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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, **v.** **FAX.COM, INC., a Delaware Corporation; KEVIN KATZ, ERIC WILSON; and DOES 1-10,** Defendants.	**COMPLAINT FOR INJUNCTION, DAMAGES, CIVIL PENALTIES AND OTHER EQUITABLE RELIEF**

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1. Plaintiff, the People of the State of California, by its attorney Bill Lockyer, Attorney General of the State of California, brings this action pursuant to the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), alleging that FAX.COM, INC., a Delaware corporation transacting business in California as a foreign corporation, and the officers and owners of FAX.COM, INC., Defendants KEVIN KATZ and ERIC WILSON are each violating the TCPA. Plaintiff seeks a permanent injunction, damages, civil penalties, and other relief, based upon Defendants' violations of the TCPA in connection with the sending of unsolicited advertisements via telephone facsimile machines as well as the placing of unsolicited prerecorded telephone calls.

/ / /

2. Plaintiff, as part of the same case or controversy, also brings this action pursuant to the California Business & Professions Code § 17200, and California Business & Professions Code § 17500 alleging that Defendants, and each of them have violated such state laws.

JURISDICTION AND VENUE

3. This court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1337(a) and 47 U.S.C. § 227(f)(1) and it also has supplemental jurisdiction over the state claims pursuant to 28 U.S.C. § 1367.

4. Venue in this matter is proper in this judicial district pursuant to 28 U.S.C. § 1391(b), in that a substantial part of the events or omissions giving rise to the claim occurred in this judicial district. Venue is also proper in this judicial district pursuant to 47 U.S.C. § 227(f)(4), in that Defendants transact business in this district and violations of the TCPA and the California statues are occurring in this district.

PARTIES

5. Plaintiff, by and through its attorney, Bill Lockyer, Attorney General of the State of California, is authorized by 47 U.S.C. § 227(f)(1) to file actions in federal district court to enjoin violations and enforce compliance with the TCPA on behalf of residents of the State of California and to obtain actual damages or damages of $500 for each violation and up to treble that amount for each violation committed willfully or knowingly.

6. Plaintiff, by and through Bill Lockyer, Attorney General of the State of California, is authorized by California Business & Professions Code § 17204 and by California Business & Professions Code § 17535 to obtain injunctive relief to halt violations of and enforce compliance with California Business & Professions Code § 17200, and California Business & Professions Code § 17500, respectively.

7. Defendant FAX.COM, INC. ("FAX.COM") is a Delaware corporation, whose physical and mailing address is 120 Columbia, Suite 500, Aliso Viejo, California 92656. Defendant FAX.COM is registered with the California Secretary of State as a foreign corporation to transact business in the State of California. The registered agent for service of process of FAX.COM is Charles Martin, 120 Columbia, Suite 500, Aliso Viejo, California 92656.

8. Defendants KEVIN KATZ and ERIC WILSON are officers and owners of FAX.COM and have the same business address as FAX.COM. KEVIN KATZ is the President of FAX.COM, and resides in Laguna Beach, California. ERIC WILSON is the Chief Technical Officer of FAX.COM, and resides in Sierra Madre, California. As officers and owners of FAX.COM, Defendants KATZ and WILSON have managed, controlled and directed the activities of Defendant FAX.COM complained of herein.

9. Whenever reference is made in this complaint to any act or transaction of a Defendant such allegation shall be deemed to mean that said Defendant and its owners, officers, directors, agents, employees, or representatives did or authorized such acts while engaged in the management, direction, or control of the affairs of the Defendant and while acting within the scope and course of their duties.

10. Whenever in this complaint reference is made to any act of any Defendant, such allegation shall be deemed to mean that said Defendant was acting (a) as a principal, (b) under express or implied agency, and/or (c) with actual or ostensible authority to perform the acts so alleged.

11. The true names and capacities, whether individual, corporate, or otherwise, of Defendants sued herein under the fictitious names of DOES 1 through 10, inclusive, are unknown to Plaintiff who therefore sues said Defendants by such fictitious names. Plaintiff will amend this complaint to show the true names of each when the same has been ascertained.

12. As used herein, the term "Defendants" means and includes Defendant FAX.COM, Defendant KEVIN KATZ, Defendant ERIC WILSON, and DOES 1-10.

DEFENDANTS' BUSINESS PRACTICES

13. Since at least January 1, 2003, Defendants have been in the business of providing facsimile (sometimes hereafter "fax") advertising services and prerecorded telephone call services to their clients.

14. Defendants, in the fax advertising portion of their business, use a telephone facsimile machine, computer, or other device to transmit advertisements to telephone facsimile machines in the State of California. Defendants transmit millions of advertisements to telephone facsimile

machines on behalf of other businesses or entities (their clients) for a fee, a practice which is referred to as "faxblasting" or "junk faxing." Defendants transmit these advertisements to the facsimile numbers they have gathered and stored in FAX.COM's proprietary database.

15. Defendants acquire and store facsimile numbers for their proprietary database by purchasing other databases, by entering the facsimile numbers of those who request to be added to the database (which represent a negligible number of the fax numbers contained in the database), by uploading the facsimile numbers gathered by those clients who elect to use FAX.COM to faxblast, and by using computer auto-dialers.

16. Defendants' primary method of gathering fax numbers is through the use of auto-dialers they have designed and named "Fax Casters." The Fax Casters are programmed to: (a) transmit signals for the purpose of detecting fax machine lines; (b) record the number of any fax machine lines they find and transmit that information to the FAX.COM proprietary database; and (c) transmit faxes to numbers relayed to the Fax Casters by the FAX.COM Fax Broadcaster and/or the FAX.COM proprietary database. The Fax Casters operate twenty-four hours a day both gathering facsimile numbers and transmitting millions of advertisements to facsimile numbers in the FAX.COM proprietary database.

17. FAX.COM also uses a "Fax Broadcaster" to transmit facsimiles directly from their principal place of business in Aliso Viejo, California. The Fax Broadcaster is similar to the Fax Casters in that it has the capability to gather facsimile numbers and transmit facsimile advertisements to those numbers. The Fax Broadcaster, however, is a much larger computer system and houses the FAX.COM proprietary database. The fax numbers are stored in FAX.COM's proprietary database such that they can be sorted using various criteria such as: radius from the advertiser, Zip Code, Metro Area, Area Code, County, State, and/or, in some instances, Standard Industry Code ("SIC"). Those who faxblast with FAX.COM are able to select the targets of their advertisements by choosing from among the aforementioned set of criteria. The Fax Broadcaster transmits the target lists of facsimile numbers via the Internet, and/or telephone line, and/or cable lines to the Fax Casters throughout the United States and Canada. FAX.COM does not obtain prior express permission to send the faxes prior to their

transmission, and the recipients who receive the transmissions in most instances do not have an established business relationship with either FAX.COM or the entities whose products, goods, or services are being advertised in the faxes received. In most instances, FAX.COM is not able to distinguish between a facsimile number located within a business establishment and a facsimile number that is located within a residence.

18. Defendants do not identify FAX.COM as the entity responsible for the fax sent on any part of the fax. Defendants' inclusion on the fax of a toll free removal number provides the consumer with little or no information as to the identity of the entity sending the fax and who the toll-free number belongs to is not reasonably ascertainable by most consumers. Further, Defendants do not identify FAX.COM as the entity responsible for sending the fax at any time during the opt-out telephone message a consumer hears when s/he calls the toll free removal number to request removal.

19. Most recipients receive multiple unsolicited fax advertisements from Defendants. Facsimile machines owned by the State of California are among those receiving unsolicited faxes from Defendants. The sending of these unsolicited advertisements to facsimile machines causes the recipients to pay for paper and toner, which otherwise would have been used to receive requested messages. In addition, receiving these unsolicited advertisements prevents other requested messages from being received and requires additional labor to handle the unrequested message. In the case of Defendants sending faxes to State-owned machines, the cost of materials and time is charged to the taxpayers of California. Moreover, Defendants' unsolicited faxes are bothersome, intrusive, and a harassment to recipients.

20. In addition to Faxblasting services, Defendants' business also consists of selling Voice Broadcasting services. Voice Broadcasting is designed to solicit response calls from consumers by sending unsolicited calls to consumers via an autodialer, computer or other device, and leaving a prerecorded message on an answering machine and/or with the individual answering the phone. These recorded telemarketing messages contain advertisements for products and/or services Defendants' clients wish to market to consumers. Recipients of these calls who are interested in the goods or services offered are instructed to call the number provided in the recorded message.

When a consumer returns the call s/he is then filtered through Defendants' call center, automated Interactive Voice Response System, or is connected directly to Defendants' client. Defendants initiate or cause the initiation of the Voice Broadcasting sending unsolicited telephone calls to consumers throughout California and the United States which contain prerecorded telephone messages for products and/or services including, but not limited to, vacation packages and home loans. The calls are initiated or caused to be initiated by Defendants to residential telephone lines without the prior express consent of the called party. The prerecorded messages do not begin with an unrecorded natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or telephone number of the caller, and are disseminated without obtaining the consent of the person receiving the call to listen to the prerecorded message.

VIOLATIONS

COUNT I

21. Paragraphs 1 through 20 are incorporated by reference herein as though set forth in full.

22. Defendants have violated the TCPA, 47 U.S.C. § 227(b)(1)(C), and 47 C.F.R. § 64.1200(a)(3), by engaging in a pattern or practice of sending unsolicited faxes, via facsimile machine, computer, or other device to facsimile machines located in California and specifically located in San Diego, California.

23. Defendants' violations are willful and knowing.

COUNT II

24. Paragraphs 1 through 20 are incorporated by reference herein as though set forth in full.

25. Defendants have violated the TCPA, 47 U.S.C. § 227(d), and 47 C.F.R. § 68.318(d), by engaging in a pattern or practice of sending faxes without including in the margin an identification of the business sending the fax and the number from which the fax was sent.

26. Defendants' violations are willful and knowing.

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COUNT III

27. Paragraphs 1 through 20 are incorporated by reference herein as though set forth in full.

28. Defendants have violated the TCPA, 47 U.S.C. § 227(b)(1)(B), and 47 C.F.R. § 64.1200(a)(2) by making or causing to be made, and continuing to make, telephone calls to residential telephone lines in California using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party.

29. Defendants' violations are willful and knowing.

COUNT IV

30. Paragraphs 1 through 29 are incorporated by reference herein as though set forth in full.

31. Beginning at an exact date unknown to plaintiff and continuing to the present, Defendants have made or caused to be made, and continue to make, in violation of California Business & Professions Code § 17500, numerous untrue or misleading statements to the public in the State of California in an attempt to sell their services to their clients and to sell the products, goods or services of their clients to consumers in California. Such statements include, but are not limited to, the following:

a. Defendants represent, directly or by implication, that there is an agreement between Defendants and the recipients of the facsimiles sent by Defendants under which Defendants have the legal right to send such facsimile advertisements to such recipients, when in fact there is no such agreement.

b. Defendants represent, directly or by implication, that Defendants have obtained the consent of the facsimile recipients since, although offered the opportunity, the recipients have not chosen to opt-out of Defendants' proprietary database.

c. Defendants represent, directly or by implication, that they may legally send facsimile advertisements to persons from whom Defendants have not obtained express invitation or permission when in fact Defendants may not legally send such facsimile advertisements.

d. Defendants represent, directly or by implication, that Defendants will remove the recipient's facsimile number from their proprietary database when the recipient requests

removal, but in fact removal of the number does not occur; and/or if the number is removed, it is only temporarily removed.

e. Defendants have failed to disclose and/or have misrepresented the identity of the sender of the faxes in order to conceal FAX.COM's identity as the sender of the unsolicited faxes from the recipient of such faxes in that:

1. FAX.COM does not identify itself as the entity responsible for sending the fax on any part of the unsolicited fax;

2. FAX.COM does not identify itself in the opt-out telephone message recordings a consumer hears when s/he calls the opt-out number to request removal;

3. Defendants fail to include the facsimile number of the sender or the number the fax was sent from on the unsolicited facsimiles they send. Instead, Defendants often use the opt-out toll free telephone number as the sender's "sent from" number, instead of providing the actual "sent from" number. This number provides the consumer with little or no information as to the identity of the entity responsible for sending the fax since the subscriber information for the toll-free number is not readily available to the consumer. In other instances, there is no sender, or "sent from" number listed at all;

4. Defendants have varied the toll-free opt-out telephone numbers that are displayed on different unsolicited fax advertisements they send, which makes it more difficult for the recipient to identify that: a) FAX.COM is the sender of the fax; b) the recipient is receiving multiple faxes from Defendants; and/or c) the recipient's requests for removal are not being honored;

5. Defendants have varied the location and font size used to disclose the toll-free opt-out telephone numbers that are displayed on different unsolicited fax advertisements they send, which makes it more difficult for the recipient to locate the opt-out number and use it to identify Defendants as the senders of the faxes they receive;

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6. In many instances, the advertiser's name is also not identified in the text or body of the unsolicited fax advertisement Defendants send;

7. In some instances, Defendants have used an 800 number which does not belong to them as their toll free opt-out number.

f. Defendants represent, directly or by implication, that by agreeing to the "Your Permission Please" facsimile, a true and correct copy of which is attached hereto as Exhibit 1 and incorporated herein by this reference as though set forth in full, which agreement Defendants claim they have if the recipient of the "Your Permission Please" facsimile does not respond to it with an objection, recipients will receive no more than one unsolicited facsimile per week from Defendants. This statement is untrue or misleading in that:

1. Defendants do not have the ability to keep track of the numbers of facsimile transmissions they send to each recipient;

2. Defendants often send more than one facsimile per week to each recipient;

3. Defendants vary the toll-free opt-out telephone numbers that are displayed on different unsolicited fax advertisements they send which makes it difficult, if not impossible, for the recipient to determine whether or not Defendants have honored the one fax per week promise.

g. Defendants represent, directly or by implication, in the "Your Permission Please" facsimile, see Exhibit 1, that the recipient can delete himself/herself from the program at any time by calling the toll-free number on the bottom of every fax FAX.COM sends out. This statement is untrue or misleading in that:

1. Recipients are unable to ascertain whether they have been removed from the program when they request to because Defendants do not identify FAX.COM by name on the unsolicited fax advertisements they send;

2. Recipients are unable to ascertain whether they have been removed from the program when they request to be because even when they call the toll free number opt out number and listen Defendants do not identify FAX.COM in the message;

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3. Recipients who request removal are not removed from FAX.COM's proprietary database, or are only removed from the FAX.COM proprietary database

temporarily.

h. Defendants represent, directly or by implication, that Defendants have obtained the consent of the facsimile recipients since they claim to send unsolicited fax advertisements only to those recipients who have not objected to the "Your Permission Please" facsimile, Exhibit 1.

32. Defendants knew or should have known at the time the statements alleged in paragraph 31 were made that they were untrue or misleading.

COUNT V

33. Paragraphs 1 through 32 of this complaint are incorporated herein as though set forth in full.

34. Beginning at an exact date unknown to plaintiff and continuing to the present, Defendants have engaged in unfair competition as defined in California Business & Professions Code § 17200. Such acts of unfair competition include, but are not limited to, the following acts or practices:

A. Defendants have violated the TCPA, 47 U.S.C. § 227(b)(1)(C) and 47 C.F.R. § 64.1200(a)(3) which prohibit the use of any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine without the prior express consent of the called party by committing the practices, inter alia, set forth in paragraph 21 of this complaint, which paragraph is incorporated herein as though set forth in full.

B. Defendants have violated the TCPA, 47 U.S.C. § 227 (d) and 47 C.F.R. § 68.318(d) by engaging in a pattern or practice inter alia, as set forth in paragraph 24 of this complaint, which paragraph is incorporated herein as though set forth in full, of sending faxes without including in the margin an identification of the business sending the fax and the number from which the fax was sent.

/ / /

C. Defendants have violated the TCPA, 47 U.S.C. § 227(b)(1)(B) and C.F.R. § 64.1200(a)(2) which prohibit the initiation of a telephone call to any residential telephone

line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party by committing the practices, inter alia, set forth in paragraph 27 of this complaint, which paragraph is incorporated herein as though set forth in full.

D. Defendants have violated California Business & Professions Code § 17500 as alleged in paragraph 31 of this complaint, which paragraph is incorporated herein as though set forth in full.

E. Defendants have violated California Public Utilities Code § 2872, inter alia, by engaging in the practice of using an automatic dialing-announcing device in the state of California to place a call that is received by a telephone in California during the hours between 9 p.m. and 9 a.m. in violation of California Public Utilities Code § 2872, which prohibits such practice.

F. Defendants have established numerous toll-free opt-out numbers which a recipient of Defendants' unsolicited faxed documents may call to notify the sender not to fax the recipient any further unsolicited documents. Upon such notification by a recipient of his or her request not to receive any further unsolicited faxed documents, Defendants identify the recipient's fax number as a valid fax number and continue to fax or cause to be faxed unsolicited advertisements to that recipient at that fax number;

G. Defendants have varied the toll-free opt-out telephone numbers that are displayed on each advertisement, and the telephone facsimile machine numbers from which the advertisements are sent, which has the effect of making it more difficult for the recipient to determine whether or not Defendants have honored the recipient's request not to receive any more unsolicited faxed advertisements from Defendants.

H. Defendants, in violation of California Civil Code § 1770(a)(22), have made or caused to be made, and continue to make, telephone calls which deliver an unsolicited prerecorded message without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message.

I. When clients of Defendants who use their fax-blasting services are sued in California Small Claims Court for the dissemination of unsolicited facsimile advertisements by the recipients of those faxes, although Defendants are not named as parties in the suit, Defendants appear in court on behalf of their clients and falsely profess to be officers of and/or employed by such clients, when in fact they are not listed as officers on any corporate documents on file with the Secretary of State, and they do not receive any compensation as employees and thus Defendants are not legally able to represent such clients in Small Claims Court matters.

REMEDIES

35. The TCPA empowers this Court to grant to Plaintiff, in an action brought by the Attorney General of the State California, injunctive and other relief, and to award $500 for each violation. Furthermore, if this Court finds that a defendant willfully or knowingly violated the TCPA or regulations promulgated pursuant to the TCPA, the Court may, in its discretion, increase the monetary award by up to three times the amount.

36. California Business & Professions Code §§ 17203, and 17535, provide that the Attorney General may seek and the Court may make such orders or judgments permanently restraining and enjoining Defendants, their successors, agents, representatives, employees, and all other persons who act under, by, through, or on behalf of any of them, or any of them, from doing any of the following acts:

(A) Making or disseminating any untrue or misleading statements in violation of California Business & Professions Code § 17500, relating to the dissemination of unsolicited fax advertisements, and/or the dissemination of prerecorded telephone message advertisements;

(B) Engaging in any acts of unfair competition in violation of California Business & Professions Code § 17200, relating to dissemination of unsolicited fax advertisements, and/or the dissemination of prerecorded telemarketing messages.

37. Pursuant to California Business & Professions Code § 17206, the Court may assess

against each Defendant a civil penalty of $2,500.00 for each violation of California Business & Professions Code § 17200.

38. Pursuant to California Business & Professions Code § 17536, the Court may assess against each Defendant a civil penalty of $2,500.00 for each violation of California Business & Professions Code § 17500.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this honorable Court:

A. Permanently enjoin Defendants from violating the TCPA;

B. Pursuant to California Business & Professions Code §§ 17203 and 17535, permanently restrain and enjoin Defendants, their successors, agents, representatives, employees, and all other persons who act under, by, through, or on behalf of any of them, or any of them, from doing any of the following acts:

(1) Making or disseminating any of the untrue or misleading statements alleged in paragraph 31 of this complaint and any other untrue or misleading statement in violation of California Business & Professions Code § 17500, relating to the dissemination of unsolicited fax advertisements, and/or the dissemination of prerecorded telephone message advertisements;

(2) Engaging in any of the acts of unfair competition set forth in paragraph 34 of this complaint and any other act of unfair competition in violation of California Business & Professions Code § 17200, relating to dissemination of unsolicited fax advertisements, and/or the dissemination of prerecorded telemarketing messages;

C. Award the People of the State of California, $500 for each of Defendants' violations of the TCPA, and find that Defendants' actions were committed willfully and knowingly so as to justify an award equal to three times this amount, pursuant to 47 U.S.C. § 227;

D. Pursuant to California Business & Professions Code § 17206, assess each Defendant a civil penalty of $2,500.00 for each violation of California Business & Professions Code § 17200, as proven at trial, but in an amount of not less than $7,500,000.00;

E. Pursuant to California Business & Professions Code § 17536, assess each Defendant a civil penalty of $2,500.00 for each violation of California Business & Professions Code § 17500, as proven at trial, but in an amount of not less than $7,500,000.00;

F. Assess to Defendants all costs incurred by Plaintiff, as well as such other and additional relief as the Court may determine to be just and proper.

Dated: July 22, 2003

Respectfully submitted,

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