

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

FULTON DENTAL, LLC, individually and)	
on behalf of all others similarly situated,)	
)	Case No. 15 C 11038
Plaintiff,)	
)	Judge Edmond E. Chang
v.)	
)	Magistrate Judge Daniel Martin
BISCO, INC.,)	
)	
Defendant.)	

ANSWER

Defendant, Bisco, Inc. ("Bisco"), by its undersigned attorneys, for its answer to the Class Action Complaint filed Plaintiff, Fulton Dental, LLC, states as follows:

1. In 1991, Congress enacted the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, to regulate the explosive growth of the telemarketing industry. In so doing, Congress recognized that "unrestricted telemarketing ... can be an intrusive invasion of privacy." 47 U.S.C. § 227, Congressional Statement of Findings #5. In enacting the TCPA, Congress outlawed telemarketing via unsolicited facsimile, hereinafter "Junk Faxes." 47 U.S.C. § 227. Plaintiff, Fulton Dental, LLC ("Fulton" or "Plaintiff"), is a private dental practice in Birmingham, Alabama, which has been inundated with Junk Faxes. Fulton brings this class action to challenge Defendant Bisco, Inc.'s ("Bisco" or "Defendant") wholesale issuance of Junk Faxes in violation of the TCPA.

Answer: Bisco admits the allegations that the Telephone Consumer Protection Act was enacted in 1991, that Congress made the quoted finding, that the Telephone Consumer Protection Act regulates fax advertisements, and that Plaintiff, Fulton Dental, LLC, is a private dental practice in Birmingham, Alabama. Bisco lacks knowledge sufficient to form a belief as to the allegation that Fulton Dental has been inundated with junk faxes. Bisco admits that Fulton Dental brings this action to challenge Bisco's fax advertisements. Bisco denies the remaining allegations of this paragraph.

THE PARTIES

2. The Plaintiff, Fulton Dental, LLC, is a private medical practice in Birmingham, Alabama.

Answer: Bisco admits the allegations of this paragraph.

3. The Defendant, Bisco, Inc. is a domestic corporation located at 1100 West Irving Park Road in Schaumburg, Illinois 60193.

Answer: Bisco admits the allegations of this paragraph.

JURISDICTION

4. The District Court has federal question subject matter jurisdiction pursuant to 28 U.S.C. § 1331. *See Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740 (2012).

Answer: Bisco admits the allegations of this paragraph.

5. The Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332 (d) because: (a) at least one member of the putative class is a citizen of a state different from Defendants, (b) the amount in controversy exceeds \$5,000,000, exclusive of interest and costs, and (c) none of the exceptions under that subsection apply to this action.

Answer: Bisco lacks knowledge sufficient to form a belief as to the citizenship of each of Fulton Dental's members, and therefore, as to whether there is diversity of citizenship between the named parties. Bisco admits that at least one member of the putative class is a citizen of a state different from Bisco. Bisco presently lacks knowledge sufficient to form a belief as to amount in controversy and whether any exceptions under 28 U.S.C. § 1332(d) apply to this action.

6. Venue is proper in this district under 28 U.S.C. § 1391(b) and (c) because Defendant resides in this District and a substantial portion of the facts and circumstances that give rise to the cause of action occurred here, as Defendant sent the challenged Junk Faxes from this District.

Answer: Bisco denies sending any "Junk Faxes" as that term is defined in paragraph 1. Bisco further denies sending any of the challenged faxes at all. Bisco admits the remaining allegations of this paragraph.

THE LEGAL BASIS OF THE CLASS CLAIMS

7. Fulton's claims, and those of the class it seeks to represent, arise under the TCPA.

Answer: Bisco admits that Fulton asserts claims under the TCPA. Bisco denies remaining the allegations of this paragraph.

8. Among other provisions, the TCPA forbids Junk Faxes- sending unsolicited advertisements for goods and services via facsimile. 47 U.S.C. §227(b)(1)(C).

Answer: Bisco admits the allegations of this paragraph except to the extent that this paragraph could be construed to extend or enlarge the TCPA's regulations as set forth in 47 U.S.C. § 227, and to the extent that any allegation of this paragraph could be so construed, Bisco denies such allegation.

9. The TCPA requires that even fax advertisements being sent to those who consented to their receipt, or with whom the advertiser had an established business relationship, must include an Opt Out Notice. 47 U.S.C. §227(b)(2)(D).

Answer: Bisco denies the allegations of this paragraph.

10. In order to comply with the Opt Out Notice requirements, each Junk Fax must include all of the following:

- a) Clear and conspicuous language on the first page of the advertisement;
- b) That states that facsimile recipients may request that the sender not send any future unsolicited advertisements, and which;
- c) Specifically informs facsimile recipients that the failure to comply with such a request, within the shortest reasonable time as determined by the Commission, is unlawful.
- d) The notice must also include *both* a toll free phone and facsimile number that a recipient may use to submit a request to cease transmitting facsimile advertisements to the recipient.

See 47 U.S. C. §227(b)(D); 47 CFR 64.1200(a)(3)(iii-v)

Answer: Bisco admits the allegations of this paragraph except to the extent that this paragraph could be construed to extend or enlarge the TCPA's regulations as set forth in 47 U.S.C. § 227 and 47 CFR 64.1200, and to the extent that any allegation of this paragraph could be so construed, Bisco denies such allegation.

11. The failure to include Opt Out Notice on a facsimile advertisement is itself an actionable violation of the TCP A. *See* 47 U.S.C. §227(b)(3) (providing for a private right of action for violations of any of the requirements of 47 U.S.C. §227(b)).

Answer: Bisco denies the allegations of this paragraph.

12. Section §227(b)(3) of the TCPA provides a 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 [sic] \$500 in damages for each violation, whichever is greater, or (C) both such actions.

Answer: Bisco admits the allegations of this paragraph except to the extent that this paragraph could be construed to extend or enlarge the TCPA's regulations as set forth in 47 U.S.C. § 227, and to the extent that any allegation of this paragraph could be so construed, Bisco denies such allegation.

FACTUAL ALLEGATIONS AS TO THE REPRESENTATIVE PLAINTIFF

13. On July 9, 2015, Bisco sent a fax advertisement to Fulton touting its dental products.

Answer: Bisco denies the allegations of this paragraph. Answering further, on July 9, 2015, Bisco Dental Products Co. sent a fax advertisement to Fulton Dental advertising Bisco's dental products.

14. A copy of the advertisement is attached as Exhibit A.

Answer: Bisco admits the allegations of this paragraph.

15. This facsimile advertises Bisco's goods and services, including products typically used in the dental or endodontic practice.

Answer: Bisco admits the allegations of this paragraph.

16. This fax advertisement is a form document that is not addressed to Fulton, or anyone in particular.

Answer: Bisco admits the allegations of this paragraph.

17. The fax advertisement includes a form advertisement inviting recipients to "Buy a product never before purchased, receive 10% OFF your TOTAL ORDER!" (emphasis in original).

Answer: Bisco admits the allegations of this paragraph.

18. The fax advertisement was sent by Bisco itself. It indicates the statement, "if you would like to order call: Call at Steve Wolf 1-800-BIS-DENT ext. 6039".

Answer: Bisco denies that the fax was sent by Bisco itself. Bisco admits that the fax includes the statement "if you would like to order call: Call at Steve Wolf 1-800-BIS-DENT ext. 6039."

19. Steve Wolf was a "Territory Sales Manager" at Bisco from March of 2014 through September of 2015, including the dates these faxes were sent. *See* <https://www.linkedin.com/in/steve-wolf-a800a478> (Last Visited November 17, 2015).

Answer: Bisco denies that Steve Wolf was employed by Bisco. Bisco admits that Steve Wolf was a Territory Sales Manager at Bisco Dental Products Co. from March of 2014 through September of 2015.

20. Mr. Wolf's job responsibilities while he was at Bisco included:
- a) Travel nationwide selling and promoting Bisco products and services.
 - b) Sell dental adhesives, primers, cements, post and core build up materials, composites, acid etchants, liners, and pulp capping materials
 - c) 80 - 100 inbound / outbound calls daily when in office including cold call farming for new business

Answer: Bisco denies that Steve Wolf was employed by Bisco and that Mr. Wolf's job responsibilities while he was at Bisco Dental Products Co. included cold call farming for new business. Bisco admits that Steve Wolf's job responsibilities while employed by Bisco Dental Products Co. included travelling nationwide to sell and promote Bisco products; selling dental adhesives, primers, cements, post and core build up materials, composites, acid etchants, liners, and pulp capping materials; and making or taking 80 to 100 inbound and outbound calls daily when in the office.

21. By sending Junk Faxes to the class, Bisco violated class members' privacy rights. Plaintiff and the putative class members have had their privacy improperly invaded, as the transmissions jammed their facsimile lines from other legitimate business communications.

Answer: Bisco denies the allegations of this paragraph.

22. By sending Junk Faxes to the class, Bisco caused class members to sustain property damage and cost in the form of paper and toner.

Answer: Bisco denies the allegations of this paragraph.

23. Upon information and belief, based upon the absence of the opt out notice, or any other opportunity to request that faxes cease, Bisco will continue to send facsimile messages to plaintiff and the class that violate the TCPA absent an injunction prohibiting such.

Answer: Bisco denies the allegations of this paragraph.

24. Fulton did not consent to receive fax advertisements from Defendant.

Answer: Bisco denies the allegations of this paragraph.

25. The Fax Advertisement did not contain an Opt Out Notice that complies with the TCPA.

Answer: Bisco admits the allegations of this paragraph.

CLASS ALLEGATIONS

26. Fulton brings this action under Fed. R. Civ. P. 23.

Answer: Bisco admits that Fulton Dental brings this action as a putative class action, but denies that any class should be certified.

27. Through the transmission of generic fax advertisements promoting its goods and services, including the Junk Fax it sent to Fulton, Defendant has engaged in wholesale violations of the TCPA.

Answer: Bisco denies the allegations of this paragraph.

28. Based on the generic style of the fax advertisement, the standard telemarketing reach of a Junk Fax campaign, and the geographic distance between Fulton's office and Defendant's locale, Defendant has likely transmitted Junk Faxes to thousands of recipients throughout the United States.

Answer: Bisco denies the allegations of this paragraph.

29. Defendant did not obtain the consent of Junk Fax recipients prior to sending them.

Answer: Bisco denies the allegations of this paragraph.

30. To the extent facsimile advertisements were transmitted by Defendant to those who had given consent, or had an established business relationship with it, of which there is no evidence at this time, the Junk Faxes still violate the TCPA, as they did not contain the Opt Out Notice required by law.

Answer: Bisco denies the allegations of this paragraph.

31. The class that Fulton seeks to represent two classes.

Unsolicited Advertisement Class: All persons or entities within the United States to whom Defendant sent Junk Faxes promoting Bisco's goods or services at any time within four years prior to the filing of this Complaint through the date of certification in this action.

Opt Out Notice Class: All persons or All persons or entities within the United States to whom Defendant sent Junk Faxes promoting Bisco's goods or services at any time within four years prior to the filing of this Complaint through the date of certification in this action, which did not contain a reference to the recipient being permitted to opt out of future faxes.

Answer: Bisco admits that Fulton Dental seeks to represent the two classes identified, but denies that any class should be certified or that Fulton Dental should be appointed representative of either class.

32. Plaintiff is a member of both classes, which are both identifiable through Defendant and its business partners or agents records, and databases used to send the Junk Faxes.

Answer: Bisco denies the allegations of this paragraph.

33. There are questions of law and fact common to Fulton and to the proposed class, including but not limited to the following:

- a. Whether Defendant violated the TCPA by engaging in fax advertising;
- b. Whether the facsimiles sent by Defendant to class members constitute unsolicited advertisements; and
- c. Whether Fulton and the members of the class are entitled to statutory damages as a result of Defendant's actions.

Answer: Bisco denies the allegations of this paragraph.

34. Fulton's claims are typical of the claims of the class.

Answer: Bisco denies the allegations of this paragraph.

35. Fulton is an adequate representative of the class because its interests do not conflict with those of the class, it will fairly and adequately protect the interests of the class, and it is represented by counsel skilled and experienced in class actions.

Answer: Bisco denies the allegations of this paragraph.

36. Common questions of law and fact predominate over questions affecting only individual class members, and a class action is the superior method for the fair and efficient adjudication of the controversy. The only individual question concerns identification of class members, which will be ascertainable from records maintained by Defendant and/or its agents.

Answer: Bisco denies the allegations of this paragraph.

37. The likelihood that individual members of the class will prosecute separate actions is remote due to the time and expense necessary to conduct such litigation.

Answer: Bisco denies the allegations of this paragraph.

38. Fulton is capable of representing the members of the class.

Answer: Bisco denies the allegations of this paragraph.

CAUSES OF ACTION COUNT I: VIOLATION OF THE TCPA

39. Defendant caused Junk Faxes promoting its goods and services to be sent to Fulton and class members, in violation of the TCPA.

Answer: Bisco denies the allegations of this paragraph.

40. By sending Junk Faxes to the class, Bisco violated class members' privacy rights. Plaintiff and the putative class members have had their privacy improperly invaded, as the transmissions jammed their facsimile lines from other legitimate business communications.

Answer: Bisco denies the allegations of this paragraph.

41. By sending Junk Faxes to the class, Defendant caused class members to sustain actual property damage and cost in the form of paper and toner.

Answer: Bisco denies the allegations of this paragraph.

42. Defendant failed to provide the requisite Opt Out Notice on its Junk Faxes, informing the recipients of their right to cease receiving such advertisements and a cost free mechanism to make such request.

Answer: Bisco admits that no opt-out notice was provided on the faxes, but denies that any opt-out notice was required. Bisco denies the remaining allegations of this paragraph.

43. Failure to provide Opt Out Notice on a facsimile advertisement is a separate and distinct violation of the TCPA.

Answer: Bisco denies the allegations of this paragraph.

44. The TCPA provides for statutory damages in the amount of a minimum of \$500 for each separate violation of its terms.

Answer: Bisco admits the allegations of this paragraph except to the extent that this paragraph could be construed to extend or enlarge the TCPA's regulations as set forth in 47 U.S.C. § 227, and to the extent that any allegation of this paragraph could be so construed, Bisco denies such allegation.

COUNT II: INJUNCTIVE RELIEF

45. The TCPA expressly authorizes injunctive relief to prevent future violations of the Act.

Answer: Bisco admits the allegations of this paragraph.

46. Fulton, on behalf of the Class, respectfully petitions the Court to order Defendant to immediately cease engaging in unsolicited facsimile advertising to them in violation of the TCPA.

Answer: Bisco admits that Fulton Dental petitions the Court for injunctive relief, but denies that it is engaging in any unsolicited facsimile advertising in violation of the TCPA and that any injunctive relief should be awarded.

AFFIRMATIVE DEFENSES

Defendant, Bisco, Inc., by its undersigned attorneys, for its affirmative defenses to the Class Action Complaint filed Plaintiff, Fulton Dental, LLC, states as follows:

FIRST AFFIRMATIVE DEFENSE

1. Bisco manufactures and sells dental adhesives.
2. Bisco Dental Products Co. ("Bisco Dental") markets Bisco's dental adhesives to Bisco's customers.

3. Bisco Dental's marketing efforts include sending facsimile advertisements to Bisco customers.

4. Prior to transmitting any advertisement by facsimile, Bisco Dental's sales representatives first contact the recipient by telephone and obtain each recipient's express permission to transmit the advertisement.

5. Prior to sending the facsimile advertisement to Fulton on July 9, 2015, Steve Wolf first contacted Fulton Dental by telephone and obtained Fulton Dental's express permission to transmit the advertisement.

6. As a result of the foregoing, neither the facsimile advertisement sent to Fulton on July 9, 2015, nor any other facsimile advertisement, was an "unsolicited advertisement" as defined under the Telephone Consumer Protection Act, 47 U.S.C. § 227(a)(5).

7. The Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(C) only prohibits individuals or entities from using a facsimile machine to send an "unsolicited advertisements."

8. Since no facsimile advertisement was an "unsolicited advertisement," neither Bisco nor Bisco Dental has violated any provision of the Telephone Consumer Protection Act.

WHEREFORE, Defendant, Bisco, Inc., prays that this Court enter judgment in its favor and against Plaintiff, Fulton Dental, LLC, and award it its costs.

Dated: January 12, 2016

Respectfully submitted,

BISCO, INC., Defendant

By: /s/ Jeffrey J. Halldin
One of Its Attorneys

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