

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

In the matter of:	)	CG Docket No. 02-278
	)	CG Docket No. 05-338
Costco Wholesale Corporation	)	
	)	

**PETITION OF COSTCO WHOLESALE CORPORATION FOR RETROACTIVE  
WAIVER, OR IN THE ALTERNATIVE, FOR DECLARATORY RULING**

Pursuant to Sections 1.3 and 1.2 of the Federal Communications Commission’s (“Commission”) rules,<sup>1</sup> Petitioner Costco Wholesale Corporation (“Costco”), respectfully requests that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) for faxes that have been transmitted by or on behalf of Costco, or in the alternative, that the Commission issue a declaratory ruling that Section 64.1200(a)(4)(iv) was not promulgated pursuant to the Section 227(b) of the Telephone Consumer Protection Act (“TCPA”).

In the Commission’s October 30, 2014 Order, it granted retroactive waiver of the opt-out requirement in Section 64.1200(a)(4)(iv) to numerous petitioners in response to the uncertainty and confusion surrounding whether the Commission’s rules require an opt-out notice for faxes sent with prior express invitation or permission—i.e., solicited faxes.<sup>2</sup> The Commission also invited similarly situated parties to petition for retroactive waiver of the opt-out requirement.<sup>3</sup> Costco hereby submits that good cause exists to grant a retroactive waiver of Section 64.1200(a)(4)(iv) for faxes that have been transmitted by or on behalf of Costco because it is similarly situated to the parties granted retroactive waiver in the Commission’s October 30, 2014

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<sup>1</sup> 47 C.F.R. §§ 1.2, 1.3.

<sup>2</sup> *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 14-164, ¶¶ 22-31 (rel. Oct. 30, 2014) (“October 30, 2014 Order”).

<sup>3</sup> *Id.* ¶ 22.

Order. In the alternative, Costco submits that a declaratory ruling would be appropriate to establish that Section 64.1200(a)(4)(iv) was not promulgated pursuant to Section 227(b) of the TCPA because the TCPA only authorizes the Commission to regulate unsolicited faxes.

### INTRODUCTION

The TCPA prohibits the use of a fax machine to send an “unsolicited advertisement.”<sup>4</sup> In 2005, Congress enacted the Junk Fax Preventive Act to “require[] the sender of an unsolicited fax advertisement to provide specified notice and contact information on the fax that allows recipients to ‘opt out’ of any future fax transmissions from the sender.”<sup>5</sup> The plain language and scope of the TCPA is expressly limited to unsolicited faxes, which the statute defines to exclude faxes sent with prior express invitation or permission.<sup>6</sup> A subsequently-issued Commission rule provided that a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice,”<sup>7</sup> and thereby appeared to impose an opt-out notice requirement even for *solicited* faxes. Confusingly, when issuing that rule, the Commission also issued an accompanying order (the “Junk Fax Order”) that stated “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.”<sup>8</sup>

Petitioner Costco is a membership warehouse club dedicated to providing its members the best possible prices on quality brand name merchandise. Its offerings to its members include convenient specialty departments and exclusive member services. In connection with its club membership marketing efforts, Costco marketers may on occasion provide information regarding Costco membership offers via fax at the specific request of a prospective member. Costco’s

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<sup>4</sup> 47 U.S.C. § 227(b)(1)(C).

<sup>5</sup> October 30, 2104 Order ¶ 5.

<sup>6</sup> 47 U.S.C. § 227(a)(5).

<sup>7</sup> 47 C.F.R. § 64.1200(a)(4)(iv).

<sup>8</sup> October 30, 2104 Order ¶ 24 (quoting *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3810 n.154 (2006)).

normal practice is to contact prospective customers via telephone and obtain express consent before sending any information, including information that will be transmitted via facsimile. To the extent any information is sent by fax to prospective customers, it typically consists of a one page invitation to visit a Costco Warehouse and may also include a special offer for new members. Costco maintains that because such faxes are sent with prior express invitation or permission, they were “solicited.”

Costco is now facing two recently-filed putative class action lawsuits alleging violations of the TCPA related to its information regarding Costco membership. *See* Complaint, *ABC Business Forms, Inc. v. Costco Wholesale Corporation*, No. 1:15-cv-03870 (May 15, 2015 N.D. Ill.), attached as Ex. 1; and Petition, *Backer Law Firm LLC v. Costco Wholesale Corporation*, No. 4:15-cv-00327-SRB (April 2, 2015 W.D. Mo.),<sup>9</sup> attached as Exhibit 2. Although the plaintiffs in these lawsuits allege that the faxes they received from Costco were unsolicited, *see* Ex. 1 at ¶ 9 and Ex. 2 at ¶¶ 9-10, their proposed classes include *all* persons who received the faxes at issue regardless of whether they were solicited or unsolicited. *See* Ex. 1 at ¶ 26 and Ex. 2 at ¶ 11.

Until these lawsuits were filed and Costco had conducted an initial investigation to determine the facts surrounding the alleged fax transmissions, it was not aware of the need to seek a waiver from compliance with the Regulation. The timing of the filing of these lawsuits was such that it was not feasible for Costco to have filed the present Petition for Waiver by April 30, 2015.<sup>10</sup> To date no scheduling order has been entered and no discovery has commenced in

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<sup>9</sup> The Backer Law Firm case was originally filed in the Circuit Court of Jackson County, Missouri on April 3, 2015. Defendant was served with a copy of Plaintiff’s state court Petition on April 10, 2015. The case was timely removed to the U.S. District Court for the Western District of Missouri on May 1, 2015.

<sup>10</sup> In its October 30, 2014 Order, the Commission invited similarly-situated parties to file for a retroactive waiver, stating that it “expected” (but did not explicitly require) parties to file within six

either lawsuit, and Costco has made efforts to pursue this Petition as soon as possible. Costco has directed the immediate cessation of any transmission of fax advertisements, solicited or unsolicited, by its employees or on its behalf, and upon information and belief has sent no fax advertisements lacking proper opt-out notice after April 30, 2015.

The present Petition for Waiver does not request that Commission resolve the factual or legal questions raised in the pending litigation; those issues remain within the jurisdiction of the federal district courts before whom the cases are pending. Costco seeks only to obtain the same retroactive waiver of Section 64.1200(a)(4)(iv) granted to multiple petitioners in the Commission's October 30, 2014 Order. In the alternative, Costco seeks a declaratory ruling by the Commission that Section 64.1200(a)(4)(iv) was not promulgated pursuant to the Section 227(b) of the TCPA.

### **ARGUMENT**

#### **A. Retroactive Waiver of the Section 64.1200(a)(4)(iv) Compliance Requirement**

The Commission may waive any provision of its rules "for good cause shown."<sup>11</sup> Specifically, the Commission may grant a waiver where "(1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule."<sup>12</sup> Applying these factors, Costco is entitled to a waiver for the same reasons that the Commission found a waiver appropriate for the parties identified in its October 30, 2014 Order.

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months of the Order's release (i.e., by April 20, 2015). *Id.* at ¶ 2. That expectation, however, is not a deadline, and the Commission must, under the law, consider Costco's Petition on the merits. The Commission also stated that "[o]ther, similarly situated parties, may also seek waivers." *Id.* It did not suggest that it would deny such waiver requests after that date. Nor did it suggest that the date of filing has any bearing on whether a petitioning party is similarly situated.

<sup>11</sup> 47 C.F.R. § 1.3.

<sup>12</sup> October 30, 2104 Order ¶ 23.

First, special circumstances warrant deviation from the general rule. As the Commission has explained, its Junk Fax Order “caused confusion or misplaced confidence” as to whether the opt-out requirement applied to solicited fax advertisements because it stated that the “opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.”<sup>13</sup> The Commission’s notice of intent to adopt Section 64.1200(a)(4)(iv) likewise “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with prior express permission of the recipient” thereby further contributing to the confusion or misplaced confidence about the opt-out notice requirement.<sup>14</sup> The inconsistent statement in the Junk Fax Order, combined with the lack of explicit notice, warrants deviation from Section 64.1200(a)(4)(iv) and supports retroactive waiver.<sup>15</sup>

Second, granting Costco a retroactive waiver would serve the public interest. The TCPA and the Commission’s TCPA rules are intended “to allow consumers to stop unwanted faxes.”<sup>16</sup> That purpose is not served where the recipients of the faxes had given Costco permission to send them information via facsimile. Moreover, the Commission has already determined that granting a retroactive waiver from the opt-out notice requirement of Section 64.1200(a)(4)(iv) serves the public interest. In its October 30, 2014 Order, the Commission explained that the “confusion or misplaced confidence . . . left some businesses potentially subject to significant damage awards under the TCPA’s private right of action,”<sup>17</sup> and that is precisely the circumstance Costco now faces. The Commission further noted that the “TCPA’s legislative history makes clear our responsibility to balance legitimate business and consumer interests,” and concluded that, on balance, the public interest was served by “grant[ing] a retroactive waiver to ensure that any such

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<sup>13</sup> October 30, 2014 Order ¶ 24 (quoting Junk Fax Order).

<sup>14</sup> *Id.* ¶ 25.

<sup>15</sup> *Id.* ¶ 26.

<sup>16</sup> *Id.* ¶ 48.

<sup>17</sup> *Id.* ¶ 27.

confusion did not result in inadvertent violations of this requirement while retaining the protections afforded by the rule going forward.”<sup>18</sup> Based on this finding, the Commission granted retroactive waiver to all of the petitioners and invited similarly situated parties to seek retroactive waivers.

Costco now seeks such a waiver because it is similarly situated to the parties who were granted a waiver in the Commission’s October 30, 2014 Order. Like the petitioners already granted a retroactive waiver, Costco is facing two lawsuits the potential to subject it to substantial statutory damages and/or costs of litigation. The public interest would also be harmed by requiring parties like Costco to divert resources and staff away from ordinary business operations to resolve unnecessary litigation efforts stemming only from uncertainty over the Commission’s regulations. Accordingly, Costco respectfully submits that the public interest would be served by the granting of its Petition for a retroactive waiver.<sup>19</sup>

Not only does the Commission have good cause to grant Costco a retroactive waiver, but the Commission would serve the public interest by doing so.

**B. Declaratory Ruling on Section 64.1200(a)(4)(iv)**

Section 227(b) of the TCPA addresses only “unsolicited advertisements,” which are defined by the statute to exclude faxes transmitted with a person’s “prior express invitation or permission, in writing or otherwise.”<sup>20</sup> Nowhere does Section 227(b) expressly regulate the transmission of *solicited* faxes or confer authority to do so on the Commission. Indeed, although Sections 227(b)(1)(C) and (2)(D) of the TCPA together prescribe what information must be

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<sup>18</sup> *Id.*

<sup>19</sup> Because the plaintiffs’ individual claims allege that the faxes to them were unsolicited, any waiver by the Commission would not affect the plaintiff’s individual right of action. However, because Costco faces a putative class action filed on behalf of persons who received a solicited fax, the grant of a waiver would prevent significant monetary damages caused by confusion over the opt-out requirement of Section 64.1200(a)(4)(iv).

<sup>20</sup> 47 U.S.C. § 227.

included in an opt-out notice on the first page of an *unsolicited* fax, the statute imposes no similar requirement for *solicited* faxes. Notwithstanding the absence of any express statutory bases for doing so, Section 64.1200(a)(4)(iv) of the Commission's rules purports to impose an opt-out notice requirement on any fax advertisement "that is sent to a recipient that has provided prior express invitation or permission."<sup>21</sup> And the Commission confirmed in its October 30, 2014 Order that its rule, as written, does require that solicited fax advertisements contain an opt-out notice, identifying Section 227(b) as providing the Commission with the authority to promulgate that rule.<sup>22</sup>

The scope of the Commission's rules adopted pursuant to statutory authority cannot be broader than the authority conferred by the statute itself.<sup>23</sup> Because by its plain language Section 227(b) applies only to unsolicited faxes, it implicitly excludes solicited faxes from its scope. Section 64.1200(a)(4)(iv) therefore cannot be promulgated pursuant to the TCPA. Accordingly, as an alternative to retroactive waiver, Costco respectfully requests that the Commission issue a declaratory ruling establishing that any regulation regarding *solicited* faxes, including Section 64.1200(a)(4)(iv), lacks a statutory basis in Section 227(b) of the TCPA.

### CONCLUSION

For the foregoing reasons, Costco respectfully requests that the Commission grant it a retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited fax advertisements sent by or on behalf of Costco before April 30, 2015, or in the alternative, that the Commission issue a

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<sup>21</sup> 47 C.F.R. § 64.1200(a)(4)(iv).

<sup>22</sup> October 30, 2014 Order ¶¶ 14, 15, 19, 20.

<sup>23</sup> *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, (1979). ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.").

declaratory ruling that Section 64.1200(a)(4)(iv) was not promulgated pursuant to the Section 227(b) of the TCPA.

Dated: July 20, 2015

Respectfully submitted,

SHOOK, HARDY & BACON LLP

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ATTORNEYS FOR PETITIONER COSTCO  
WHOLESALE CORPORATION

# Exhibit 1

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

ABC BUSINESS FORMS, INC.,	)	
on behalf of plaintiff and	)	
the class members defined herein,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
COSTCO WHOLESALE CORPORATION	)	
and JOHN DOES 1-10	)	
	)	
Defendants.	)	

**COMPLAINT – CLASS ACTION**

**MATTERS COMMON TO MULTIPLE COUNTS**

**INTRODUCTION**

1. Plaintiff ABC Business Forms, Inc., brings this action to secure redress for the actions of defendant Costco Wholesale Corporation, in sending or causing the sending of unsolicited 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 ABC Business Forms, Inc. is an Illinois corporation with offices at 5654 North Elston Avenue, Chicago, Illinois 60646, where it maintains telephone facsimile equipment.

4. Costco Wholesale Corporation is a Washington corporation. Its registered agent and office are John Sullivan, 999 Lake Drive, Issaquah, Washington 98027.

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 (7<sup>th</sup> Cir. 2005).

7. Personal jurisdiction exists under 735 ILCS 5/2-209, in that defendant:

- a. Has committed tortious acts in Illinois by causing the transmission of unlawful communications into the state.
- b. Has transacted business in Illinois.

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

### **FACTS**

9. In April 2015, plaintiff ABC Business Forms, Inc. received the unsolicited fax advertisement attached as Exhibit A on its facsimile machine.

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

11. Defendant Costco Wholesale Corporation is responsible for sending or causing the sending of the fax.

12. Defendant Costco Wholesale Corporation, as the entity whose products or services were advertised in the fax, derived economic benefit from the sending of the fax.

13. Defendant Costco Wholesale Corporation either negligently or wilfully violated the rights of plaintiff and other recipients in sending the fax.

14. Plaintiff had no prior relationship with defendant and had not authorized the sending of fax advertisements to plaintiff.

15. The fax did not contain an opt-out notice that complied with 47 U.S.C. §227.

16. On information and belief, the fax attached hereto was sent as part of a mass broadcasting of faxes.

17. On information and belief, defendant has transmitted similar unsolicited fax advertisements to at least 40 other persons in Illinois.

18. There is no reasonable means for plaintiff or other recipients of defendant's unsolicited 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**

19. Plaintiff incorporates ¶¶ 1-18.

20. 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).

21. 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.**

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

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

24. Defendant violated the TCPA even if its actions were only negligent.

25. Defendant should be enjoined from committing similar violations in the future.

**CLASS ALLEGATIONS**

26. 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 (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 Costco Wholesale Corporation, promoting its goods or services for sale (d) and which did not contain an opt out

notice as described in 47 U.S.C. §227.

27. 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.

28. 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 defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. The manner in which defendant compiled or obtained its list of fax numbers;
- c. Whether defendant thereby violated the TCPA;
- d. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- e. Whether defendant thereby converted the property of plaintiff.
- f. Whether defendant thereby created a private nuisance.
- g. Whether defendant thereby committed a trespass to chattels.

29. 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.

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

31. 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 defendant is small because it is not economically feasible to bring individual actions.

32. Several courts have certified class actions under the TCPA. *Holtzman v. Turza*, 08 C 2014, 2009 U.S. Dist. LEXIS 95620 (N.D.Ill., Oct. 14, 2009), *aff'd* in relevant part, 728 F.3d 682 (7<sup>th</sup> Cir. 2013); *Sadowski v. Med1 Online, LLC*, 07 C 2973, 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 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. 1<sup>st</sup> Cir. 2007); *Display South, Inc. v. Graphics House Sports Promotions, Inc.*, 992 So. 2d 510 (La. App. 1<sup>st</sup> 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).

33. 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 defendant for:

- a. Actual damages;
- b. Statutory damages;
- c. An injunction against the further transmission of unsolicited 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**

34. Plaintiff incorporates ¶¶ 1-18.

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

36. Unsolicited fax advertising is contrary to the TCPA and also Illinois law. 720 ILCS 5/26-3(b) makes it a petty offense to transmit unsolicited fax advertisements to Illinois residents.

37. Defendant 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 unsolicited faxes, in the form of paper and ink or toner consumed as a result.

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

40. Defendant's conduct caused recipients of their advertising to bear the cost thereof.

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

42. Defendant 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 and entities 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, Costco Wholesale Corporation, promoting its goods or services for sale (d) and 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 defendant engaged in a pattern of sending unsolicited fax

advertisements;

- b. Whether defendant thereby violated the TCPA;
- c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendant thereby converted the property of plaintiff.
- e. Whether defendant thereby created a private nuisance.
- f. Whether defendant 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 a class, consisting of (a) all persons and entities 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 Costco Wholesale Corporation, promoting its goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.

49. 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.

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

51. 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.

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

53. 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 defendant is small because it is not economically feasible to bring individual actions.

54. 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 defendant for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unsolicited 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**

55. Plaintiff incorporates ¶¶ 1-18.

56. By sending plaintiff and the class members unsolicited faxes, defendant converted to its own use ink or toner and paper belonging to plaintiff and the class members.

57. Immediately prior to the sending of the unsolicited 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.

58. By sending the unsolicited faxes, defendant appropriated to its 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.

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

60. 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 unsolicited faxes.

61. Defendant should be enjoined from committing similar violations in the future.

**CLASS ALLEGATIONS**

62. 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 Costco Wholesale Corporation, promoting its goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.

63. 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.

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

65. 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.

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

67. 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 defendant is small because it is not economically feasible to bring individual actions.

68. 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 defendant for:

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

### **COUNT III – PRIVATE NUISANCE**

69. Plaintiff incorporates ¶¶ 1-18.

70. Defendant's sending plaintiff and the class members unsolicited faxes was an unreasonable invasion of the property of plaintiff and the class members and constitutes a private nuisance.

71. 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 (8<sup>th</sup> Cir. 2005).

72. Defendant acted either intentionally or negligently in creating the nuisance.

73. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes.

74. Defendant should be enjoined from continuing its nuisance.

#### CLASS ALLEGATIONS

75. 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 Costco Wholesale Corporation, promoting its goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.

76. 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.

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

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

78. 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.

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

80. 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 defendant is small because it is not economically feasible to bring individual actions.

81. 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 defendant for:

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

**COUNT IV – TRESPASS TO CHATTELS**

82. Plaintiff incorporates ¶¶ 1-18.

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

84. Defendant's sending plaintiff and the class members unsolicited 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 unsolicited faxes), vacated on jurisdictional grounds 131 F.3d 507 (5th Cir. 1997).

85. Defendant acted either intentionally or negligently in engaging in such conduct.

86. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes.

87. Defendant should be enjoined from continuing trespasses.

#### **CLASS ALLEGATIONS**

88. 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 Costco Wholesale Corporation, promoting its goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.

89. 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.

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

91. 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.

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

93. 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 defendant is small because it is not economically feasible to bring individual actions.

94. 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 defendant for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unsolicited 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  
Dulijaza Clark  
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)

# **EXHIBIT A**

# JOIN COSTCO!



Join as a new Executive Member and get a **\$20 Costco Cash Card**.

Or, join as a new Gold Star Member and get a **\$10 Costco Cash Card**.

For more information, or to join, contact:

**Sandra Arias**

**(847) 647-9187**

**w383mkt@costco.com**



Offer is only valid when you join in person or present this flier at any U.S. Costco location. Valid only for new members for their first year of membership. Limit one Costco Cash Card offer per household. Offer is nontransferable and may not be combined with any other offer or coupon. Costco Cash Cards are not redeemable for cash. • A Gold Star Membership is \$55 a year. An Executive Membership is an additional \$55 upgrade fee a year. Each membership includes a free Household Card. Please include sales tax in applicable states. • Costco accepts cash, checks, debit/ATM cards, EBT, Costco Cash Cards, Costco Credit Cards and American Express. You must be a Costco member to pay by check. Departments and product selection vary by location.

Awareness Code: **Special Event 1 - 5110**

Offer Expires: **05/30/2015**



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# Exhibit 2

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
AT INDEPENDENCE

THE BACKER LAW FIRM, LLC, on behalf of )  
itself and all those similarly situated, )

Plaintiff, )

v. )

Case No.:

COSTCO WHOLESALE CORPORATION, )

Serve: CT Corporation System )  
120 South Central Avenue )  
Clayton, MO 63105 )

Defendant. )

**PETITION FOR DAMAGES**  
**(CLASS ACTION)**

COMES NOW Plaintiff The Backer Law Firm, LLC ("Plaintiff"), on behalf of  
itself and all those similarly situated, and for its causes of action against Defendant  
Costco Wholesale Corporation ("Defendant"), states, alleges, and avers to the Court as  
follows:

**Venue and Jurisdiction**

1. This action arises out of an incident that occurred on or about December 17, 2012 in Jackson County, Missouri.
2. Pursuant to RSMo. § 506.500, jurisdiction is proper in this Court because Defendant transacted business in Jackson County, Missouri and/or committed tortious acts in Jackson County, Missouri.
3. Pursuant to RSMo. § 508.010, venue is proper in this Court because the transaction, some part of the transaction, and tortious acts arose and took place within Jackson County, Missouri, and/or Plaintiff was first injured Jackson County, Missouri.

4. Further, jurisdiction and venue are proper pursuant to 47 U.S.C. § 227(b)(3), which grants state courts jurisdiction over actions alleging violations of 47 U.S.C § 227.

#### **The Parties**

5. Plaintiff is a Missouri limited liability corporation, maintaining its office at 14801 East 42<sup>nd</sup> Street South, Suite 100, Independence, Jackson County, Missouri 64055.

6. Defendant is and was a corporation formed in the State of Washington maintaining a principal place of business in the State of Washington.

7. At all times pertinent hereto, Defendant was and is registered or authorized to do business in the State of Missouri and Defendant may be served at its registered agent in the State of Missouri, CT Corporation System, 120 South Central Avenue, Clayton, Missouri 63105.

#### **General Allegations**

8. On or about December 17, 2012, and thereafter, Plaintiff maintained telephone service at Plaintiff's business location in Jackson County, Missouri, which was connected to a telephone facsimile machine.

9. On or about December 17, 2012, Defendant transmitted or caused to be transmitted to Plaintiff's telephone facsimile machine an unsolicited fax advertisement, an example of which is attached hereto as "**Exhibit A.**"

#### **Class Action Allegations**

10. Upon information and belief, Defendant transmitted or caused to be transmitted unsolicited fax advertisements to numerous persons in addition to Plaintiff.

11. Plaintiff brings this action on its own behalf and on behalf of a class of all

persons similarly situated pursuant to Rule 52.08. The Plaintiff Class consists of all persons to whom Defendant transmitted a facsimile promoting Defendant's products or services between April 10, 2011 and April 10, 2015.

12. The Plaintiff Class satisfies all of the prerequisites stated in Rule 52.08(a):
  - (a) The class is so numerous that joinder of all members would be impractical. Upon information and belief, members of the class number in the hundreds or thousands.
  - (b) There are questions of law or fact common to the class, such as whether or not Defendant committed the acts complained of and if the actions of Defendant violated the TCPA or constituted conversion, violation of the Missouri Computer Tampering Act, negligence, or negligence per se.
  - (c) The claims of the representative plaintiff are typical of the claims of the Plaintiff Class.
  - (d) The representative plaintiff and its counsel will fairly and adequately protect the interests of the class. Representative plaintiff and its counsel have no interests antagonistic to the class. The representative plaintiff and its counsel will prosecute the action vigorously on behalf of the class. Plaintiff is represented by counsel with experience in litigation of tort and telecommunication class action cases.
  
13. The Plaintiff Class also satisfies the requirements of Rule 52.08(b):
  - (a) The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications

with respect to individual members of the class, which would establish incompatible standards of conduct for the party opposing the class.

- (b) The questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

14. Further, the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class, which would establish incompatible standards of conduct for the party opposing the class.

15. The questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and the class action is superior to other available methods for the fair and efficient adjudication of the controversy, in that:

- (a) It is believed that Defendant's computer and business records will enable Plaintiff to readily identify class members and establish liability and damages;
- (b) Liability and damages can be established for Plaintiff and the class with the same common proofs;
- (c) Statutory damages are provided for in the TCPA and are the same for all class members and can be calculated in the same or similar manner;
- (d) A class action will result in an orderly and expeditious

administration of claims, and it will foster economies of time, effort and expense;

- (e) A class action will contribute to uniformity of decisions concerning Defendant's practices;
- (f) As a practical matter, the claims of the class are likely to go unaddressed absent class certification.

**Count I:**  
**Violation of the**  
**Telephone Consumer Protection Act**

16. Plaintiff incorporates by reference Paragraphs 1 through 15 as though fully set forth herein.

17. In pertinent part, the TCPA, 47 U.S.C. § 227(b)(1)(C) provides that:

It shall be unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement . . . .

18. "Unsolicited advertisement" is defined by 47 U.S.C. § 227(a)(5) as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without the person's prior express invitation or permission, in writing or otherwise."

19. The TCPA provides for a private right of action as stated in 47 U.S.C § 227(b):

(3) 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 subparagraph (B) of this paragraph.

20. On or about December 17, 2012, Defendant violated the TCPA by using or causing to be used a telephone facsimile machine, computer, or other device to send an unsolicited facsimile advertisement to Plaintiff's telephone facsimile machine.

**WHEREFORE**, Plaintiff prays that this Court:

- (a) Enter an order pursuant to Rule 52.08(c) that this action is to be maintained as a class action and appoint and denominate the undersigned as class counsel;
- (b) Enter judgment for Plaintiff and Plaintiff Class against Defendant awarding damages of \$500.00 to \$1,500.00 for each violation of the TCPA;
- (c) Enter a Preliminary and Permanent Injunction prohibiting Defendant from transmitting unlawful facsimile advertisements; and
- (d) Any relief the Court deems just and proper under the circumstances.

**Count II:**  
**Conversion**

21. Plaintiff incorporates by reference Paragraphs 1 through 20 as though fully set forth herein.

22. On or about December 17, 2012, and thereafter, Plaintiff possessed an unqualified and immediate ownership interest and right to possession and use of its facsimile machine, telephone line, toner, paper, and memory.

23. Plaintiff never authorized Defendant to use Plaintiff's facsimile machine, telephone line, toner, paper, or memory for any purpose.

24. Without authorization, on or about December 17, 2012, Defendant assumed or exercised the right of ownership and possession over Plaintiff's facsimile machine, telephone line, toner, paper, and memory by using or causing to be used a telephone facsimile machine, computer, or other device to send an unsolicited facsimile advertisement to Plaintiff's telephone facsimile machine.

25. During Defendant's exercise of unauthorized ownership and possession over Plaintiff's facsimile machine, telephone line, toner, paper, and memory, Plaintiff was excluded from exercising its ownership and possession rights over its facsimile machine, telephone line, toner, paper, and memory.

26. As a direct and proximate result of Defendant's conversion of Plaintiff's facsimile machine, telephone line, toner, paper, and memory, Plaintiff was aggrieved and denied its ownership rights and has suffered an actual and ascertainable loss and interest thereon, including, but not limited to the loss of use of Plaintiff's facsimile

machine, telephone line, toner, paper, and memory and the permanent loss of Plaintiff's toner and paper.

**WHEREFORE**, Plaintiff prays that this Court:

- (a) Enter an order pursuant to Rule 52.08(c) that this action is to be maintained as a class action and appoint and denominate the undersigned as class counsel;
- (b) Enter judgment for Plaintiff and Plaintiff Class against Defendant awarding damages, interest, and costs of suit;
- (c) Enter a Preliminary and Permanent Injunction prohibiting Defendant from transmitting unlawful facsimile advertisements; and
- (d) Any relief the Court deems just and proper under the circumstances.

**Count III:**  
**Violation of the**  
**Missouri Computer Tampering Act**

27. Plaintiff incorporates by reference Paragraphs 1 through 26 as though fully set forth herein.

28. In pertinent part, the Missouri Computer Tampering Act, RSMo. § 569.097 ("MCTA"), provides:

A person commits the crime of tampering with computer equipment if he knowingly and without authorization or without reasonable grounds to believe that he has such authorization:

- (1) Modifies, destroys, damages, or takes equipment or data storage devices used or intended to be used in a computer, computer system, or computer network; or

(2) Modifies, destroys, damages, or takes any computer, computer system, or computer network.

29. In pertinent part, the MCTA, provides:

A person commits the crime of tampering with computer users if he knowingly and without authorization or without reasonable grounds to believe that he has such authorization:

(1) Accesses or causes to be accessed any computer, computer system, or computer network; or

(2) Denies or causes the denial of computer system services to an authorized user of such computer system services, which, in whole or in part, is owned by, under contract to, or operated for, or on behalf of, or in conjunction with another.

30. Plaintiff's telephone facsimile machine is one or more of the following, pursuant to RSMo. § 556.063:

- (a) A "computer" because it is "the box that houses the central processing unit (cpu), along with any internal storage devices, such as internal hard drives, and internal communication devices, such as internal modems capable of sending or receiving electronic mail or fax cards, along with any other hardware stored or housed internally . . .";
- (b) "Computer equipment" because it is "computers, terminals, data storage devices, and all other computer hardware associated with a computer system or network";
- (c) "Computer hardware" because it is "all equipment which can collect, analyze, create, display, convert, store, conceal or transmit electronic, magnetic, optical or similar computer impulses or data . . ."; or
- (d) A "computer system" because it is "a set of related, connected or unconnected, computer equipment, data, or software."

31. Defendant's unsolicited facsimile transmission to Plaintiff's telephone facsimile machine is tampering because, as defined by RSMo. § 569.010, "to tamper" means "to interfere with something improperly, to meddle with it, displace it, make unwarranted alterations in its existing condition, or to deprive, temporarily, the owner or possessor of that thing."

32. The MCTA provides for a private right of action, as provided in RSMo. § 537.535:

1. In addition to any other civil remedy available, the owner or lessee of the computer system, computer network, computer program, computer service or data may bring a civil action against any person who violates sections 569.095 to 569.099, RSMo, for compensatory damages, including any expenditures reasonably and necessarily incurred by the owner or lessee to verify that a computer system, computer network, computer program, computer service, or data was not altered, damaged, or deleted by the access.

2. In any action brought pursuant to this section, the court may award reasonable attorney's fees to a prevailing plaintiff.

33. Defendant violated RSMo. § 569.097 on or about December 17, 2012 by tampering with and modifying, destroying, or damaging the telephone line, internal storage device, paper, and toner of Plaintiff's telephone facsimile machine without Plaintiff's authorization.

34. Defendant violated RSMo. § 569.099 on or about December 17, 2012 by tampering with and accessing, causing to be accessed, denying service, or causing service to be denied to Plaintiff's telephone line and telephone facsimile machine without Plaintiff's authorization.

35. As a result of Defendant's violation of the MCTA, Plaintiff is entitled to attorney's fees and compensatory damages, including expenditures to verify Plaintiff's telephone facsimile machine was not altered, damaged, or otherwise affected by Defendant's unauthorized access and tampering.

**WHEREFORE**, Plaintiff prays that this Court:

- (a) Enter an order pursuant to Rule 52.08(c) that this action is to be maintained as a class action and appoint and denominate the undersigned as class counsel;
- (b) Enter judgment for Plaintiff and Plaintiff Class against Defendant awarding damages, reasonable attorney's fees, and costs of suit;
- (c) Enter a Preliminary and Permanent Injunction prohibiting Defendant from transmitting unlawful facsimile advertisements; and
- (d) Any relief the Court deems just and proper under the circumstances.

**Count IV:**  
**Negligence**

36. Plaintiff incorporates by reference Paragraphs 1 through 35 as though fully set forth herein.

37. As the operators or controllers of a telephone facsimile machine, computer, or other device used to send telephone facsimile communications, Defendant owed a duty of reasonable care to conduct its facsimile marketing campaign in a reasonable manner so as not to cause unauthorized use and consumption of the facsimile machine, telephone line, toner, paper, and memory of Plaintiff.

38. This duty of reasonable care included the duty to refrain from sending a facsimile advertisement to Plaintiff unless: (1) Plaintiff had expressly consented to receiving facsimile advertisements from Defendant and Defendant included the specific opt-out language on the face of each facsimile advertisement as required by 47 U.S.C. § 227(b)(1)(C)(i), (ii), and (iii); or (2) Defendant had a documented established business relationship with Plaintiff and Defendant included the specific opt-out language on the face of each facsimile advertisement as required by 47 U.S.C. § 227(b)(1)(C)(i), (ii), and (iii).

39. In the exercise of reasonable care, Defendant knew or should have known that Plaintiff had not expressly consented to receiving facsimile advertisements from Defendant and Defendant's facsimile advertisement did not include the specific opt-out language on the face of each facsimile advertisement as required by 47 U.S.C. § 227(b)(1)(C)(i), (ii), and (iii).

40. In the exercise of reasonable care, Defendant knew or should have known that Defendant did not have a documented established business relationship with Plaintiff and Defendant's facsimile advertisement did not include the specific opt-out language on the face of each facsimile advertisement as required by 47 U.S.C. § 227(b)(1)(C)(i), (ii), and (iii).

41. Defendant acted negligently and breached this duty of reasonable care on or about December 17, 2012 by using or causing to be used a telephone facsimile machine, computer, or other device to send an unsolicited facsimile advertisement to Plaintiff's telephone facsimile machine, causing unauthorized use and consumption of Plaintiff's facsimile machine, telephone line, toner, paper, and memory.

42. As a direct and proximate result of Defendant's negligence, Plaintiff was aggrieved and has suffered an actual and ascertainable loss, including, but not limited to, the loss of use of Plaintiff's facsimile machine, telephone line, toner, paper, and memory and the permanent loss of Plaintiff's toner and paper.

**WHEREFORE**, Plaintiff prays that this Court:

- (a) Enter an order pursuant to Rule 52.08(c) that this action is to be maintained as a class action and appoint and denominate the undersigned as class counsel;
- (b) Enter judgment for Plaintiff and Plaintiff Class against Defendant awarding damages and costs of suit;
- (c) Enter a Preliminary and Permanent Injunction prohibiting Defendant from transmitting unlawful facsimile advertisements; and
- (d) Any relief the Court deems just and proper under the circumstances.

**Count V:**  
**Negligence Per Se**

43. Plaintiff incorporates by reference Paragraphs 1 through 42 as though fully set forth herein.

44. On or about December 17, 2012, the TCPA and the MCTA applied to Defendant.

45. On or about December 17, 2012, Defendant violated the TCPA by using or causing to be used a telephone facsimile machine, computer, or other device to send an unsolicited facsimile advertisement to Plaintiff's telephone facsimile machine.

46. On or about December 17, 2012, Defendant violated the MTCA by tampering with and modifying, destroying, or damaging the telephone line, internal storage device, paper, and toner of Plaintiff's telephone facsimile machine without Plaintiff's authorization.

47. On or about December 17, 2012, Defendant violated the MCTA by tampering with and accessing, causing to be accessed, denying service, or causing service to be denied to Plaintiff's telephone line and telephone facsimile machine without Plaintiff's authorization.

48. Plaintiff was in the class of persons the TCPA and the MCTA is designed to protect.

49. As a direct and proximate result of Defendant's violation of the TCPA and the MCTA, Plaintiff was aggrieved and has suffered an actual and ascertainable loss, including, but not limited to, the loss of use of Plaintiff's facsimile machine, telephone line, toner, paper, and memory and the permanent loss of Plaintiff's toner and paper.

50. The losses suffered by Plaintiff are of the type the TCPA and the MCTA are designed to protect.

51. The TCPA and the MCTA provide for a private right of action.

**WHEREFORE**, Plaintiff prays that this Court:

- (a) Enter an order pursuant to Rule 23(c)(1) that this action is to be maintained as a class action and appoint and denominate the undersigned as class counsel;
- (b) Enter judgment for Plaintiff and Plaintiff Class against Defendant awarding damages and costs of suit;
- (c) Enter a Preliminary and Permanent Injunction prohibiting

Defendants from transmitting unsolicited facsimile advertisements;  
and

- (d) Any relief the Court deems just and proper under the  
circumstances.

**Demand For Trial By Jury**

52. Plaintiff hereby demands a trial by jury on all issues so triable.

Respectfully submitted,

WOOD LAW FIRM, LLC

By /s/ Ari N. Rodopoulos

Noah K. Wood MO #51249

Ari N. Rodopoulos MO #58777

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Kansas City, MO 64105-5171

T: (816) 256-3582

F: (816) 337-4243

Attorneys for Plaintiff



Employees and families of  
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