

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SUZANNE DEGNEN, D.M.D., P.C.)	
d/b/a SUNSET TOWER FAMILY)	
DENTISTRY,)	
)	
Plaintiff,)	
)	Case No. 15-1103
v.)	
)	
ZIMMER DENTAL, INC. d/b/a)	
ZIMMER DENTAL, AMY BETH GERZOG)	
and JOHN DOES 1-10,)	
)	
Defendants.)	

ANSWER OF DEFENDANT ZIMMER DENTAL, INC.

COMES NOW Defendant Zimmer Dental, Inc. d/b/a Zimmer Dental (“Zimmer Dental”) by and through undersigned counsel, and for its Answer to Plaintiff’s Class Action Junk-Fax Petition, states as follows:

PARTIES, JURISDICTION, AND VENUE

1. Zimmer Dental has insufficient knowledge to admit or deny the allegations contained in Paragraph 1 and, therefore, denies same.
2. Zimmer Dental admits that it is a Delaware corporation with its principal place of business in Warsaw, Indiana, but denies the remaining allegations contained in Paragraph 2.
- 3-5. Zimmer Dental admits the allegations contained in Paragraph 3, 4, and 5.
6. Zimmer Dental provides no response to Paragraph 6 as it contains no allegations against this defendant.
7. The statements contained in Paragraph 7 related to jurisdiction are legal conclusions to which no answer or response is required. To the extent that the jurisdictional

allegations are deemed not to be legal conclusions, such allegations are hereby denied. Zimmer Dental denies the remainder of the allegations contained in Paragraph 7.

8. The statements contained in Paragraph 8 related to venue are legal conclusions to which no answer or response is required. To the extent that the allegations in Paragraph 8 are deemed not to be legal conclusions, such allegations are hereby denied. Zimmer Dental specifically denies that it sent “illegal faxes” to any location, including Missouri.

THE FAXES

9. Zimmer Dental denies the allegations contained in Paragraph 9.

10. Zimmer Dental admits that on April 24, 2014, Zimmer Dental sent a fax to Plaintiff at (314) 849-1139, and that the copy attached as Exhibit 1 of Plaintiff’s Petition is true and correct. Zimmer Dental lacks sufficient information to admit or deny that the receiving device was a “telephone facsimile machine” as defined by the TCPA and, therefore, denies same. Zimmer Dental denies that it was an unsolicited advertisement.

11. Zimmer Dental admits that on April 29, 2014, Zimmer Dental sent a fax to Plaintiff at (314) 849-1139, and that the copy attached as Exhibit 2 of Plaintiff’s Petition is true and correct. Zimmer Dental lacks sufficient information to admit or deny that the receiving device was a “telephone facsimile machine” as defined by the TCPA and, therefore, denies same. Zimmer Dental denies that it was an unsolicited advertisement.

12. Zimmer Dental admits that on May 13, 2014, Zimmer Dental sent a fax to Plaintiff at (314) 849-1139, and that the copy attached as Exhibit 3 of Plaintiff’s Petition is true and correct. Zimmer Dental lacks sufficient information to admit or deny that the receiving device was a “telephone facsimile machine” as defined by the TCPA and, therefore, denies same. Zimmer Dental denies that it was an unsolicited advertisement.

13. Zimmer Dental admits that on May 20, 2014, Zimmer Dental sent a fax to Plaintiff at (314) 849-1139, and that the copy attached as Exhibit 4 of Plaintiff's Petition is true and correct. Zimmer Dental lacks sufficient information to admit or deny that the receiving device was a "telephone facsimile machine" as defined by the TCPA and, therefore, denies same. Zimmer Dental denies that it was an unsolicited advertisement.

14. Zimmer Dental admits that on June 10, 2014, Zimmer Dental sent a fax to Plaintiff at (314) 849-1139, and that the copy attached as Exhibit 5 of Plaintiff's Petition is true and correct. Zimmer Dental lacks sufficient information to admit or deny that the receiving device was a "telephone facsimile machine" as defined by the TCPA and, therefore, denies same. Zimmer Dental denies that it was an unsolicited advertisement.

15. Zimmer Dental admits that on June 17, 2014, Zimmer Dental sent a fax to Plaintiff at (314) 849-1139, and that the copy attached as Exhibit 6 of Plaintiff's Petition is true and correct. Zimmer Dental lacks sufficient information to admit or deny that the receiving device was a "telephone facsimile machine" as defined by the TCPA and, therefore, denies same. Zimmer Dental denies that it was an unsolicited advertisement.

16. Zimmer Dental admits that on June 24, 2014, Zimmer Dental sent a fax to Plaintiff at (314) 849-1139, and that the copy attached as Exhibit 7 of Plaintiff's Petition is true and correct. Zimmer Dental lacks sufficient information to admit or deny that the receiving device was a "telephone facsimile machine" as defined by the TCPA and, therefore, denies same. Zimmer Dental denies that it was an unsolicited advertisement.

17. Zimmer Dental admits that on July 8, 2014, Zimmer Dental sent a fax to Plaintiff at (314) 849-1139, and that the copy attached as Exhibit 8 of Plaintiff's Petition is true and correct. Zimmer Dental lacks sufficient information to admit or deny that the receiving device

was a “telephone facsimile machine” as defined by the TCPA and, therefore, denies same.

Zimmer Dental denies that it was an unsolicited advertisement.

18. Zimmer Dental admits that on August 5, 2014, Zimmer Dental sent a fax to Plaintiff at (314) 849-1139, and that the copy attached as Exhibit 9 of Plaintiff’s Petition is true and correct. Zimmer Dental lacks sufficient information to admit or deny that the receiving device was a “telephone facsimile machine” as defined by the TCPA and, therefore, denies same. Zimmer Dental denies that it was an unsolicited advertisement.

19. Zimmer Dental admits that on August 20, 2014, Zimmer Dental sent a fax to Plaintiff at (314) 849-1139, and that the copy attached as Exhibit 10 of Plaintiff’s Petition is true and correct. Zimmer Dental lacks sufficient information to admit or deny that the receiving device was a “telephone facsimile machine” as defined by the TCPA and, therefore, denies same. Zimmer Dental denies that it was an unsolicited advertisement.

20. Zimmer Dental admits that on August 26, 2014, Zimmer Dental sent a fax to Plaintiff at (314) 849-1139, and that the copy attached as Exhibit 11 of Plaintiff’s Petition is true and correct. Zimmer Dental lacks sufficient information to admit or deny that the receiving device was a “telephone facsimile machine” as defined by the TCPA and, therefore, denies same. Zimmer Dental denies that it was an unsolicited advertisement.

21. Zimmer Dental admits that on September 2, 2014, Zimmer Dental sent a fax to Plaintiff at (314) 849-1139, and that the copy attached as Exhibit 12 of Plaintiff’s Petition is true and correct. Zimmer Dental lacks sufficient information to admit or deny that the receiving device was a “telephone facsimile machine” as defined by the TCPA and, therefore, denies same. Zimmer Dental denies that it was an unsolicited advertisement.

22. Zimmer Dental admits that on September 9, 2014, Zimmer Dental sent a fax to Plaintiff at (314) 849-1139, and that the copy attached as Exhibit 13 of Plaintiff's Petition is true and correct. Zimmer Dental lacks sufficient information to admit or deny that the receiving device was a "telephone facsimile machine" as defined by the TCPA and, therefore, denies same. Zimmer Dental denies that it was an unsolicited advertisement.

23. Zimmer Dental admits that on September 16, 2014, Zimmer Dental sent a fax to Plaintiff at (314) 849-1139, and that the copy attached as Exhibit 14 of Plaintiff's Petition is true and correct. Zimmer Dental lacks sufficient information to admit or deny that the receiving device was a "telephone facsimile machine" as defined by the TCPA and, therefore, denies same. Zimmer Dental denies that it was an unsolicited advertisement.

24. Zimmer Dental admits that on September 30, 2014, Zimmer Dental sent a fax to Plaintiff at (314) 849-1139, and that the copy attached as Exhibit 15 of Plaintiff's Petition is true and correct. Zimmer Dental lacks sufficient information to admit or deny that the receiving device was a "telephone facsimile machine" as defined by the TCPA and, therefore, denies same. Zimmer Dental denies that it was an unsolicited advertisement.

25. Zimmer Dental admits that on October 7, 2014, Zimmer Dental sent a fax to Plaintiff at (314) 849-1139, and that the copy attached as Exhibit 16 of Plaintiff's Petition is true and correct. Zimmer Dental lacks sufficient information to admit or deny that the receiving device was a "telephone facsimile machine" as defined by the TCPA and, therefore, denies same. Zimmer Dental denies that it was an unsolicited advertisement.

26. Zimmer Dental admits that on October 28, 2014, Zimmer Dental sent a fax to Plaintiff at (314) 849-1139, and that the copy attached as Exhibit 17 of Plaintiff's Petition is true and correct. Zimmer Dental lacks sufficient information to admit or deny that the receiving

device was a “telephone facsimile machine” as defined by the TCPA and, therefore, denies same. Zimmer Dental denies that it was an unsolicited advertisement.

27. Zimmer Dental admits that on December 9, 2014, Zimmer Dental sent a fax to Plaintiff at (314) 849-1139, and that the copy attached as Exhibit 18 of Plaintiff’s Petition is true and correct. Zimmer Dental lacks sufficient information to admit or deny that the receiving device was a “telephone facsimile machine” as defined by the TCPA and, therefore, denies same. Zimmer Dental denies that it was an unsolicited advertisement.

28. Zimmer Dental admits that on December 16, 2014, Zimmer Dental sent a fax to Plaintiff at (314) 849-1139, and that the copy attached as Exhibit 19 of Plaintiff’s Petition is true and correct. Zimmer Dental lacks sufficient information to admit or deny that the receiving device was a “telephone facsimile machine” as defined by the TCPA and, therefore, denies same. Zimmer Dental denies that it was an unsolicited advertisement.

29. Zimmer Dental provides no response to Paragraph 29 as it contains no allegations against Zimmer Dental.

30. Zimmer Dental has insufficient knowledge to admit or deny the allegations contained in Paragraph 30 and, therefore, denies same.

31. Zimmer Dental admits the allegations contained in Paragraph 31.

32. The statements contained in Paragraph 32 are legal conclusions to which no answer or response is required. To the extent that the allegations in Paragraph 32 are deemed not to be legal conclusions, such allegations are hereby denied, with the exception that Zimmer Dental admits the faxes stated “You have received this message because you are registered as a customer of Zimmer Dental.”

33. Zimmer Dental admits plaintiff was not a customer of Zimmer Dental.

34-36. Zimmer Dental admits the allegations contained in Paragraphs 34, 35, and 36.

37. The statements contained in Paragraph 37 are legal conclusions to which no answer or response is required. To the extent that the allegations in Paragraph 37 are deemed not to be legal conclusions, such allegations are hereby denied.

38. Zimmer Dental admits it has sent other facsimile transmissions to at least 40 other persons. Except as expressly admitted herein, Zimmer Dental denies all other allegations contained within Paragraph 38.

39. Zimmer Dental admits that it approved, authorized, and participated in sending solicited faxes, including directing the list of parties to contact, directing and supervising employees, creating and approving the fax form, and determining the number and frequency of facsimile transmissions. Except as expressly admitted herein, Zimmer Dental denies all other allegations contained within Paragraph 39.

40. Zimmer Dental denies the allegations contained in Paragraph 40.

41. Zimmer Dental admits that it created the faxes attached to the Petition as Exhibits 1-19. Except as expressly admitted herein, Zimmer Dental denies all allegations contained in Paragraph 41.

42. Zimmer Dental admits that the faxes attached to the Petition as Exhibits 1-19 are a part of Zimmer Dental's work to market its products and that they were sent by Zimmer Dental. Except as expressly admitted herein, Zimmer Dental denies all allegations contained in Paragraph 42.

43. Zimmer Dental admits that the faxes attached to the Petition as Exhibits 1-19 were furnished in connection with Zimmer Dental's work. Except as expressly admitted herein, Zimmer Dental denies all allegations contained in Paragraph 43.

44. Zimmer Dental denies the allegations contained in Paragraph 44.

45. Zimmer Dental admits that the faxes attached to the Petition as Exhibits 1-19 do not include language stating that failure to comply with an opt-out request within 30 days is unlawful.

46. Zimmer Dental admits that the faxes attached to the Petition as Exhibits 1-19 do not contain a fax number.

47. The statements contained in Paragraph 47 are legal conclusions to which no answer or response is required. To the extent that the allegations in Paragraph 47 are deemed not to be legal conclusions, such allegations are hereby denied.

48. The statements contained in Paragraph 48 are legal conclusions to which no answer or response is required. To the extent that the allegations in Paragraph 48 are deemed not to be legal conclusions, such allegations are hereby denied.

49. Zimmer Dental admits that it sent multiple facsimile transmissions to Plaintiff between 2011 and 2015.

50-51. Zimmer Dental denies the allegations contained in paragraphs 50 and 51.

52-57. The statements contained in Paragraphs 52 through 57, inclusive, are legal conclusions to which no answer or response is required. To the extent that the allegations in Paragraphs 52 through 57 are deemed not to be legal conclusions, such allegations are hereby denied.

CLASS ACTION ALLEGATIONS

58-59. Zimmer Dental provides no response to Paragraphs 58 and 59, as they contain no allegations against Zimmer Dental.

60. Zimmer Dental denies Paragraph 60, including all subparagraphs.

61-65. Zimmer Dental provides no response to Paragraphs 61 through 65, inclusive, as they contain no allegations against Zimmer Dental. Zimmer Dental expressly denies that it violated the TCPA.

66. Zimmer Dental expressly denies that it violated the TCPA, that it is liable to Plaintiff and/or the purported class, and that it acted negligently. Zimmer Dental provides no further response to Paragraph 66, as it contains no further allegations against Zimmer Dental.

67. Zimmer Dental denies Paragraph 67, including all subparagraphs.

68. Zimmer Dental denies Paragraph 68.

69. Zimmer Dental denies Paragraph 69, including all subparagraphs.

70. Zimmer Dental denies Paragraph 70.

AFFIRMATIVE DEFENSES

1. Plaintiff fails to state a claim or cause of action against Zimmer Dental upon which relief may be granted.

2. Plaintiff failed to mitigate its damages, if any, by failing to make a single toll-free call to be removed from the mailing list.

3. Zimmer Dental is entitled to a retroactive waiver pursuant to the Federal Communication Commission's October 30, 2014 Order, FCC 14-164, CG Docket No. 02-278 and CG Docket No. 05-338, because the facsimile transmissions in issue were sent with the recipients' prior express consent.

4. Plaintiff's claims are barred by the doctrines of laches, unreasonable delay, and estoppel.

5. Plaintiff's claims are barred, in whole or in part, because the faxed forms such as those in Exhibits 1-19 to Plaintiff's Petition contained a toll-free telephone number by which it

could opt-out of receiving any facsimile transmissions from Zimmer Dental. Accordingly, it would be inequitable to impose liability, strict or otherwise, based on any alleged insufficiency of the wording of the opt-out notice.

6. Class certification is improper because the proposed class definition requires a determination of the merits of the lawsuit prior to certification of any class.

7. Class certification is improper under Federal Rule of Civil Procedure 23 because individual issues predominate over class issues.

8. Class certification would violate due process because application of Rule 23 to a case brought under the TCPA is duplicative, unduly punitive, grossly disproportionate to any alleged harm, and inequitable.

9. Attorney fees are not recoverable under the TCPA.

10. Plaintiff is not entitled to prejudgment interest as a matter of law because it has failed to comply with the requirements of Mo. Rev. Stat. §408.040.

WHEREFORE, Defendant Zimmer Dental, Inc. d/b/a Zimmer Dental requests entry of judgment dismissing Plaintiff's Petition with prejudice, and awarding Zimmer Dental its costs and attorney fees and all such other relief as the Court may deem just and proper.

/s/ Jonathan H. Garside

Jonathan H. Garside, #48523MO
Laura M. Robb, #64117MO
FOX GALVIN, LLC
One South Memorial Drive, 12th Floor
St. Louis, MO 63102
(314) 588-7000
(314) 588-1965 (Fax)
jgarside@foxgalvin.com
lrobb@foxgalvin.com

Attorneys for Defendants Zimmer Dental, Inc. d/b/a
Zimmer Dental

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service was made by means of the Notice of Electronic Filing this 23rd day of July, 2015, to:

Mr. Ronald J. Eisenberg
Mr. Robert Schultz
Schultz & Associates LLP
640 Cepi Drive, Suite A
Chesterfield, MO 63005-1221

/s/ Jonathan H. Garside