

Received & Inspected

MAY 01 2015

FCC Mail Room

JOEL D. SIEGEL*
LAURENCE B. ORLOFF*
STANLEY SCHWARTZ*
JEFFREY M. GARROD*
SANDERS M. CHATTMAN
SAMUEL FELDMAN*
EDMUND A. MIKALAUSKAS
SUSAN M. HOLZMAN*
WILLIAM J. ADELSON*
EUGENIA YUDANIN*
PHILIP C. CORBO*
ADAM M. HABERFIELD
CRAIG A. OLLENSCHLEGER

ORLOFF, LOWENBACH, STIFELMAN & SIEGEL

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
101 EISENHOWER PARKWAY - SUITE 400
ROSELAND, NEW JERSEY 07068-1097

(973) 622-6200 • Fax: (973) 622-3073

E-Mail: attorneys@olss.com

www.olss.com

April 28, 2015

AZRIEL J. BAER*
MATTHEW T. ASLANIAN
DAVID CORVITZ*
SHEIKH M. SHAGHAF*
LAURA N. WILENSKY*
XIAO SUN*

OF COUNSEL

RALPH M. LOWENBACH*
FLOYD SHAPIRO†

FRANK L. STIFELMAN
1937-2015

* MEMBER NJ & NY BARS
† MEMBER NJ, NY & FL BARS

REFER TO FILE NO.

028470-002

DOCKET FILE COPY 05/01/15

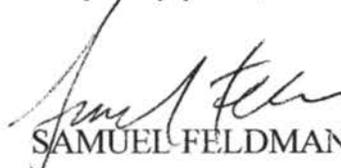
Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-B204
Washington, DC 20554

Re: **Five-M Software Systems Corporation**
CG Docket No. 02-278; CG Docket No. 05-338

Dear Sir/Madam:

On behalf of Five-M Software Systems Corporation, enclosed please find its original and four (4) copies of a Petition for Waiver of the requirements of 47 C.F.R. §64.1200(a) with regard to faxes sent with recipient's prior express consent, filed electronically today, April 28, 2015.

Very truly yours,


SAMUEL FELDMAN

SF/lam
Enclosure

cc: Daniel A. Edelman, Esq. (w/encl. by e-mail and U.S. Mail)

No. of Copies rec'd
List ABCDE

0+4

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Petition for Waiver
of Five-M Software Systems Corporation

CG Docket No. 02-278

CG Docket No. 05-338

Received & Inspected

MAY 01 2015

FCC Mail Room

PETITION FOR WAIVER OF
FIVE-M SOFTWARE SYSTEMS CORPORATION

DOCKET FILE COPY ORIGINAL

SAMUEL FELDMAN
ORLOFF, LOWENBACH, STIFELMAN
& SIEGEL, P.A.
101 Eisenhower Parkway - Suite 400
Roseland, New Jersey 07068-1097
Telephone: (973) 622-6200
Facsimile: (973) 622-3073
sf@olss.com

Dated: April 28, 2015

MAY 01 2015

INTRODUCTION**FCC Mail Room**

Five-M Software Systems Corporation (“Five-M”) respectfully requests that the Commission grant Five-M a waiver from Section 64.1200(a)(4)(iv) of the Commission’s regulations with respect to any facsimiles that have been transmitted by or on behalf of Five-M prior to the date of this Petition. The referenced regulation was promulgated pursuant to the Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005 (the “TCPA”), and requires solicited fax advertisements to include the same opt-out notice as unsolicited fax advertisements.

Five-M submits this waiver request in light of the Order that the Commission released in the referenced Dockets on October 30, 2014 (the “October 30 Order”). Five-M is one of many companies that have inappropriately been subjected to putative class action lawsuits for sending alleged facsimile advertisements, regardless of whether the facsimiles were solicited or unsolicited. For reasons that follow, the public interest favors granting the requested waiver.

BACKGROUND

As the Commission knows, putative class action lawsuits are pending across the country that seek windfall recoveries for alleged violations of the TCPA’s prohibition on sending unsolicited facsimile advertisements. The lawsuits rely upon the TCPA provision that allows for statutory damages based on any violation of Section 277(b) “or the regulations prescribed [there]under,” 47 U.S.C. §277(b)(3), and routinely target both unsolicited and solicited faxes even though the TCPA was not intended to regulate solicited faxes. It is common for these lawsuits to seek millions of dollars in statutory damages for alleged violations that, at best, had a negligible effect on the recipients of the facsimiles. The named plaintiffs in such cases often

participate in name only, deferring entirely to their counsel in the hopes of getting a monetary “incentive” award on top of any statutory damages.

Five-M is headquartered in Parsippany, New Jersey. For over 25 years, Five-M has provided software solutions for the distributors industry. Among other services, Five-M provides programs which enable high school students and college students to study and travel abroad.

The TCPA lawsuit in which Five-M is a defendant was brought by Wholesale Point, Inc., an interested seller of a variety of merchandise.¹ Wholesale Point, Inc. (“Wholesale Point”) is based in Willowbrook, Illinois. Wholesale Point alleges in its Complaint that it received one unsolicited facsimile from Five-M in 2013. Wholesale Point alleges that Five-M sent unsolicited facsimile advertisements to many persons as part of a mass broadcasting of faxes across the United States all of whom Wholesale Point seeks to represent in a putative class action that seeks millions of dollars in statutory damages.

This Petition does not ask the Commission to resolve specific questions regarding the particular faxes sent by Five-M, such as whether Wholesale Point or any other entity invited the faxes or gave Five-M permission to send them, or whether the faxes are “advertisements” within the meaning of the TCPA. Those types of factual determinations are properly left for the district court. Five-M seeks only a limited retroactive waiver from 47 C.F.R. §64.1200(a)(4)(iv), consistent with the waiver that the Commission has provided to similarly situated entities.

ARGUMENT

The TCPA prohibits sending unsolicited advertisements via facsimile. 47 U.S.C. §277(b)(1)(C). There is an exception for unsolicited advertisements faxed pursuant to an

¹ The action is captioned Wholesale Point, Inc. v. Five-M Software Systems Corporation. U.S. District Court, N.D. Ill Dkt. no. 15-cv-02196. See Exhibit A hereto..

established business relationship between the sender and the recipient, so long as the fax includes an opt-out notice that meets various requirements. *Id.* The Commission's rules impose the same opt-out notice requirement on faxes that are sent with the recipient's prior express invitation or permission – i.e., on faxes that are solicited, as opposed to unsolicited. See 47 C.F.R. §64.1200(a)(4)(iv).

To the extent the recipients of Five-M' faxes provided their prior express invitation or permission for Five-M to send them the faxes, the faxes were, by definition, solicited not unsolicited and therefore fall outside the scope of Section 227(b) of the Act. This is true regardless of whether the faxes contained any opt-out notice. Such faxes are not “unwanted faxes,” and allowing a party to be subjected to liability for sending such faxes is not in the public interest. Five-M therefore asks the Commission to waive compliance with Section 64.1200(a)(4)(iv) with respect to all faxes sent by or on behalf of Five-M with a recipient's prior express invitation or permission.

The Commission may waive any provision of its rules “for good cause shown.”⁴⁷ C.F.R. §1.3. Among other instances, good cause exists where the waiver of a rule's application would be consistent “with the public interest.” *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). That is the situation here.

Indeed, the Commission has already held that a retroactive waiver from Section 64.1200(a)(4)(iv) would serve the public interest for various reasons. See generally October 30 Order at ¶¶22–31. Based upon this holding, the Commission granted waivers to multiple petitioners, *Id.* at ¶36, and held that “similarly situated parties” could “also seek waivers such as those granted in th[e] [October 30] Order,” *Id.* at ¶30.

Five-M is similarly situated to the parties to whom waivers were granted in the Commission's October 30 Order. It is filing this Petition within six months of the release of that Order. See October Order at 1. Five-M' waiver request should therefore be granted, for the reasons set forth in the Commission's Order. It does not serve the public interest, the TCPA's statutory purposes, or the interests of equity and justice to impose staggering aggregated statutory damages on Five-M or any other regulated party based upon the sending of facsimiles that Congress never intended be covered by the Act.

CONCLUSION

The Commission should grant Five-M a waiver from 47 C.F.R.

§64.1200(a)(4)(iv) for all facsimiles sent by Five-M subsequent to the regulation's effective date and prior to the date of this Petition.

Dated: April 28, 2015

Respectfully submitted,

By: /s/Samuel Feldman

ORLOFF, LOWENBACH, STIFELMAN
& SIEGEL, P.A.

101 Eisenhower Parkway - Suite 400

Roseland, New Jersey 07068-1097

Telephone: (973) 622-6200

Facsimile: (973) 622-3073

sf@olss.com

Attorneys for Five-M Software
Systems Corporation

DECLARATION

I have read the foregoing Petition for Waiver, and I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.


ALLEN P. LEVICKY
EXEC. V.P.
Five-M Software Systems Corporation

Executed on April __, 2015

CERTIFICATION OF SERVICE

The undersigned certifies that on April 28, 2015, a copy of Five-M Software Systems Corporation Petition for Waiver was served upon counsel of record at the following address via First Class Mail, postage prepaid and via email:

David Edelman, Esq.
EDELMAN, COMBS, LATTURNER & GOODWIN, LLC
20 S. Clark St., Suite 1500
Chicago, IL 60603

The undersigned also hereby certifies that on April 28, 2015, the undersigned caused to be filed, by mail and by electronic service, the foregoing Petition for Waiver with the Federal Communications Commission, Office of the Secretary, 445 12th Street, SW, Washington, D.C. 20554.

/s/Samuel Feldman
SAMUEL FELDMAN

EXHIBIT A

DISTRIBUTION LIST: IT Department or Computer Software Purchasing Manager



FIVE-M SOFTWARE SYSTEMS, 1130 US Highway 46, Suite 26, Parsippany, NJ 07054
Tel: (973) 331-1611 Fax: (973) 331-9398

HYPERLINK "mailto:art@fivem.com" art@fivem.com HYPERLINK "http://www.fivem.com" www.fivem.com

Your company may have started out using the same wholesale distribution software which is commonly used in your industry; but your time, your growth, and the competitive marketplace maybe suggesting a move to the next step. It is probably time for your company to go beyond the current limitations of your present wholesale distribution software; and, move forward to a better integration with technological devices at your disposal today.

Five-M Software Systems is a vendor which has been providing complete software solutions to the wholesale distribution industry for over 25 years. Five-M offers their customers a full range of services including:

- Custom Programming,
- Installation,
- Telephone Support and Assistance, and
- On-Site Training.

Five-M Software is proud to present its distribution software application that will live up to your expectations in terms of features, performance, user friendliness and productivity. The application runs on many different hardware platforms and operating systems including: Windows, Unix, Linux, etc. As a complete ERP System, we have clients running our business software on smart phones too. Therefore based on your business needs, our application can be configured to provide one seamlessly integrated ERP solution of individual modules working in concert or independently to provide a solution for growing your business and enhance your current business operations.

Five-M Software Solutions has been working with many distributors who have taken that next step and are reaping the rewards today. Moving to Five-M has eliminated concerns of re-entering information, possibly losing data, conforming to processes instead of running your business the way it will give you the best ROI, and providing your company with the reports and information to support your business plan. The system is priced below the average price for a similar "**ALL INCLUSIVE**" system in the marketplace today for the number of users interacting with the system. Just start by comparing our support cost, which starts at \$199 per month, to other systems annual support contract costs.

Call 973.331.1611 - For a Live Demonstration of our Wholesale Distribution Software over the Internet!

Modules for a Basic System

PURCHASE

RFQ
MULTI RFQ BROADCASTING
DEMAND FORECASTING
CONSIGNMENT INVENTORY
BACK ORDER ALLOCATION
PURCHASE RETURNS
P/O ACTIVITY DISPLAY
RECEIPTS NOT VOUCHERED
QUOTE, ORDER, RFQ, PO
CONVERSION FUNCTION

INVENTORY

BIN & LOT ABILITY
BOM & KIT PROCESSING
PHYSICAL INVENTORY
PRODUCT SUBSTITUTION
ITEM CROSS REFERENCE
MULTI WAREHOUSE
RFID WAREHOUSE INTEGRATION
VALUATION REPORT
LOW STOCK REPORTING

GENERAL LEDGER

MULTI COMPANY
MULTI DIVISION
CONSOLIDATION OF SUBS
13 PERIODS PER FISCAL YEAR
USER CUSTOMIZED TRIAL-BALANCE
AND INCOME STATEMENT
TRANSACTION INQUIRY

SALES

INVOICES & CREDITS
DAILY SALES JOURNAL
MONTHLY SALES JRNL
RMA
EMAIL INVOICES
COMMISSIONS
ANALYSIS REPORTS
FLASH REPORTS
SALES TAX REPORTS
RANKING REPORTS

PAYABLES

MULTI COMPANIES & BANKS
DEFAULT G/L # BY VENDOR
AGED PAYABLES REPORT
AUTO PAYMENT SELECTION
CHECK PRINTING
MONTHLY CHECK REGISTER
CHECK RECONCILIATION
CASH REQUIREMENTS
ACH & EFT HANDLING

RECEIVABLES

CASH RECEIPTS
DAILY RECEIPTS
JOURNAL
MONTHLY RECEIPTS
JRNL
MULTIBANK ABILITY
AGED TRIAL BALANCES
COLLECTIONS REPORT
STATEMENTS
FOLLOW-UP REPORTS

ORDERS

QUOTES
CREDIT CHECKING
AUTOMATIC PRICING
EASY ACCESS TO ALL
DATA
DROP SHIPPING
WEB ORDER
INTERFACE
COUNTER SALES
FEDEX & UPS
INTEGRATION
QUOTE, ORDER, RFQ,
PO CONVERT
FUNCTION

OTHER

TOUCH SCREEN TECHNOLOGY
SECURITY
BUYING GROUP INTEGRATION
SERIAL # MANAGEMENT
BAR CODING
MOBILE ERP
TABLET AND SMART PHONE
RENTAL MODULE
EDI & E-COMMERCE

EXHIBIT A

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

WHOLESALE POINT, INC.,
on behalf of plaintiff and
the class members defined herein,

Plaintiff,

v.

FIVE-M SOFTWARE
SYSTEMS CORPORATION,
and JOHN DOES 1-10,

Defendants.

COMPLAINT – CLASS ACTION

MATTERS COMMON TO MULTIPLE COUNTS

INTRODUCTION

1. Plaintiff Wholesale Point, Inc., brings this action to secure redress for the actions of defendant Five-M Software Systems Corporation in sending or causing the sending of unlawful 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.

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 authorized faxes, cause wear and tear on fax machines, and require labor to attempt to identify the source and purpose of the unsolicited faxes.

PARTIES

3. Plaintiff Wholesale Point, Inc., is an Illinois corporation with offices at 7223 South Route 83, Suite 198, Willowbrook, Illinois 60527, where it maintains telephone facsimile

equipment.

4. Defendant Five-M Software Systems Corporation is a New Jersey corporation that has offices at 1130 Route 46 West, Parsippany, New Jersey 07054.

5. Defendants 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.

JURISDICTION AND VENUE

6. 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).

7. 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.
8. Venue in this District is proper for the same reason.

FACTS

9. On December 27, 2013, plaintiff Wholesale Point, Inc., received the fax advertisement attached as Exhibit A on its facsimile machine.

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

11. Defendant Five-M Software Systems Corporation is responsible for sending or causing the sending of the faxes.

12. Defendant Five-M Software Systems Corporation, as the entity whose products or services were advertised in the faxes, derived economic benefit from the sending of the faxes.

13. Defendant Five-M Software Systems Corporation either negligently or wilfully violated the rights of plaintiff and other recipients in sending the faxes.

14. Each fax refers to a website registered to defendant Five-M Software Systems

Corporation.

15. The faxes do not contain an “opt out” notice that complies with 47 U.S.C. §227.

16. 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).

17. 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).

18. On information and belief, the faxes attached hereto were sent as part of a mass broadcasting of faxes.

19. On information and belief, defendants have transmitted similar fax advertisements to at least 40 other persons in Illinois.

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

COUNT I – TCPA

21. Plaintiff incorporates ¶¶ 1-20.

22. 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.

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

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

25. Defendants violated the TCPA even if their actions were only negligent.

26. Defendants should be enjoined from committing similar violations in the future.

CLASS ALLEGATIONS

27. 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 fax numbers (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 Five-M Software Systems Corporation promoting its goods or services for sale (d) which did not contain an opt out notice as described in 47 U.S.C. §227.

28. 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.

29. 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 defendants engaged in a pattern of sending unlawful fax advertisements;
- b. Whether defendants thereby violated the TCPA;
- c. Whether defendants thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendants thereby converted the property of plaintiff.

- e. Whether defendants thereby created a private nuisance.
- f. Whether defendants thereby committed a trespass to chattels.

30. 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.

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

32. 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.

33. Several courts have certified class actions under the TCPA. *Holtzman v. Turza*, 08 C 2014, 2009 WL 3334909, 2009 U.S. Dist. LEXIS 95620 (N.D.Ill., Oct. 14, 2009), *aff'd* in relevant part, 728 F.3d 682 (7th Cir. 2013); *Sadowski v. Med1 Online, LLC*, 07 C 2973, 2008 WL 2224892, 2008 U.S. Dist. LEXIS 41766 (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 Sys. v Preferred Chiropractic Ctr., Ltd.*, 679 F. Supp. 2d 894 (N.D.Ill. 2010); *Garrett v. Ragle Dental Lab, Inc.*, 10 C 1315, 2010 U.S. Dist. LEXIS 108339, 2010 WL 4074379 (N.D.Ill., Oct. 12, 2010); *Hinman v. M & M Rental Ctr.*, 545 F.Supp. 2d 802 (N.D.Ill. 2008); *Clearbrook v. Rooflifters, LLC*, 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 Communs., Inc.*, 08 C 4521, 2010 WL 744262, 2010 U.S. Dist. LEXIS 17843 (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. 1st Cir. 2007); *Display South, Inc. v. Graphics House Sports Promotions, Inc.*, 992 So. 2d 510 (La. App. 1st Cir. 2008); *Lampkin v. GGH, Inc.*, 146 P.3d 847 (Ok. App. 2006); *ESI Ergonomic Solutions,*

LLC v. United Artists Theatre Circuit, Inc., 203 Ariz. (App.) 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).

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

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendants for:

- a. Actual damages;
- b. Statutory damages;
- c. An injunction against the further transmission of unlawful fax advertising;
- d. Costs of suit;
- e. Such other or further relief as the Court deems just and proper.

COUNT II – ILLINOIS CONSUMER FRAUD ACT

35. Plaintiff incorporates ¶¶ 1-20.

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

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

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

39. Defendants engaged in such conduct in the course of trade and commerce.

40. Defendants' conduct caused recipients of their advertising to bear the cost thereof. This gave defendants 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.

41. Defendants' shifting of advertising costs to plaintiff and the class members in this manner makes such practice unfair. In addition, defendants' conduct was contrary to public policy, as established by the TCPA and Illinois statutory and common law.

42. Defendants should be enjoined from committing similar violations in the future.

CLASS ALLEGATIONS

43. 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 Five-M Software Systems Corporation promoting its goods or services for sale (d) which did not contain an opt out notice as described in 47 U.S.C. §227.

44. 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.

45. 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 defendants engaged in a pattern of sending unlawful fax advertisements;
- b. Whether defendants thereby violated the TCPA;
- c. Whether defendants thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendants thereby converted the property of plaintiff.
- e. Whether defendants thereby created a private nuisance.

f. Whether defendants thereby committed a trespass to chattels.

46. 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.

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

48. 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.

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

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendants for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unlawful fax advertising;
- c. Attorney's fees, litigation expenses and costs of suit;
- d. Such other or further relief as the Court deems just and proper.

COUNT III – CONVERSION

50. Plaintiff incorporates ¶¶ 1-20.

51. By sending plaintiff and the class members unlawful faxes, defendants converted to their own use ink or toner and paper belonging to plaintiff and the class members.

52. Immediately prior to the sending of the unlawful 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.

53. By sending the unlawful 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.

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

55. 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 unlawful faxes.

56. Defendants should be enjoined from committing similar violations in the future.

CLASS ALLEGATIONS

57. 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 Five-M Software Systems Corporation promoting its goods or services for sale (d) which did not contain an opt out notice as described in 47 U.S.C. §227.

58. 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.

59. 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 defendants engaged in a pattern of sending unlawful fax advertisements;
- b. Whether defendants thereby violated the TCPA;
- c. Whether defendants thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendants thereby converted the property of plaintiff.

- e. Whether defendants thereby created a private nuisance.
- f. Whether defendants thereby committed a trespass to chattels.

60. 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.

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

62. 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.

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

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendants for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unlawful fax advertising;
- c. Costs of suit;
- d. Such other or further relief as the Court deems just and proper.

COUNT IV – PRIVATE NUISANCE

64. Plaintiff incorporates ¶¶ 1-20.

65. Defendants' sending plaintiff and the class members unlawful faxes was an unreasonable invasion of the property of plaintiff and the class members and constitutes a private nuisance.

66. 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).

67. Defendants acted either intentionally or negligently in creating the nuisance.

68. Plaintiff and each class member suffered damages as a result of receipt of the unlawful faxes.

69. Defendants should be enjoined from continuing its nuisance.

CLASS ALLEGATIONS

70. 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 Five-M Software Systems Corporation promoting its goods or services for sale (d) which did not contain an opt out notice as described in 47 U.S.C. §227.

71. 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.

72. 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 defendants engaged in a pattern of sending unlawful fax advertisements;
- b. Whether defendants thereby violated the TCPA;
- c. Whether defendants thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendants thereby converted the property of plaintiff.
- e. Whether defendants thereby created a private nuisance.
- f. Whether defendants thereby committed a trespass to chattels.

73. 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.

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

75. 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.

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

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendants for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unlawful fax advertising;
- c. Costs of suit;
- d. Such other or further relief as the Court deems just and proper.

COUNT V – TRESPASS TO CHATTELS

77. Plaintiff incorporates ¶¶ 1-20.

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

79. Defendants' sending plaintiff and the class members unlawful 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 unlawful faxes), vacated on jurisdictional grounds 131 F.3d 507 (5th Cir. 1997).

80. Defendants acted either intentionally or negligently in engaging in such conduct.

81. Plaintiff and each class member suffered damages as a result of receipt of the unlawful faxes.

82. Defendants should be enjoined from continuing trespasses.

CLASS ALLEGATIONS

83. 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 Five-M Software Systems Corporation promoting its goods or services for sale (d) which did not contain an opt out notice as described in 47 U.S.C. §227.

84. 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.

85. 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 defendants engaged in a pattern of sending unlawful fax advertisements;
- b. Whether defendants thereby violated the TCPA;
- c. Whether defendants thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendants thereby converted the property of plaintiff.
- e. Whether defendants thereby created a private nuisance.
- f. Whether defendants thereby committed a trespass to chattels.

86. 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.

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

88. 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.

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

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendants for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unlawful fax advertising;
- c. Costs of suit;
- d. Such other or further relief as the Court deems just and proper.

s/ Daniel A. Edelman
Daniel A. Edelman

Daniel A. Edelman
Cathleen M. Combs
James O. Lattuner
Heather A. Kolbus
EDELMAN, COMBS, LATTURNER & GOODWIN, LLC
20 S. Clark Street, Suite 1500
Chicago, Illinois 60603
(312) 739-4200
(312) 419-0379 (FAX)

NOTICE OF LIEN AND ASSIGNMENT

Please be advised that we claim a lien upon any recovery herein for 1/3 or such amount as a court awards. All rights relating to attorney's fees have been assigned to counsel.

s/ Daniel A. Edelman
Daniel A. Edelman

Daniel A. Edelman
EDELMAN, COMBS, LATTURNER
& GOODWIN, LLC
20 S. Clark Street, Suite 1500
Chicago, Illinois 60603
(312) 739-4200
(312) 419-0379 (FAX)

T:\31037\Pleading\Complaint_Pleading.wpd