

# EXHIBIT C

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

**JEFFERSON RADIATION ONCOLOGY,  
L.L.C.**

**Plaintiff,**

**v.**

**ADVANCED CARE SCRIPTS, INC.**

**Defendant.**

**CIVIL ACTION NO.: 2:15-cv-01399**

**JUDGE: BERRIGAN**

**MAGISTRATE: KNOWLES**

**JURY TRIAL DEMANDED**

**THIRD-PARTY COMPLAINT**

Defendant and Third-Party Plaintiff Advanced Care Scripts, Inc. (“ACS”), by and through its attorneys of record, hereby files the following Third-Party Complaint against Third-Party Defendant WestFax, Inc. (“WestFax”) as follows:

**INTRODUCTION**

1. This action arises out of WestFax’s provision of fax transmission and related services to ACS. WestFax transmitted faxes on behalf of ACS, and represented to ACS that it would properly establish, administer, and maintain the services required for those fax transmissions. Among other things, WestFax arranged and controlled the opt-out mechanism used for the transmission of faxes, and Westfax owned and operated the opt-out phone number and opt-out fax number. WestFax also is the sole entity that maintains the list of medical providers that have requested to opt out of receiving future fax transmissions. On its website, WestFax represented that its staff was “dedicated to helping [WestFax customers] design and implement a successful campaign.” On at least three occasions, WestFax instructed ACS to utilize specific opt-out language in the fax transmissions that WestFax sent on its behalf, and at

no time did WestFax indicate that the opt-out language on the fax transmissions it sent was deficient in any way. ACS paid WestFax for its fax transmission services.

2. WestFax owed a duty to ACS to establish, administer, and maintain its fax transmission services in accordance with all applicable laws, including the TCPA. To the extent ACS is found to have any liability under the TCPA for utilizing WestFax's services, ACS has justifiably relied, to its detriment, upon WestFax's instructions, representations, and purported expertise. As the party responsible for sending faxes on behalf of ACS and with responsibility for selecting the opt-out language included in those faxes, WestFax is liable to ACS to the full extent that ACS may be found liable to Plaintiff Jefferson Radiation Oncology, L.L.C. ("Jefferson") under the Complaint and any amendments thereto in this action and also is liable for all of ACS's attorney's fees and costs incurred because of having to defend against Jefferson's claims.

### **STANDING AND JURISDICTION**

3. This Court has supplemental jurisdiction over this Third-Party Complaint pursuant to 28 U.S.C. § 1367. The Court has original jurisdiction over the initial Jefferson Complaint pursuant to 28 U.S.C. § 1331 and the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 and ACS's claims in this Third-Party Complaint are so related to the claims asserted by Jefferson that they form a part of the same case or controversy. The Court also has jurisdiction based on complete diversity between the parties to the Third-Party Complaint, which reside in different states and have an amount in controversy that exceeds \$75,000.

### **THE PARTIES**

4. On information and belief, Jefferson is, and was, at all times relevant to this Third-Party Complaint, a limited liability company duly organized and existing under the laws of

the State of Louisiana, with its principal place of business in Metairie, Louisiana and with all of its members being citizens of Louisiana. Jefferson filed its Complaint against ACS on April 29, 2015, alleging violations of the TCPA.

5. Defendant and Third-Party Plaintiff ACS is, and was at all times relevant to this Third-Party Complaint, a corporation organized and existing under the laws of the State of Florida with its principal place of business in the State of Ohio.

6. On information and belief, Third-Party Defendant WestFax is, and was at all times relevant to this Third-Party Complaint, a corporation organized and existing under the laws of the State of Colorado with its principal place of business in the State of Colorado.

#### **FACTUAL BACKGROUND**

7. ACS is a specialty pharmacy services provider primarily based in Orlando, Florida. ACS provides specialty medications—many of which are “limited-access” medications, *i.e.*, medications that are available only through certain pharmacies—to approximately 29,000 patients on a monthly basis. The vast majority of ACS’s medications are used to treat cancer and multiple sclerosis (“MS”). When new medications become available through ACS’s pharmacy network, or when an existing medication is approved for a new treatment purpose, ACS notifies medical providers. To ensure proper and effective treatment, ACS sometimes notifies medical providers of changes in packaging or dosage protocols. ACS does so through a variety of methods, including fax communications, so that they can adjust their patients’ treatment programs as needed. ACS also may use faxes to notify medical providers of Medicaid program changes that may affect their patients’ benefits and the offerings through ACS.

8. ACS prides itself on a very patient-centric business model and good customer service. For example, ACS provides a single point of contact that is in continual communication

with medical providers' offices to keep them updated on the status of their prescription requests. ACS is also well-known for providing reimbursement support, as well as assisting patients and physicians work through the co-pay assistance and benefit verification process. These are the value propositions that motivate medical providers to fulfill their prescription requests through ACS, even though providers do not themselves purchase the medications or receive monetary benefits from ACS. Further, patients who use ACS for their specialty pharmacy needs are free to choose among various specialty pharmacies, and their choice of ACS is a reflection of ACS's ability to provide high-quality, patient-centric care.

9. To ensure that medical providers are kept informed of any changes to ACS's network of available medications and their uses, ACS relies on a third-party service provider, WestFax, to distribute notifications via fax transmissions to various medical practices. The list of entities that are sent faxes varies, depending on the medication or issue being discussed, among other factors. ACS has been using and paying for WestFax's services since around 2008, and since that time has relied on WestFax to ensure the proper opt-out language was included in all fax transmissions, consistent with the requirements of the TCPA.

10. WestFax owed a duty to ACS to establish, administer, and maintain its fax transmission services in accordance with all applicable laws, including the TCPA. To the extent ACS is found to have any liability under the TCPA for utilizing WestFax's services, ACS has justifiably relied, to its detriment, upon WestFax's representations and expertise in performing the notification service and on its instructions regarding the language and physical placement of the TCPA opt-out language in its notices to medical providers.

11. WestFax developed and controlled the opt-out mechanism used by ACS for its fax transmissions, including owning the opt-out phone number and/or fax number. WestFax also is

the sole entity that maintains the list of medical providers that have requested to opt out of receiving future fax transmissions. ACS paid WestFax for its fax transmission services, which were to include WestFax's use of opt-out language compliant with applicable laws. Each fax that WestFax sent to medical providers on ACS's behalf included a toll-free number listed at the bottom that a recipient may call to opt-out of future faxes. The three faxes allegedly sent to Jefferson state: "To be removed from future faxes call 877-573-7105." An earlier version of the opt-out disclosure from February 2012 similarly states: "You may request to be removed from future faxes call 800-841-3020 [e]xt 54060 or fax 877-679-7131 and include your fax number."

12. Typically, ACS sent WestFax a notice to be sent to a particular provider network. WestFax reviewed the notice and offered to send a test fax to ACS. On at least one occasion in approximately 2008, a WestFax representative informed ACS that TCPA opt-out language was required and provided the language that ACS adopted for use in all subsequent notices sent by WestFax. Approximately one year later, a WestFax representative contacted ACS to inform ACS that the bottom of a notice was cut off, rendering the opt-out language unreadable. ACS followed WestFax's instruction and edited the notice to ensure the opt-out notice appeared on the first page. Finally, on or about 2012, WestFax instructed ACS to change its opt-out language to purportedly conform to a requirement for a dedicated toll-free number. Thus, any ACS-related fax transmissions that allegedly did not include a TCPA-compliant opt-out notice were sent by WestFax, and the opt-out language at issue was developed by WestFax and relied upon by ACS.

13. In addition, representations made on WestFax's website when ACS began to use the services purported to provide legal guidance on the use of WestFax's fax services, including advising customers of WestFax regarding compliance with FCC rules and regulations. For example, on information and belief, around the time that ACS entered into a business

relationship with WestFax in or about 2008, WestFax represented on its website that FCC rules “require senders to include opt-out notices, but provide flexibility in designing them.” WestFax’s website then provided a description of the FCC’s rules for providing an opt-out notice. WestFax held itself out as a leading fax transmission service provider with “well-trained” staff “dedicated to helping [WestFax customers] design and implement a successful campaign.” ACS relied on WestFax’s implied representations regarding WestFax’s expertise and the legality of its fax transmission services when ACS agreed to allow WestFax to send faxes on its behalf.

14. Jefferson filed its Complaint against ACS on April 29, 2015, alleging violations of the TCPA, based on faxes that WestFax sent on ACS’s behalf, using opt-out language that, as explained above, WestFax drafted. ACS denies the allegations made in Jefferson’s Complaint, including Jefferson’s assertion of liability and its assertion of any legal right to represent the interests of an alleged class of persons similarly situated. However, to the extent the faxes WestFax sent on ACS’s behalf contained inadequate opt-out language, WestFax is responsible, and ACS detrimentally relied on WestFax’s assertions of compliance. Indeed, ACS was unaware of any potential issue until Jefferson brought its action against ACS in April 2015.

## **FIRST CLAIM FOR RELIEF**

### **Contribution and Indemnity**

15. ACS hereby repeats, re-alleges, and incorporates by reference all allegations contained in the preceding paragraphs as fully set forth herein. To the extent ACS may be found liable based on any of the allegations in Jefferson’s Complaint, WestFax is liable to ACS for contribution and indemnity. The fax transmissions to Jefferson contained the opt-out language selected and included by WestFax. WestFax also owed a duty to ACS to establish, administer,

and maintain its fax transmission services in accordance with all applicable laws, including the TCPA. If ACS is held to be liable or responsible to Jefferson for damages relating to WestFax's opt-out language or fax transmission services, that liability would be the direct and proximate result of WestFax's failure to provide proper opt-out language on faxes it sent on ACS's behalf. ACS is entitled to complete indemnification or, alternatively, contribution by WestFax for all costs of suit and attorney's fees incurred in defending against Jefferson's action, as well as for any sums for which it may be found liable pursuant to the TCPA.

## **SECOND CLAIM FOR RELIEF**

### **Fraud / Fraud in the Inducement**

16. ACS hereby repeats, re-alleges, and incorporates by reference all allegations contained in the preceding paragraphs as fully set forth herein. By providing specific language to ACS for use in all its fax transmissions, including information on what was legally required, WestFax implicitly represented that its opt-out language was sufficient to comply with the TCPA. Additionally, by providing specific opt-out language to ACS and providing guidance on its website regarding FCC interpretations of the TCPA, WestFax held itself out as having expertise and responsibility for compliance with the TCPA with respect to fax transmission services it provides to customers such as ACS. WestFax was aware of FCC rules and applicable laws at the time it provided the opt-out language and, thus, to the extent its opt-out language is determined to be legally defective, WestFax knew or should have known that its opt-out language was inadequate and that its representations, in that event, were false. ACS justifiably relied on WestFax's statements, to its detriment, when it followed WestFax's instructions to use the opt-out notice it provided. As a direct and proximate result of WestFax's actions, ACS has

suffered damages from the attorneys' fees and costs incurred in defending the underlying action, and it may have additional damages if Jefferson is successful in its action against ACS.

### **THIRD CLAIM FOR RELIEF**

#### **Negligent Misrepresentation**

17. ACS hereby repeats, re-alleges, and incorporates by reference all allegations contained in the preceding paragraphs as fully set forth herein. To the extent ACS is found liable under the TCPA as a result of the opt-out language used in the faxes, WestFax falsely represented a material fact to ACS, namely that WestFax's recommended opt-out language was sufficient and required on all transmissions that it sent on behalf of ACS. As the fax transmissions service provider that offered its services to ACS, WestFax reasonably knew that ACS would rely to its detriment on WestFax's representations regarding the opt-out language used in those transmissions. To the extent the opt-out language WestFax provided was non-compliant with TCPA requirements, WestFax failed to act with reasonable care in misrepresenting a material fact. As a direct and proximate result of WestFax's actions, ACS has suffered damages from the attorneys' fees and costs incurred in defending the underlying action, and it may have additional damages if Jefferson is successful in its action against ACS.

### **FOURTH CLAIM FOR RELIEF**

#### **Negligence**

18. ACS hereby repeats, re-alleges, and incorporates by reference all allegations contained in the preceding paragraphs as fully set forth herein. As the fax transmissions service provider that offered its services to ACS, WestFax owed a duty of care to ACS to ensure that the opt-out language it recommended for use in fax transmissions sent on ACS's behalf complied with the TCPA's regulations. WestFax breached that duty of care to the extent it negligently

provided deficient opt-out notices (if they are found to be deficient) and to the extent it negligently failed to provide accurate information—or to subsequently update that information—to ACS regarding the sufficiency of its opt-out notices. As a direct and proximate result of WestFax's actions, ACS has suffered damages from the attorneys' fees and costs incurred in defending the underlying action, and it may have additional damages if Jefferson is successful in its action against ACS.

#### **FIFTH CLAIM FOR RELIEF**

##### **Breach of Contract**

19. ACS hereby repeats, re-alleges, and incorporates by reference all allegations contained in the preceding paragraphs as fully set forth herein. WestFax entered into an agreement with ACS to provide fax transmission services to ACS and to properly administer and maintain fax transmission services provided to ACS. WestFax assumed responsibility for the opt-out language used in all fax transmissions that WestFax sent on ACS's behalf. In exchange, ACS promised to pay WestFax for its services. To the extent the faxes WestFax sent on ACS's behalf are found to be unlawful or insufficient under the TCPA or other applicable laws, WestFax breached its agreement with ACS. As a direct and proximate result of WestFax's breach, ACS has suffered damages from the attorneys' fees and costs incurred in defending the underlying action, and it may have additional damages if Jefferson is successful in its action against ACS.

#### **SIXTH CLAIM FOR RELIEF**

##### **Unjust Enrichment / Quantum Meruit**

20. ACS hereby repeats, re-alleges, and incorporates by reference all allegations contained in the preceding paragraphs as fully set forth herein. To the extent there is no

enforceable contract between ACS and WestFax, and the fax transmissions WestFax sent on ACS's behalf are found to be unlawful as a result of deficient opt-out language, ACS alleges that WestFax was unjustly benefited by its business relationship with ACS, whereby WestFax charged and received large sums of money from ACS to provide a service that may expose ACS to legal liability and costs. As a direct and proximate result of WestFax's actions, ACS has suffered damages from the attorneys' fees and costs incurred in defending the underlying action, and it may have additional damages if Jefferson is successful in its action against ACS.

### **SEVENTH CLAIM FOR RELIEF**

#### **Colorado Consumer Protection Act**

21. ACS hereby repeats, re-alleges, and incorporates by reference all allegations contained in the preceding paragraphs as fully set forth herein. To the extent the opt-out language is found to be deficient under the TCPA, WestFax violated the Colorado Consumer Protection Act ("CCPA") by directing ACS to use particular opt-out language and representing or implying that such language was legally compliant. WestFax therefore represented that its fax transmission services were lawful and in compliance with applicable regulations. WestFax is or should be familiar with FCC guidelines relating to opt-out language required for fax transmission services. To the extent the opt-out language used is found to be insufficient to satisfy the requirements of the TCPA, WestFax should have known that it misrepresented the quality of its fax transmission services as lawful, and therefore negligently and falsely misrepresented to ACS that its fax transmission services were TCPA compliant. *See* Colo. Rev. Stat. § 601-1-105(1)(g). As a direct and proximate result of WestFax's actions, ACS has suffered damages from the attorneys' fees and costs incurred in defending the underlying action, and it may have additional damages if Jefferson is successful in its action against ACS.

**PRAYER FOR RELIEF**

WHEREFORE, ACS demands judgment against WestFax and prays for the following relief:

1. All or part of any sums that may be adjudged against ACS in favor of Jefferson;
2. An award of attorneys' fees and costs in bringing and litigating this Third-Party Complaint and in defending against Jefferson's Complaint; and
3. Such other further relief as is deemed just and proper by the Court.

**DEMAND FOR JURY TRIAL**

PLEASE TAKE NOTICE that ACS demands a jury trial in this case.

Dated: August 14, 2015

Respectfully submitted,

*/s/ Craig Isenberg*

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*Attorneys for Advanced Care Scripts, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on August 14, 2015, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all CM/ECF participants. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to all non-CM/ECF participants.

*/s/ Craig Isenberg*

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