contained in Paragraph 44 of Plaintiff’s Complaint.

CLASS ALLEGATIONS

45. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons with Illinois fax numbers (b) who, on or after a date three years prior to the filing of this action, (c) were sent faxes by or on behalf of defendant American Screening, promoting its goods or services for sale (d) which did not contain a compliant opt out notice. By “compliant opt out notice” is meant one (i) on the first page of the fax (ii) that states that the recipient may make a request to the sender not to send any future unsolicited advertisements to a telephone facsimile machine (iii) that states that failure to comply, within the shortest reasonable time, as determined by the Federal Communications Commission, is unlawful; (iv) that provides instructions on how to submit an opt out request and (v) that includes a domestic contact telephone and facsimile machine number and a cost-free mechanism for the

recipient to transmit such a request to the sender that permit a request to be made at any time on any day of the week.

ANSWER: Defendant admits that Plaintiff purports to bring this action on behalf of a class of individuals. To the extent that Paragraph 45 is deemed to contain allegations of fact, Defendant denies the same.

46. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

ANSWER: Defendant denies the allegations contained in Paragraph 46 of Plaintiff's Complaint.

47. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.

ANSWER: Defendant denies the allegations contained in Paragraph 47 of Plaintiff's Complaint.

48. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

ANSWER: Defendant denies the allegations contained in Paragraph 48 of Plaintiff's Complaint.

49. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

ANSWER: Defendant denies the allegations contained in Paragraph 49 of Plaintiff's Complaint.

50. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

ANSWER: Defendant denies the allegations contained in Paragraph 50 of Plaintiff's Complaint.

51. Management of this class action is likely to present significantly fewer difficulties that those presented in many class actions, e.g. for securities fraud.

ANSWER: Defendant denies the allegations contained in Paragraph 51 of Plaintiff's Complaint.

COUNT III – CONVERSION

52. Plaintiff incorporates ¶¶ 1-20.

ANSWER: Defendant incorporates its answer to Paragraphs 1-20 of Plaintiff's Complaint as though fully set forth herein.

53. By sending plaintiff and the class members unsolicited faxes, defendant converted to its own use ink or toner and paper belonging to plaintiff and the class members.

ANSWER: Defendant denies the allegations contained in Paragraph 53 of Plaintiff's Complaint.

54. Immediately prior to the sending of the unsolicited faxes, plaintiff and the class members owned and had an unqualified and immediate right to the possession of the paper and ink or toner used to print the faxes.

ANSWER: Defendant states it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 54 of Plaintiff's Complaint, and therefore denies the same.

55. By sending the unsolicited faxes, defendants appropriated to their own use the

paper and ink or toner used to print the faxes and used them in such manner as to make them unusable. Such appropriation was wrongful and without authorization.

ANSWER: Defendant denies the allegations contained in Paragraph 55 of Plaintiff's Complaint. Defendant has insufficient knowledge or information to form a belief as to the truth of the allegations plead against the other John Doe defendants, and therefore denies the same.

56. Defendant knew or should have known that such appropriation of the paper and ink or toner was wrongful and without authorization.

ANSWER: Defendant denies the allegations contained in Paragraph 56 of Plaintiff's Complaint.

57. Plaintiff and the class members were deprived of the paper and ink or toner, which could no longer be used for any other purpose. Plaintiff and each class member thereby suffered damages as a result of receipt of the unsolicited faxes.

ANSWER: Defendant states it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 57 of Plaintiff's Complaint that "Plaintiff and the class members were deprived of the paper and ink or toner, which could no longer be used for any other purpose," and therefore denies the same. Defendant denies the remainder of the allegations in Paragraph 57 of Plaintiff's Complaint.

58. Defendant should be enjoined from committing similar violations in the future.

ANSWER: Defendant denies the allegations contained in Paragraph 58 of Plaintiff's Complaint.

CLASS ALLEGATIONS

59. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons with Illinois fax numbers (b) who, on or after a date five years prior to the filing of this action, (c) were sent faxes by or on behalf of defendant American Screening, promoting its goods or services for sale (d) which did not contain a compliant opt out notice. By "compliant opt out notice" is meant one (i) on the first page of the fax (ii) that states

that the recipient may make a request to the sender not to send any future unsolicited advertisements to a telephone facsimile machine (iii) that states that failure to comply, within the shortest reasonable time, as determined by the Federal Communications Commission, is unlawful; (iv) that provides instructions on how to submit an opt out request and (v) that includes a domestic contact telephone and facsimile machine number and a cost-free mechanism for the recipient to transmit such a request to the sender that permit a request to be made at any time on any day of the week.

ANSWER: Defendant admits that Plaintiff purports to bring this action on behalf of a class of individuals. To the extent that Paragraph 59 is deemed to contain allegations of fact, Defendant denies the same.

60. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

ANSWER: Defendant denies the allegations contained in Paragraph 60 of Plaintiff's Complaint.

61. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. Whether defendant thereby converted the property of plaintiff.

ANSWER: Defendant denies the allegations contained in Paragraph 61 of Plaintiff's Complaint.

62. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not

to vigorously pursue this action.

ANSWER: Defendant denies the allegations contained in Paragraph 62 of Plaintiff's Complaint.

63. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

ANSWER: Defendant denies the allegations contained in Paragraph 63 of Plaintiff's Complaint.

64. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

ANSWER: Defendant denies the allegations contained in Paragraph 64 of Plaintiff's Complaint.

65. Management of this class action is likely to present significantly fewer difficulties that those presented in many class actions, e.g. for securities fraud.

ANSWER: Defendant denies the allegations contained in Paragraph 65 of Plaintiff's Complaint.

COUNT IV – NUISANCE

66. Plaintiff incorporates ¶¶ 1-20.

ANSWER: Defendant incorporates its answer to Paragraphs 1-20 of Plaintiff's Complaint as though fully set forth herein.

67. Defendant's sending plaintiff and the class members unsolicited faxes was an unreasonable invasion of the property of plaintiff and the class members and constitutes a nuisance.

ANSWER: Defendant denies the allegations contained in Paragraph 67 of Plaintiff's Complaint.

68. Congress determined, in enacting the TCPA, that the prohibited conduct was a “nuisance.” *Universal Underwriters Ins. Co. v. Lou Fusz Automotive Network, Inc.*, 401 F.3d 876, 882 (8th Cir. 2005).

ANSWER: Defendant states that the allegations contained in Paragraph 68 are conclusions of law to which no answer is required. However, to the extent an answer is required, Defendant denies that the allegations contained in Paragraph 68 accurately and fully characterizes the determinations of Congress in enacting the TCPA. To the extent this Paragraph contains misrepresentations of the law or is deemed to contain allegations of fact, Defendant denies the same.

69. Defendant acted either intentionally or negligently in creating the nuisance.

ANSWER: Defendant denies the allegations contained in Paragraph 69 of Plaintiff’s Complaint.

70. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes.

ANSWER: Defendant denies the allegations contained in Paragraph 70 of Plaintiff’s Complaint.

71. Defendant should be enjoined from continuing its nuisance.

ANSWER: Defendant denies the allegations contained in Paragraph 71 of Plaintiff’s Complaint.

CLASS ALLEGATIONS

72. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons with Illinois fax numbers, (b) who, on or after a date five years prior to the filing of this action, (c) were sent faxes by or on behalf of defendant American Screening, promoting its goods or services for sale (d) which did not contain a compliant opt out notice. By “compliant opt out notice” is meant one (i) on the first page of the fax (ii) that states that the recipient may make a request to the sender not to send any future unsolicited advertisements to a telephone facsimile machine (iii) that states that failure to comply, within the

shortest reasonable time, as determined by the Federal Communications Commission, is unlawful; (iv) that provides instructions on how to submit an opt out request and (v) that includes a domestic contact telephone and facsimile machine number and a cost-free mechanism for the recipient to transmit such a request to the sender that permit a request to be made at any time on any day of the week.

ANSWER: Defendant admits that Plaintiff purports to bring this action on behalf of a class of individuals. To the extent that Paragraph 72 is deemed to contain allegations of fact, Defendant denies the same.

73. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

ANSWER: Defendant denies the allegations contained in Paragraph 73 of Plaintiff's Complaint.

74. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. Whether defendant thereby created a nuisance.

ANSWER: Defendant denies the allegations contained in Paragraph 74 of Plaintiff's Complaint.

75. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

ANSWER: Defendant denies the allegations contained in Paragraph 75 of Plaintiff's Complaint.

76. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

ANSWER: Defendant denies the allegations contained in Paragraph 76 of Plaintiff's Complaint.

77. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

ANSWER: Defendant denies the allegations contained in Paragraph 77 of Plaintiff's Complaint.

78. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

ANSWER: Defendant denies the allegations contained in Paragraph 78 of Plaintiff's Complaint.

COUNT V – TRESPASS TO CHATTELS

79. Plaintiff incorporates ¶¶ 1-20.

ANSWER: Defendant incorporates its answer to Paragraphs 1-20 of Plaintiff's Complaint as though fully set forth herein.

80. Plaintiff and the class members were entitled to possession of the equipment they used to receive faxes.

ANSWER: Defendant states it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 80 of Plaintiff's Complaint, and therefore denies the same.

81. Defendant's sending plaintiff and the class members unsolicited faxes interfered with their use of the receiving equipment and constitutes a trespass to such equipment. *Chair King v. Houston Cellular*, 95cv1066, 1995 WL 1693093 at *2 (S.D. Tex. Nov. 7, 1995) (denying

a motion to dismiss with respect to plaintiff's trespass to chattels claim for unsolicited faxes), vacated on jurisdictional grounds 131 F.3d 507 (5th Cir. 1997).

ANSWER: Defendant states that the allegations contained in Paragraph 81 are conclusions of law to which no answer is required. However, to the extent an answer is required, Defendant denies the same.

82. Defendant acted either intentionally or negligently in engaging in such conduct.

ANSWER: Defendant denies the allegations contained in Paragraph 82 of Plaintiff's Complaint.

83. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes.

ANSWER: Defendant denies the allegations contained in Paragraph 83 of Plaintiff's Complaint.

84. Defendant should be enjoined from continuing trespasses.

ANSWER: Defendant denies the allegations contained in Paragraph 84 of Plaintiff's Complaint.

CLASS ALLEGATIONS

85. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons with Illinois fax numbers (b) who, on or after a date five years prior to the filing of this action, (c) were sent faxes by or on behalf of defendant American Screening, promoting its goods or services for sale (d) which did not contain a compliant opt out notice. By "compliant opt out notice" is meant one (i) on the first page of the fax (ii) that states that the recipient may make a request to the sender not to send any future unsolicited advertisements to a telephone facsimile machine (iii) that states that failure to comply, within the shortest reasonable time, as determined by the Federal Communications Commission, is unlawful; (iv) that provides instructions on how to submit an opt out request and (v) that includes

a domestic contact telephone and facsimile machine number and a cost-free mechanism for the recipient to transmit such a request to the sender that permit a request to be made at any time on any day of the week.

ANSWER: Defendant admits that Plaintiff purports to bring this action on behalf of a class of individuals. To the extent that Paragraph 85 is deemed to contain allegations of fact, Defendant denies the same.

86. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

ANSWER: Defendant denies the allegations contained in Paragraph 86 of Plaintiff's Complaint.

87. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. Whether defendant thereby committed a trespass to chattels.

ANSWER: Defendant denies the allegations contained in Paragraph 87 of Plaintiff's Complaint.

88. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

ANSWER: Defendant denies the allegations contained in Paragraph 88 of Plaintiff's Complaint.

89. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

ANSWER: Defendant denies the allegations contained in Paragraph 89 of Plaintiff's Complaint.

90. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

ANSWER: Defendant denies the allegations contained in Paragraph 90 of Plaintiff's Complaint.

91. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

ANSWER: Defendant denies the allegations contained in Paragraph 91 of Plaintiff's Complaint.

WHEREFORE, Defendant, Cook Fast Cash, respectfully requests that judgment be entered in its favor and against Plaintiff with costs assessed against Plaintiff, and that Plaintiff take none of the relief it requests in its Complaint.

GENERAL DENIAL

Defendant denies each and every allegation contained in Plaintiff's Complaint that is not specifically admitted to be true in the preceding Paragraphs of this Answer.

AFFIRMATIVE DEFENSES

NOW COMES the Defendant, American Screening LLC, by and through its attorneys, Molly A. Arranz and John C. Ochoa of SMITHAMUNDSEN LLC, and for its Affirmative Defenses to the Plaintiff's Complaint, states as follows:

First Affirmative Defense
(Prior Express Consent)

Defendant did not send unsolicited facsimile advertisements without having obtained prior express consent. Instead, Defendant was invited and/or obtained prior express permission to contact and/or send facsimiles to Plaintiff and putative class members, such that the claims asserted in the Complaint are barred.

Second Affirmative Defense
(Established Business Relationship)

Defendant did not send unsolicited facsimile advertisements without having an established business relationship with recipients, such that the claims asserted in the Complaint are barred.

Third Affirmative Defense
(No Standing)

Plaintiff and the putative class members lacks standing under Article III of the Constitution and, therefore, are not entitled to pursue the instant suit in federal court. On information and belief, Plaintiff and the putative class members have not suffered a concrete and particularized injury as a result of the conduct alleged in the Complaint.

Fourth Affirmative Defense
(Good Faith)

Defendant acted reasonably and in good faith at all times material herein, based on all relevant facts and circumstances known by Defendant and at the time Defendant so acted. Specifically, Defendant was invited and/or obtained prior express permission to send facsimiles to Plaintiff. Accordingly, Plaintiff is barred, in whole or in part, from any recovery in this action.

Fifth Affirmative Defense
(Unlawful Acts)

Plaintiff's Complaint, and every cause of action therein, is barred to the extent any purportedly unlawful or other wrongful acts of any person employed by Defendant were outside

the scope of that employee's authority, that such acts, if any, were not authorized, ratified or condoned by Defendant, and that Defendant did not know or have reason to be aware of such alleged conduct.

Sixth Affirmative Defense
(Excessive Damages)

The imposition of statutory damages in this action, unrelated to any actual harm caused by the conduct alleged in the Complaint, would violate Defendant's state and federal constitutional rights, including its rights to procedural and substantive due process.

DEFENDANT DEMANDS A TRIAL BY JURY

Respectfully submitted,

By: /s/ John C. Ochoa
Counsel for Defendant

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John C. Ochoa ARDC #6302680
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Chicago, Illinois 60601
(312) 894-3200

Counsel for Defendant American Screening LLC

CERTIFICATE OF SERVICE

The undersigned certifies that on October 4, 2016 he served **Defendant's Answer and Affirmative Defenses to Plaintiff's Complaint** on all attorneys of record. This pleading was served upon the attorneys as listed above, pursuant to the Northern District of Illinois General Order on Electronic Case Filing.

Pursuant to 28 USC Section 1746(2), I certify under penalty of perjury that the foregoing is true and correct.

Executed on: October 4, 2016.

/s/ John C. Ochoa

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