

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

Carol Manheim, d/b/a Plantation Plaza
Therapy Center, individually, and on
behalf of all other persons similarly
situated,

Plaintiff,

v.

SME Inc., USA, d/b/a Superior Medical
Equipment,

Defendant.

Case No. 2:14-cv-02856-DCN

Plaintiff's Brief in Support of its Motion for Class Certification

The Telephone Consumer Protection Act ("TCPA")¹ prohibits people from sending fax advertisements without first obtaining prior express invitation or permission from those to whom they send their advertisements. Sending fax advertisements, which are often called junk faxes, causes damage to those to whom the junk faxes are sent. Those to whom junk faxes are sent have their telephone lines tied up, and their paper and toner or ink used to print the senders' advertisements. Sending fax advertisements invades the privacy of those to whom the junk faxes are sent. Unwanted faxes prevent fax machines from receiving authorized faxes, prevent fax machines from being used for authorized

¹ 47 USC § 227.

outgoing faxes, cause undue wear and tear on the fax machines to which the junk faxes are sent, and require additional labor by those to whom the junk faxes are sent to attempt to discern the source and purpose of the unsolicited message. And sending unwanted fax advertisements consumes a portion of the limited capacity of the telecommunications infrastructure serving those to whom they are sent. The TCPA allows anyone to whom an advertiser sent an unsolicited fax advertisement to sue the advertiser for statutory damages of \$500 per fax, and up to \$1,500 per fax if the violation is found to be willful or knowing.²

Carol Manheim d/b/a Plantation Plaza Therapy Center sued SME Inc., USA d/b/a Superior Medical Equipment after Superior Medical Equipment repeatedly sent illegal advertising faxes to Plantation Plaza Therapy Center. Plantation Plaza Therapy Center seeks to prosecute its claims against Superior Medical Equipment as a class action because it is impossible for those targeted by junk-faxing campaigns to vindicate their rights without aggregating their claims with those of others.³

Argument & Citation of Authority

Class action lawsuits have long been recognized as an efficient way of resolving the

² 47 U.S.C. § 227(b)(3).

³ See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (discussing that most plaintiffs “would have no realistic day in court if a class action were not available” when their individual claims are for a modest amount); *Junk Faxes Are Illegal, So Why Are You Getting Them?*, CONSUMER REPORTS, March 2004, at 47.

problems of many persons who share a common interest or have a problem in common.⁴

“Class certification is strictly a procedural matter and the merits of the claims at stake are not to be considered when determining the propriety of a class action vehicle.”⁵ Thus, the substantive allegations of the complaint must be taken as true when determining whether a class action will be allowed.⁶ The court should resolve any doubt regarding the propriety of class certification in favor of allowing the class action so that it will remain an effective vehicle for deterring corporate wrongdoing.⁷ Whether to certify a class and allow the case to proceed as a class action is a matter for the trial judge’s discretion.⁸

At least three times—on October 1 and November 12, 2012, and on December 13, 2013—Superior Medical Equipment, or an agent acting under its direction, used a telephone facsimile or fax machine, computer, or other device to send advertisements to the fax machine belonging to Plantation Plaza Therapy Center. It even sent a junk fax to Plantation Plaza Therapy Center after receiving a letter demanding that it stop.

Plantation Plaza Therapy Center seeks certification of a class consisting of all persons, natural or otherwise, throughout the United States to whom Superior Medical

⁴ *E.g., Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 298 (1853) (stating “[t]he rule is well established that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others”).

⁵ *Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 346 (S.D. Ga. 1996).

⁶ *Heastie v. Community Bank of Greater Peoria*, 125 F.R.D. 669, 671 n.2 (N.D. Ill. 1989).

⁷ *See In re Folding Cartons Antitrust Litig.*, 75 F.R.D. 727, 731 (N.D. Ill. 1977) (stating “Rule 23 is a remedial procedure which should be construed liberally to permit class actions”).

⁸ *Chisolm v. TranSouth Fin. Corp.*, 184 F.R.D. 556, 560 (E.D. Va. 1999).

Equipment sent or caused to be sent, at any time from the date that is four years before the filing of this lawsuit to the present, one or more facsimile or fax transmissions with content substantially similar to those fax transmissions contained in Exhibits A, B, or C attached to the Complaint. Excluded from the class are the judge to whom this case is assigned and any member of the judge's staff and immediate family, as well as all persons who validly request exclusion from the class.

The proposed class should be certified by this Court because it meets the prerequisites for a class action under Federal Rule of Civil Procedure 23:

1. The class is so numerous that joinder of all members is impracticable;
2. There are questions of law or fact common to the class;
3. The claims of the representative party are typical of the claims of the class;
4. The questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy; and
5. The representative party will fairly and adequately protect the interests of the class.⁹

Class actions serve three essential purposes: (1) to facilitate judicial economy by avoiding multiple suits on the same subject matter;¹⁰ (2) to provide a feasible means for asserting the rights of those who “would have no realistic day in court if a class action

⁹ Fed. R. Civ. P. 23(a) & (b)(2)–(3).

¹⁰ *American Pipe and Constr. Co. v. Utah*, 414 U.S. 538, 550 (1974).

were not available,”¹¹ and (3) to deter inconsistent results, assuring a uniform, singular determination of rights and liabilities.¹² For these reasons, Plantation Plaza Therapy Center’s motion for class certification should be granted.

I. Membership in the proposed class is so numerous as to make it impracticable to bring everyone before the Court.

In order for a class action to be certified, the membership in the proposed class must be so numerous that joinder of all members is impracticable.¹³ Professor Arthur Miller conducted an exhaustive review of the cases on the numerosity requirement under Rule 23 and concluded that the numerosity requirement is satisfied if the class has more than 40 people in it.¹⁴

The exact number of class members are unknown at this time, but the Court can make commonsense assumptions about the numerosity of the class and whether joinder of all is unfeasible.¹⁵ A class action may also proceed upon a mere estimate of the size of the

¹¹ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

¹² *First Federal of Michigan v. Barrow*, 878 F.2d 912, 919 (6th Cir.1989).

¹³ Fed. R. Civ. P. 23(a)(1).

¹⁴ Arthur Miller, *An Overview of Federal Class Actions: Past, Present and Future*, Federal Judicial Center Education & Training Series, (2d Ed.1977) at 22.

¹⁵ See *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1039 (5th Cir. 1981) (stating numerosity requirement generally assumed to be met in class action suits involving nationally traded securities); A. Conte, *NEWBERG ON CLASS ACTIONS* § 7.22 at 73 (4th ed. 2002) (stating “the court may assume sufficient numerousness where reasonable to do so in absence of a contrary showing by defendant”).

proposed class.¹⁶ And “[w]here the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied.”¹⁷

Common sense and general knowledge tell us that the size of the proposed class is large and that joinder is impractical. The faxes that Superior Medical Equipments sent that are at issue in this case are general advertisements intended for physical-therapy clinics. Their purpose was to promote Superior Medical Equipment’s products. Based on the form form, content, and context of Superior Medical Equipment’s faxes, common sense tells us that Superior Medical Equipment likely sent the same advertisements to thousands of other physical-therapy clinics.

II. Common questions of law and fact predominate over any individual issues.

To satisfy the commonality requirement, Plantation Plaza Therapy center need only show that there is a common nucleus of operative facts and that common questions predominate over any individual questions affecting individual class members.¹⁸ Here, Superior Medical Equipment sent the same fax (or substantially the same fax) as part of the same course of conduct to each class member, and the sending of the faxes to each class member is governed by the same law.

¹⁶ *Amswiss Int’l Corp. v. Heublein, Inc.*, 69 F.R.D. 663, 666 (N.D. Ga. 1975).

¹⁷ *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 370 (C.D. Cal. 1982).

¹⁸ *Peterson v. H & R Block Tax Servs., Inc.*, 174 F.R.D. 78, 82 (N.D. Ill. 1997).

Questions of law and fact common to the members of the proposed class predominate over any questions affecting individual members. The principal questions raised by this action are:

- (a) whether Superior Medical Equipment's fax transmissions violated the TCPA;
- (b) the amount of statutory damages and other relief to which Superior Medical Equipment's conduct entitles class members; and
- (c) whether class members are entitled to injunctive relief as a result of Superior Medical Equipment's conduct.

These questions are common to every class member.

"Commonality is not required on every question raised in a class action. Rather, Rule 23 is satisfied when the legal question 'linking the class members is substantially related to the resolution of the litigation.'" ¹⁹ There need not be a total absence of individual questions of law or fact as long as the common questions predominate, ²⁰ and they do so here. Thus, there is simply no need to burden either the court system or the class members by requiring each member of the class to pursue his or her own action.

Unlike many class actions, no individual issues concerning damages are presented here. Damages are a common issue because the TCPA imposes statutory damages of \$500 for each violation. ²¹ Whether Superior Medical Equipment's conduct was knowing and, as a result, warrants trebling these damages is also common to the entire class.

¹⁹ *DeBoear v. Mellon Mortgage Co.*, 64 F.3d 1171, 1174 (3rd Cir. 1995).

²⁰ *Chmielecki v. City Prods. Corp.*, 71 F.R.D. 118, 176 (W.D. Mo. 1976).

²¹ 47 U.S.C. § 227(b)(3).

Common questions of law and fact do not just predominate over any individual issues in this case, common questions are the only issues to be decided.

III. Plantation Plaza Therapy Center's claims are typical of those of the proposed class members.

Although Rule 23(a) separately sets forth the commonality and typicality requirements, those requirements tend to merge.²² Thus, just as Plantation Plaza Therapy Center has shown that it meets the commonality requirement, it also meets the typicality requirement.

“A plaintiff’s claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.”²³ Plantation Plaza Therapy Center’s claims are typical of the claims of the proposed class because they arise from the same course of conduct—a fax advertising campaign—directed toward the entire class, and because the claims of the entire class arise under the TCPA. Any differences that may exist in Plantation Plaza Therapy Center’s factual situation are minor given Superior Medical Equipment’s common course of conduct directed toward members of the class with its fax advertising campaign.

A strong similarity of legal theories will satisfy the typicality requirement even if

²² *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985).

²³ *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983).

there are substantial factual differences.²⁴ As long as the claims “resemble or exhibit the essential characteristics of those of the representatives,” Rule 23(a)(3) will be satisfied.²⁵

Here, the exact same legal theories are being used to seek redress for Superior Medical Equipment’s fax advertising campaign. No substantial factual differences exist in the fact pattern. The typicality requirement is met when the same unlawful course of conduct is directed at both the named plaintiff and the members of the proposed class.²⁶ Because the same unlawful conduct was directed at FastSigns and the proposed class members in this case, the typicality requirement is satisfied.

IV. A class action is a superior method of adjudicating what is otherwise expected to be thousands of TCPA claims.

It is difficult to imagine a case better suited for class certification than this one. The TCPA claims in this case are not just similar, they are identical. Based on the same fax transmissions, each proposed class member could assert the identical TCPA claims as Plantation Plaza Therapy Center, seeking the same statutory damages. Each claim would literally be a carbon copy of the others.

While the TCPA provides statutory damages of \$500 for a single violation of its junk-faxing ban, the economic realities of the legal system and the aggressive litigation tactics of junk-faxers make it nearly impossible for individuals targeted by junk-faxing

²⁴ *Appleyard*, 754 F.2d at 958.

²⁵ *Kas v. Financial Gen. Bankshares, Inc.*, 105 F.R.D. 453, 461 (D.D.C. 1984).

²⁶ *Kennedy v. Tallant*, 710 F.2d 711, 717 (11th Cir. 1983).

campaigns to vindicate their rights without aggregating their claims with those of others.

One pro se plaintiff, a software developer in Boulder, Colorado, sued a fax advertiser in small claims court.²⁷ After obtaining a judgment, the advertiser appealed to the district court, forcing the software developer to spend 100 hours learning the law and writing briefs.²⁸ Sixteen months later, he won and collected \$500.²⁹ While he considered his experience a moral victory, he recognizes that “economically, it was a complete loss.”³⁰

The Federal Communications Commission’s Enforcement Bureau’s chief acknowledges that junk faxers’ litigation tactics “have stymied [TCPA] enforcement efforts.”³¹ Class relief is the only effective means of achieving individual justice under the TCPA.

“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s

²⁷ *Junk Faxes Are Illegal, So Why Are You Getting Them?*, CONSUMER REPORTS, March 2004, at 47.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Junk Faxes Are Illegal, So Why Are You Getting Them?*, CONSUMER REPORTS, March 2004, at 47.

(usually an attorney's) labor.”³²

Class relief is a superior method of adjudicating what would otherwise be expected to be thousands of identical TCPA claims. Recognizing that small consumer claims generally go unprosecuted because of ignorance of the claim and reluctance to file an expensive lawsuit, courts strongly support class relief both to ensure compensation for victims and to deter those who prey on consumers knowing they are unlikely to sue.³³

Small, one-person awards of \$500 do not deter corporate defendants engaged in massive (and immensely lucrative) violations of the law. A class-based effort is more effective than an individual consumer in getting a defendant to modify its conduct under such circumstances. “[C]lass actions were not designed solely to compensate similarly situated victims of misconduct, but also to deter violations of the law, especially when small individual claims are involved.”³⁴ Class actions “reinforce the regulatory scheme by providing an additional deterrent beyond that afforded either by public enforcement or by a single-party private enforcement.”³⁵

Class relief also educates the public about the TCPA and its junk-faxing ban. In *Duran v. Credit Bureau of Yuma, Inc.*, the plaintiffs brought a statutory-damages class

³² *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (parenthetical in original; citation omitted).

³³ *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (discussing desirability of class relief for small consumer claims).

³⁴ *Brink v. First Credit Resources*, 185 F.R.D. 567, 573 (D. Ariz. 1999).

³⁵ *Hackett v. General Host Corp.*, 455 F.2d 618, 623 (3rd. Cir. 1972).

action under the Fair Debt Collection Practices Act, which the district court certified because class actions to enforce compliance with consumer-protection laws are desirable and should be encouraged.³⁶ Not only do class actions enable class members to share in a financial recovery that they might otherwise never pursue on their own, but it also provides an opportunity to educate the public—particularly those included in the class—of the obligations that are owed to them.³⁷

When considering whether the class-action mechanism is superior to other available methods for the fair and efficient adjudication of the class members' claims, the pertinent factors the Court should consider are (1) the class members' interests in individually controlling the prosecution of separate actions; (2) the extent and nature of any litigation concerning the controversy already begun by class members; (3) the desirability or undesirability of concentrating the litigation of the claims in this particular forum; and (4) the likely difficulties in managing a class action.³⁸ Each of these considerations militates in favor of class certification.

Plantation Plaza Therapy Center knows of no other lawsuit against Superior Medical Equipment for its junk-faxing activities. The absence of individual lawsuits supports the superiority of a class action.³⁹ This is true for several reasons. First, the lack of other suits

³⁶ 93 F.R.D. 607, 610 (D. Ariz. 1982).

³⁷ *Id.*

³⁸ *See* Fed. R. Civ. Pro. 23(b)(3).

³⁹ *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 50 P.3d 844, 848 (continued...)

suggests that class members would have no interest in controlling their own litigation.⁴⁰

Second, the lack of other suits may indicate that individuals are unaware that they possess any claim.⁴¹ A class action serves to educate people about their rights as well as protect those rights.⁴²

The lack of other suits may also indicate that the prosecution of individual claims is not economically feasible. That would be the case when the claim involves a small potential recovery, where the cost and inconvenience of pursuing individual litigation would exceed the benefit if victorious. This is the case with TCPA claims.⁴³ The ability to combine claims in a class action permits the vindication of rights that would otherwise go unprosecuted.⁴⁴

This Court has personal jurisdiction over Superior Medical Equipment because Superior Medical Equipment committed multiple more tortious acts in South Carolina. There is no reason not to have all of the TCPA claims against Superior Medical Equipment litigated in this particular forum.

³⁹(...continued)
(Az. Ct. App. 2002).

⁴⁰ *Id.* at 849.

⁴¹ *Id.* at 848.

⁴² *Id.* at 848.

⁴³ *See Junk Faxes Are Illegal, So Why Are You Getting Them?*, CONSUMER REPORTS, March 2004, at 47.

⁴⁴ *ESI Ergonomic Solutions, LLC*, 50 P.3d 844, 848-49.

And given the simplicity of TCPA claims, there is little likelihood that this Court will encounter any difficulties in managing a class action in this case.

Certainly, a class action is a superior method of adjudicating what is otherwise expected to be thousands of identical TCPA claims.

V. Plantation Plaza Therap Center will fairly and adequately protect the interests of the class.

Rule 23 requires that the named plaintiff provide fair and adequate protection for the interests of the class. That protection involves two factors:

- (a) that the plaintiff's attorneys must be qualified, experienced, and generally able to conduct the proposed litigation; and
- (b) that the plaintiff must not have interests antagonistic to those of the class.⁴⁵

Plantation Plaza Therapy Center has retained experienced counsel who possess extensive experience in class action litigation and the TCPA.⁴⁶

The second relevant consideration under Rule 23(a)(4) is whether the interests of the named plaintiff coincide with the general interests of the class. Both Plantation Plaza Therapy Center and the class members seek the same thing: receiving the statutory damages to which they are entitled by virtue of Superior Medical Equipment's violation of the TCPA. Because the claims of Plantation Plaza Therapy Center and the class

⁴⁵ *E.g., Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 345-46 (S.D. Ga. 1996).

⁴⁶ Affidavits of John Nichols, Clarke Newton, and Marc B. Hershovitz are attached as Exhibits A, B, and C, respectively.

members are identical, there is no potential for conflicting interests in this case. There is no antagonism between Plantation Plaza Therapy Center's interests and those in the proposed class; they are all in the same boat and share a like interest in vindicating Superior Medical Equipment's violation of the TCPA.

Finally, Plantation Plaza Therapy Center has demonstrated its desire and ability to protect the interests of the class members by seeking and retaining counsel experienced in prosecuting TCPA claims, and by filing and vigorously prosecuting this lawsuit.

Conclusion

Superior Medical Equipment engaged in a fax advertising campaign to promote its products. When marketing material is sent through the mail, the recipient pays nothing to receive the advertisement. But junk faxes are the equivalent of junk mail sent postage-due. You are harmed when a junk fax is sent to you. The ringing of the phone line prevents other faxes and calls from coming in and going out. And the sending of junk faxes occupies capacity in the national telecommunications system for which every user pays. That's why sending junk faxes is illegal.

Superior Medical Equipment sent what is expected to be thousands of faxes as part of the same advertising campaign. Its conduct toward each class member is governed by the same law, which provides for the same statutory damages for each violation. It is difficult to imagine a case better suited for class certification than this one.

The prerequisites for class certification having been met, this Court should grant

Plantation Plaza Therapy Center's motion for class certification.

Respectfully submitted, this 16th day of July 2014.

/s/ J. Clarke Newton

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