

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

**ADVANCED INTERVENTIONAL PAIN &
DIAGNOSTICS OF WESTERN
ARKANSAS, LLC, on behalf of itself and
all others similarly situated,**

Plaintiff,

v.

MODERNIZING MEDICINE, INC.,

Defendant.

Case No.:

CLASS ACTION COMPLAINT

Jury Trial Demanded

CLASS ACTION COMPLAINT

Plaintiff Advanced Interventional Pain & Diagnostics of Western Arkansas, LLC (“AIPD” or “Plaintiff”), on behalf of itself and all others similarly situated, brings this Complaint against Modernizing Medicine, Inc. (“Modernizing Medicine”), for violations of the Telephone Consumer Protection Act. Plaintiff seeks certification of its claims against Defendant as a class action. In support, Plaintiff states as follows:

INTRODUCTION

1. This case challenges Defendant’s policy and practice of faxing unsolicited advertisements. In or around June 2018, Defendant faxed an unsolicited and unwanted advertisement to Plaintiff which is attached as Exhibit A.

2. Congress enacted the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, to regulate the fast-growing expansion of the telemarketing industry. As is pertinent here, the TCPA and its implementing regulations prohibit persons within the United States from sending advertisements via fax.

3. Junk faxes disrupt recipients' peace; drain recipients' paper, ink, and toner; and cause recipients tangible damages. Junk faxes also cause recipients to waste valuable time retrieving and discerning the purpose of the faxes; prevent fax machines from receiving and sending authorized faxes; and cause undue wear and tear on recipients' fax machines. Plaintiff offers medical services and must use its fax machine to receive communications about patients, including vital information such as prescriptions and insurance information. That purpose is impeded when Plaintiff's fax machine is invaded by junk faxes. As recognized by Congress in enacting the TCPA, junk faxes are a significant problem interfering with modern commerce. As discussed below, this is particularly true for healthcare providers like Plaintiff, which still rely significantly on faxes to communicate vital information about patients such as prescriptions and insurance information.

4. Plaintiff is an interventional pain medicine clinic that provides pain management for patients in northwest Arkansas. As a medical provider, Plaintiff relies upon fax machines to operate and provide services to its patients. Plaintiff estimates that it receives thousands of unwanted and unsolicited faxes each year. Plaintiff must wade through dozens of unsolicited faxes from companies selling their products to find vital incoming faxes, such as medical documents and insurance authorizations. It was this harm that Congress recognized in passing the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA").¹

¹ "Unsolicited advertising is beginning to clog fax lines, restricting the owners' ability to use their machines for the purposes they originally bought them for and generating operating costs the users can't control. Unlike junk mail, which can be discarded, or solicitation phone calls, which can be refused or hung up, junk fax ties up the recipient's line until it has been received and printed. The recipient's machine is unavailable for business and he or she incurs the high cost for supplies before knowing whether the message is either wanted or needed." 135 Cong. Rec. E 1462 (May 2, 1989, statement of Rep. Edward Markey, 101 Cong). Representative Markey further testified: "To quote an article from the Washington Post, 'receiving junk fax is like getting junk mail with postage due.' Succinctly put, using a facsimile machine to send

5. The TCPA provides a private right of action and statutory damages of \$500 per violation, which may be trebled when the violation is willing or knowing.

6. On behalf of itself and all others similarly situated, Plaintiff brings this case under the TCPA to recover declaratory relief, damages for violations of the TCPA, and an injunction prohibiting Defendant from future TCPA violations.

JURISDICTION AND VENUE

7. This Court has personal jurisdiction over Defendant, as Defendant's headquarters is located in this district.

8. This Court has subject matter jurisdiction over Plaintiff's TCPA claim pursuant to 28 U.S.C. § 1331.

9. Venue is proper in this court as substantial acts giving rise to the cause of action asserted herein occurred in this venue, and Defendant is headquartered in this District.

PARTIES

10. Plaintiff is a pain management clinic located in Fort Smith, Arkansas.

11. Defendant is a corporation formed under the laws of the State of Delaware and has its corporate headquarters in Boca Raton, Florida. In part, Defendant's business is providing electronic health records (EHR) systems to medical clinics. On its website, Defendant states "Modernizing Medicine and its affiliated companies help physicians save time in their medical practices while improving both quality of care and business outcomes."²

FACTS

unsolicited advertising not only shifts costs from the advertiser to the recipient, but keeps an important business machine from being used for its intended purpose." 136 Cong. R. H 5818 (July 30, 1990), 101st Cong. 2nd Sess., statement of Rep. Markey, p. 5.

² *About Modernizing Medicine*, <https://www.modmed.com/company/> (last accessed November 24, 2020).

12. On or around June 18, 2018, Defendant sent an unsolicited advertisement to Plaintiff's facsimile machine located at its office in Fort Smith, Sebastian County, Arkansas. The advertisement provides the like, kind, and quality of Defendant's product, "modmed EMA,"³ and describes how it would benefit Plaintiff to do business with Defendant. The fax touts the "key benefits of modmed EMA" and describes Defendant's product as "Intelligent. Intuitive. Impressive." According to the fax, users of Defendant's product can "conveniently scribe notes without tedious typing." Other benefits of Defendant's product listed in the fax are that its interface technology "has increased efficiency"; its "organized structured data streamlines workflow"; and that its "intuitive functionality saves time" for doctors.

13. The fax includes a cover page from Defendant's employee Anthony Kim sending the fax to "Dear Staff and Members of AIPD." Mr. Kim's title is listed on the fax as Regional Sales Consultant.

14. A copy of this facsimile is attached hereto and marked as Exhibit A.

15. Defendant did not have Plaintiff's prior express invitation or permission to send advertisements to Plaintiff's fax machine.

CLASS ALLEGATIONS

16. In accordance with Fed. R. Civ. P. 23, Plaintiff brings this action on behalf of the following class of persons (the "Class"):

All persons and entities who held telephone numbers that received one or more telephone facsimile transmissions that promoted the commercial availability or quality of property, goods, or services offered by Modernizing Medicine, Inc.

³ The fax identifies the product as "a pain medicine-specific EHR system with adaptive learning." Exhibit A, at 2.

17. Plaintiff reserves the right to modify or amend the definition of the proposed Class before the Court determines whether certification is proper, as more information is gleaned in discovery.

18. Excluded from the Class are Defendant; any parent, subsidiary, affiliate, or controlled person of Defendant; as well as the officers, directors, agents, servants, or employees of Defendant and the immediate family members of any such person. Also excluded are any judge who may preside over this case and any attorneys representing Plaintiff or the Class.

19. Numerosity. The Members of the Class are so numerous that joinder is impractical. Upon information and belief, Defendant has sent illegal fax advertisements to hundreds if not thousands of other recipients.

20. Commonality. Common questions of law and fact apply to the claims of all Class Members and include (but are not limited to) the following:

- (a) Whether Defendant sent faxes advertising the commercial availability of property, goods, or services;
- (b) The manner and method Defendant used to compile or obtain the list of fax numbers to which it sent Exhibit A as well as other fax advertisements;
- (c) Whether Defendant faxed advertisements without first obtaining the recipient's prior express permission or invitation;
- (d) Whether Defendant sent the fax advertisements knowingly or willfully;
- (e) Whether Defendant violated 47 U.S.C. § 227;
- (f) Whether Plaintiff and the other Class Members are entitled to actual and/or statutory damages;
- (g) Whether the Court should award treble damages; and
- (h) Whether Plaintiff and the other Class Members are entitled to declaratory, injunctive, and/or other equitable relief.

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